LAWYERS' EXPERIENCES OF COLLABORATIVE FAMILY LAW

by

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ABSTRACT

Collaborative family law recently emerged as a method of dispute resolution where the parties and their lawyers agree to finalize all matters through negotiations only, without going to court. This thesis includes a history and literature review of collaborative family law, drawing comparisons to mediation or litigation. It raises questions about the capacity of collaborative family law to deal with disputes involving power imbalance or spousal abuse.

Interviews with twenty Vancouver collaborative family lawyers were conducted to inquire into their practical experiences and whether a paradigm shift in dispute resolution has occurred, as is claimed in some of the literature. The results suggest that collaborative family law in Vancouver is part of a spectrum of dispute resolution mechanisms including litigation, lawyer-assisted negotiation, mediation, and arbitration. Lawyers perceived key elements of the process to include agreement amongst clients and lawyers not to go to court, signing of a participation agreement including a lawyer withdrawal clause, trust between clients, trust among lawyers, trust between lawyers and clients, and four-way meetings. Collaborative negotiation is distinguished by the heightened levels of trust between lawyers, clients, and lawyer-clients, as well as an extension of the role of advocacy to include broader notions of fairness, openness and disclosure. In instances where one or both parties are unwilling, or unable, to participate honestly and respectfully in the process then those parties should be screened out.
The collaborative process is being used in practice where high conflict, power imbalances, or spousal abuse exist. Participants highlighted the need for practitioners to be trained to recognize power imbalances and utilize power balancing techniques, or screen clients out of the process. In cases involving spousal abuse, some participants highlighted the need to be specifically trained and experienced in recognizing spousal abuse, but also to include other professionals, such as divorce coaches, to support clients. Others suggested screening abused clients out of the process. Given the private nature of collaborative negotiations, and the risk of abuse and misuse of process, it is important that ethical and professional standards be developed and monitored.
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CHAPTER 1 – INTRODUCTION

Collaborative law, also referred to as collaborative practice\(^1\), is a new and evolving form of dispute resolution. This thesis focuses specifically on attempts by collaborative law to resolve family disputes arising at the time of separation of domestic partners\(^2\) and includes family law disputes involving children’s matters (custody and access), as well as child and spousal support, and division of property. Whilst the principles of collaborative law can be applied in any area of legal practice, to date it has predominantly been practiced in the area of family law. Therefore, the term collaborative family law will be the preferred terminology used throughout this thesis.

Collaborative law is both a movement within the legal profession and also a specific way in which to conduct negotiations. Collaborative family law is a movement away from the traditional, adversarial, court-based process used to resolve family law disputes. Particularly in the practice area of family law, it has emerged as an alternative to litigation. Collaborative family law stands alongside mediation, lawyer-assisted negotiation, arbitration and litigation on a continuum of methods available to lawyers to assist clients who are trying to resolve family law disputes.\(^3\)

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\(^1\) It has also variously been called collaborative law, collaborative family law, or collaborative divorce. See also P.H. Tesler, “Collaborative Law: What is It and Why Family Law Attorneys Need to Know about It” (1999) 13 American Journal of Family Law 215.

\(^2\) This thesis uses the term ‘separation’ in the broad sense to include both divorce for parties to married relationships, and separation for parties in common law (de facto) relationships. The term also includes couples in both same-sex and heterosexual marriage relationships.

\(^3\) In May 2005 the Justice Review Task Force in British Columbia recommended that all clients participate in alternative dispute resolution prior to commencing any form of family law litigation. For the purpose of dispute resolution in this context the Justice Review Task Force specifically listed mediation and collaborative family law. See www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdf.
Collaborative family law in practice involves a unique and (re)defined way of conducting negotiations that involves a high degree of communication and trust between both practitioners and clients. It also involves empowering clients to reach outcomes that are in the best interests of them both. These more detailed aspects of collaborative family law are discussed in Chapter 2.

AIMS AND PURPOSE

The aims of this thesis are threefold. First, it will critically review the current status of collaborative law as it impacts on the area of family law, both in theory and in practice. In particular, it does this by reviewing the emerging professional and academic literature in the area of collaborative family law. It looks at the history of the collaborative family law movement in Canada and the United States, and in particular focuses on the practice of collaborative family law by practitioners in Vancouver, Canada. Collaborative family law has emerged in Vancouver as a viable alternative (for both practitioners and clients) to court for resolving family law disputes.

Second, this thesis compares collaborative law to mediation. There are three reasons for this comparison. First, collaborative law (like mediation⁴) is a method of private dispute resolution. Both collaborative law and mediation are alternatives to court, and both involve negotiating disputes using non-adversarial methods. Second, much has been written, especially in the feminist legal literature, concerning the possible (negative) impact of private dispute resolution methods on outcomes for some clients,

⁴ Some mediation may also be court-assisted, and therefore more “public”.
especially women. Third, the practice of collaborative law is in its relative infancy, both in North America and the rest of the world, and there is very little written on the topic. In particular, the ways in which the issues of spousal abuse and power imbalances have been addressed in the academic and professional literature relating primarily to mediation will be the basis to inform an analysis of these issues and concerns in the context of the practice of collaborative family law.

A third aim of this thesis is to present the results of 20 interviews conducted in 2005 with collaborative family lawyers who practice in Vancouver. The Vancouver collaborative family law group had a practice history of over 6 years at the time of the study and provides an opportunity to investigate the models and methods of collaborative family law used in practice. The study employed a structured interview approach to obtain a large and complex set of qualitative data of lawyers' perceptions of collaborative law. The result of this process is a rich source of data, comprising 300 pages of transcripts.\(^5\)

The process of collaborative law is described in detail including the roles of lawyers, the roles of clients, and the role of other professionals, such as divorce coaches and financial advisors. At the time of undertaking this project no detailed investigation had been undertaken of lawyers' perceptions of collaborative law.\(^6\) The project focuses

\(^5\) A similar methodological approach could be taken in future studies investigating the perceptions of clients, and other professionals in the practice of collaborative family law.

\(^6\) The results have recently been reported of a three-year study on collaborative law conducted for the Government of Canada by Professor Julie Macfarlane of the University of Windsor. See J. Macfarlane, *The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases* (Department of Justice, Canada, 2005). That study investigated the practice of collaborative family law.
specifically on the legal profession and the role of lawyers in collaborative practice because it has been lawyers who have largely been involved in promoting and developing collaborative family law. Often it has been lawyers who have had long and successful careers as litigators, who have come to seriously question the role of the adversarial approach in resolving family law disputes. These lawyers have either supplemented their litigation practices with some collaborative family law, or have completely rejected traditional practice and taken on only collaborative family law files. Therefore, the results of the empirical study will provide an original contribution to our understanding of the ways in which collaborative family law is being practiced by family lawyers.

As pointed out by Professor Macfarlane in her paper *The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases* (Department of Justice, Canada, 2005) collaborative family lawyers have been primarily motivated by a realignment in their values. That is, collaborative lawyers have sought ways to practice family law that fit better with their personal values and beliefs than does the traditional model of litigation.

The International Academy of Collaborative Professionals state “lawyers and the clients together comprise the Collaborative Law component of Collaborative Practice”. See [http://www.collaborativepractice.com/index.cfm/hurl/obj=what/what.cfm](http://www.collaborativepractice.com/index.cfm/hurl/obj=what/what.cfm) It is also worth noting that collaborative family law is being embraced to varying degrees by different family lawyers. Some collaborative family lawyers are now conducting successful practices based solely on collaborative family law files. These practitioners are “purist” collaborative family lawyers. However other lawyers practice collaborative family law in a mixed practice of litigation and collaborative family law files. These practitioners are “mixed practice” collaborative family lawyers.
WHAT IS COLLABORATIVE FAMILY LAW?

Collaborative family law is an approach for negotiating and resolving separation and divorce disputes without going to court. The process involves lawyers, clients, and other professionals on both sides of the dispute working together fully as problem-solvers. The goal is to resolve all issues in dispute in a non-adversarial manner.

Collaborative practice may be more suited to some types of family law disputes than others. For instance, it may be best suited to custody disputes involving low levels of conflict between the clients, where there is no family violence or spousal abuse, and in disputes where the balance of power between the clients is weighed relatively evenly. The present study also sets out to provide an indication of the types of disputes suited to being resolved by collaborative family law in practice.

Collaborative practice can also be characterized by the ways in which other professionals (such as mental health professionals, divorce coaches, child specialists, and financial specialists) work together with clients in the context of meetings to assist clients in negotiating their separation issues. Group meetings (particularly four-way meetings) between clients and lawyers, or clients and coaches, for instance, are common and are discussed in more detail in Chapter 2.

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Collaborative practice involves encouraging more open communication and cooperation between parties during the separation process. It involves much more than the traditional negotiation that goes on between lawyers on behalf of their clients in the shadow of litigation. It is based on mutual respect and team problem solving.

Other attempts have been made to help lawyers and clients better resolve legal disputes using cooperative negotiation styles. The terms “cooperative divorce” and “collaborative divorce” are not synonymous. Cooperative divorce involves adopting a process for each case at the outset which is aimed at aiding resolution of the dispute as early as possible. For instance this may involve building an early resolution plan in the context of the overall file, which may also simultaneously involve plans for litigation in the case of failure to achieve a resolution through negotiation. Some authors have argued that there has been a decline in recent decades in lawyers seeking cooperative outcomes for clients generally.

10 The most common type of negotiation in family disputes involving lawyers are formal or informal negotiations that are arrange on an “as-needed” or general basis. They occur between lawyers and their clients, and also between lawyers on behalf of their clients, where clients may either be present or absent from the actual negotiation setting. They do not necessarily involve a standard protocol, either used by the individual lawyer, or used between the two lawyers and their clients. I refer to these general negotiations as “lawyer-assisted negotiations”.

11 At the time of conducting the interviews in this study (in May – July 2005) there were 46 Family Lawyers, 18 Divorce Coaches, 11 Child Specialists and 5 Financial Advisors in the Vancouver Collaborative Practice Group. See http://www.collaborativedivorcebc.org/


In contrast, collaborative practice involves a deeper and more detailed level of shared understandings and expectations between the parties to the negotiation. The collaborative process does not occur unilaterally and the parties and their lawyers agree not to include litigation as an option on the file.

Many feel collaborative practice is particularly suited to family law where there is an important role for negotiations to take place between the parties to a dispute. Family law disputes may often involve complex interpersonal, psychological, social, emotional and financial circumstances in the client’s life which, it is argued, can benefit from a team of professionals working to assist clients to resolve those disputes. In this sense collaborative family law functions as a client-centered, team process for settling disputes related to separation and divorce.¹⁴

Collaborative practice can also be characterized by the ways in which the parties to a dispute come together in an attempt to resolve their dispute; they sign a participation agreement which reflects client undertakings to participate in the process, in the context of group meetings. The participation agreement entered into between the clients and their lawyers requires, *inter alia*, both an explicit, and an implicit, reliance on trust and honesty especially since disclosure is a voluntary event during collaborative negotiations. In this sense the collaborative model thus requires both parties to negotiate their dispute in good faith. It is also in this sense that collaborative family law departs from the court-based model of public dispute resolution and is a model of private dispute resolution.

¹⁴ See also http://www.nancy-cameron.com
FAMILY DISPUTES AND CONFLICT

Conflict can be defined as “an express struggle between at least two interdependent parties who perceive incompatible goals, scarce rewards or resources, and interference from the other party in achieving their goals”.\(^\text{15}\) A dispute, then, arises where there is conflict that has become particularized to a specific issue or set of issues.\(^\text{16}\) While a small minority of disputes end up adjudicated in court, the vast majority are settled through some form of negotiation.

When parties attempt to negotiate a family dispute they do so recognizing that “differences of interests and values exist [between] them and in which they want to seek a compromise agreement”.\(^\text{17}\) Negotiation, therefore, by its nature also contains an element of opportunism in which the parties “seek to do better through jointly decided action than they could do otherwise”.\(^\text{18}\) For instance, it has been suggested that negotiation is “a basic means of getting what you want from the other party. It is a back and forth communication designed to reach agreement when you and the other side have some interests that are shared and others that are opposed”.\(^\text{19}\) Family disputes can be complicated by issues such as client’s personal expectations, clients’ understandings of the conflict and, especially in family law, a broad range of

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\(^{15}\) M. LeBaron, *Conflict and Culture: A Literature Review and Bibliography (Revised Edition)* (Institute for Dispute Resolution, University of Victoria, 2001) at 120.

\(^{16}\) Ibid.


emotions. These may include expectations and feelings of being treated fairly and with respect, anger over past conduct, and loss of relationship and opportunities. Clients and lawyers bring their own approaches to problem solving to the dispute. Depending on the different approaches taken by the lawyers and the respective clients the result of negotiations may be unpredictable.

Some disputes are able to be settled by negotiation among clients themselves, with little or no assistance from lawyers or other professionals. Others require the intervention of third parties such as family and friends or professionals such as mediators. When family law disputes cannot be resolved between the parties themselves or with the assistance of third parties then clients may seek legal advice and the processes of lawyer-assisted negotiation may also be used to reach settlement of the family law issues. The process of negotiation is, however, often complicated by the fact that negotiation style is a very individual quality and compounded by the interaction between lawyers-clients, lawyers-lawyers, and clients-clients.

Resolving Family Disputes

Family members have different characteristics, including needs, interests, and rights, both in intact families and also at the time of separation and during negotiations. These

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22 It has been suggested that the way in which clients make sense of their disputes is the most important predictor of outcomes. See J. Macfarlane, “Why Do People Settle?” (2001) 46 McGill Law Journal 663.
characteristics may be important in determining the way in which negotiations take place.  

When looking at conflict in families it is important to contextualize the conflict being addressed. For instance, Taylor and Bernstein Miller point out gender and power are two important aspects of context. One party to a dispute may place high value on negotiating in good faith or may rely heavily in the negotiation on a presumption that both parties empathize with each other’s needs and circumstances. Although not all agree, it has been suggested, for instance, that many women may show a high degree of empathy towards their ex-partner during negotiations. If such a degree of empathy is not reciprocated during the negotiations then she may be disadvantaged in the outcome of the negotiation.

However, the suggestion that women negotiate cooperatively and men negotiate competitively may be misleading if it is also presumed that women’s cooperativeness is equated with weakness and ineffectiveness. Whilst cooperation may not be viewed as achieving for the individual the greatest likelihood of winning the dispute, cooperation may, on the other hand, lead to more mutually satisfactory outcomes for participants to

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25 Ibid at 4.

the dispute. Therefore it would be too simplistic to portray women as being poorer negotiators than men.\textsuperscript{27}

Family disputes typically do not end up in court. Most disputes are settled well before the matter reaches trial.\textsuperscript{28} While a large percentage of disputes settle before they reach the trial stage, a large number of those matters that do ultimately settle, only do so after a period of private negotiation involving lawyers and/or other professionals.\textsuperscript{29} The negotiation stage may also involve interim court appearances such as judicial case conferences.

Traditionally in family law disputes, negotiation also takes place in an adversarial environment with the threat of litigation always looming in the background. The parties’ positions are well established right from the beginning with sworn written statements to the court further cementing each party’s position from the start. Many of the matters that do settle without going to court only do so after many hours of negotiating and may be settled literally “at the door of the court”. Today, more than

\textsuperscript{27} C. Watson, “Gender Differences in Negotiating Behavior and Outcomes: Fact or Artifact?” in A. Taylor & J. Bernstein Miller, \textit{Conflict and Gender: Introduction to Part I} (Cresskill, NJ: Hampton Press, 1994) at 2

\textsuperscript{28} It is often quoted that 95% of family disputes are resolved without proceeding to trial. See J. Macfarlane, \textit{Court-based Mediation in Civil Cases} (Toronto: Queen’s Printer, 1995); and M. Galanter, & M. Cahill, “Most Cases Settle: Judicial Promotion and Regulation of Settlements” (1994) 46 \textit{Stanford Law Review} 1339.

\textsuperscript{29} It has been suggested that negotiating lawyers are involved in settling more than 90% of family disputes in the U.S.A. See P.E. Bryan, “Killing us Softly: Divorce Mediation and the Politics of Power” (1992) 40 \textit{Buffalo Law Review} 441 at 445, note 8.
ever, clients are faced with a growing number of choices between processes that can be used to negotiate their family disputes.\textsuperscript{30}

There have also been challenges to the formal, court-based system for resolving family disputes. It has been argued that the court system is not the best forum of dispute resolution process for family disputes because it is based on adversarial principles. The adversarial system is seen as being paternalistic\textsuperscript{31}, inflaming the family dispute, and entrenching the parties into their positions with emphasis on fault of one party or the other, with a winner-take-all mentality. In contrast to court-driven processes, numerous informal, out-of-court processes have arisen.\textsuperscript{32}

\textbf{Defining Dispute Resolution}

The broad term of dispute resolution is adopted throughout this thesis to include all mechanisms for resolving disputes, whether formal or informal, unassisted or assisted by a third party (or parties), consensual or mandated, and court-based or out-of-court. The voluntary and private nature of dispute resolution using collaborative law is discussed further in Chapter 3, and comparisons are drawn to mediation.

In practice, a small proportion of family disputes are resolved only by a decision of the court. A much larger proportion of family disputes are resolved through a combination

\textsuperscript{30} N.J. Cameron, \textit{Collaborative Practice: Deepening the Dialogue} (Continuing Legal Education Society of British Columbia, 2004).


\textsuperscript{32} See also N.J. Cameron (2004), supra note 30.
of negotiation processes (lawyer-assisted or other-assisted) and litigation leading to a possible trial. Much negotiation and many preliminary court appearances may take place prior to achieving settlement. Typically, lawyers working with clients attempt to negotiate a settlement for their clients by bargaining with other lawyers and eventually they may reach an agreement. Lawyers who do successfully negotiate an agreement for their client may use a wide range of bargaining techniques to reach the settlement. Lawyer-assisted negotiation is a term that can be used for lawyers attending settlement conferences with their clients as part of ongoing litigation of a family dispute. Finally some matters will settle with negotiations on the doorstep of the court, and in a very small percentage of matters the dispute will remain unresolved and proceed to trial for judicial determination.

Alternative dispute resolution (ADR) processes have in common the underlying principle of interest-based negotiation to arrive at a mutually agreeable settlement to

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33 For a discussion of why some matters settle and others do not; see J. Macfarlane (2001) supra note 22.

34 J. Scutt, “The Privatization of Justice: Power Differentials, Inequality and the Palliative of Counseling and Mediation” (1988) 11 Women’s Studies International Forum 503. See also supra note 17. While this paper does not deal specifically with the issue of same-sex relationships, mediating disputes within the gay and lesbian community has also been addressed in the academic literature, see W.M. Emnett, “Queer Conflicts: Mediating Parenting Disputes within the Gay Community” (1997) 86 Georgetown Law Journal 433. Also see H. Astor, “Mediation of Intra-Lesbian Disputes” (1995-1996) 20 Melbourne University Law Review 953.


36 This acronym has taken on many different and confusing meanings. For a review see J. Macfarlane supra note 6.

37 As opposed to positional negotiation, where parties take and retain individual bargaining positions against each other during the negotiations. See R. Fisher, W. Ury, & B. Patton (1991), supra note 19.
the family dispute. It has been suggested that dispute resolution involves a continuum, or spectrum, of processes that may be used effectively by different clients to resolve their issues. At one end of this spectrum is discussion or negotiations that take place privately between parties in informal settings such as around the kitchen table.

There has been some criticism of the term alternative dispute resolution (ADR) since the use of such terminology places the litigation process at the centre and other forms of dispute resolution are viewed as “alternative” to it. In fact, not all couples have a dispute that requires lawyers or litigation. Many couples do not have intractable disputes and there are several methods of dispute resolution, including negotiation, mediation, arbitration and now collaboration. Such methods have traditionally been referred to as “alternative”, meaning that they were alternative to litigation or court-based resolution of disputes.

Given the wide variety of alternatives available to litigation, and the increasing popularity of such processes, collectively these methods are used far more often than litigation. It is unclear whether such methods are more successful than litigation in resolving family disputes but there is a perception that they produce better outcomes for clients since they are less likely to deepen the conflict between the parties before their


case is later resolved. Regardless of success rates, alternative methods are far more likely to be used than litigation.

Another distinction that needs to be drawn is between negotiation that takes place in the context of litigation and negotiation that takes place in the absence of any threat of litigation. As stated above, most family disputes that proceed to trial are negotiated before the matter goes to court. Some of those matters may involve protracted negotiations over a period of months, or years, while the litigation is also processing. This type of negotiation occurs in the shadow of litigation and for the purpose of this thesis, is referred to as settlement negotiation. Settlement negotiations may take place at settlement conferences in the context of litigation that has already been commenced, with interim applications to the courts, or at later stages of the litigation process, leading up to trial.

In settlement negotiation, the threat of ongoing litigation forms the context of those negotiations. That context is very different to the context of negotiation without commencing litigation, but a large part of the lawyer’s task is in attempting to settle the matter out of court. As mentioned above, most matters are settled out of court, including those in which litigation has been commenced. Therefore, non-litigious processes, including negotiation, form the basis for resolving most family disputes.

Parties who cannot settle their own disputes may call upon the assistance of mediators or arbitrators to assist them in resolving their dispute, rather than proceeding to court.
Lawyers may be involved, either as mediators or arbitrators, working towards agreements between the parties to the dispute, or as legal advisors to clients in mediation or arbitration. Clients may use mediation to assist them in arriving at a consent agreement. In those instances where clients cannot agree, a decision may be imposed by an arbitrator if the parties choose to use one, and the parties agree to be bound by the decision.

**FAMILY MEDIATION**

Mediation⁴⁰ is a procedure designed to promote private negotiation and cooperative problem-solving. In mediation the parties are assisted by a mediator to reach a mutually agreeable resolution to their dispute.⁴¹ The mediation process typically involves parties attempting to work together, with the assistance of the mediator, to look for possible future joint interests and solutions in resolving their dispute.⁴² Mediators act as neutral third parties to the family dispute. Their role is not to impose a settlement on the parties, nor to give legal advice, but to help to identify the parties’ interests and needs.⁴³

The mediation process also involves forward-looking decision-making processes. It may therefore be difficult for abuse⁴⁴ to be dealt with squarely within the mediation

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⁴² L. Fisher & M. Brandon (2002), supra note 40.

⁴³ M. LeBaron (2001), supra note 15.
process if that abuse is no longer active or has not been revealed as presently active.

Abuse may also be physical or emotional. The latter may play out via mediation if not checked by the mediator. Whilst mediators often screen out cases that involve active abuse, those cases that involved abuse in the past may not be recognised or placed on the agenda despite the fact that past abuse may have a real impact on victims' ability to negotiate current issues in dispute. If mediators, and lawyers,\(^4^5\) fail to recognize a case as one involving abuse there is little chance that clients will have much opportunity in which to voice further concerns once the mediation process has begun. This scenario is especially concerning since it has also been suggested that the mediation process can itself be a site for continued abuse.\(^4^6\)

In some circumstances, lawyers may also be present with their clients during the mediation. Whether clients have retained lawyers when they are in mediation, or whether lawyers are present during the mediation varies greatly.\(^4^7\) For instance, some clients may retain lawyers for advice outside of the mediation session. Some lawyers may not be willing to participate in mediation sessions with their clients because they

\(^4^4\) Abuse in families may not only exist within the context of the dispute in question, but may also have existed within the family and over a complex array of issues. It may also persist after separation of the spouses. See E. Pence & M. Paymar, Domestic Violence Information Manual: The Duluth Domestic Abuse Intervention Project (1993) http://www.duluth-model.org/

\(^4^5\) Some lawyers are also mediators. Whether the negotiations in mediation deal directly with legal issues and take into consideration possible court outcomes may depend on the background and training of the mediator. Unlike collaborative family law, lawyer-mediators do not act as lawyer advocates.


\(^4^7\) J. Lande & G. Herman, “Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law or Cooperative Law for Negotiating Divorce Cases” (2004) 42(2) Family Court Review 280 at 282.
feel that legal issues are not being discussed in the negotiations or they are sidelined in the negotiations.⁴⁸

As Pauline Tesler has noted, agreements which are made by parties in mediation may be questionable in situations where a neutral mediator would have difficulty conducting negotiations, such as where the negotiations may be unfair and not in the best interests of both parties. For instance, she suggests that “imbalances of power, sophistication, emotional attitude and stability of the parties, as well as dishonesty, foot-dragging and other less-than-good faith orientations….can render effective mediation by a single neutral professional difficult”.⁴⁹

Even where abuse does not exist, in many family disputes there may be high conflict between the parties. That is, the parties may not only disagree on a number of issues but may also be unwilling to compromise on them. In the worst cases, conflicts can become entrenched and lead to impasse in the negotiations. The conflict between the parties may include less-than-good faith discussions with the other party, emotional or heated discussions, as well as using delaying tactics to gain advantage, and even dishonesty.


RESOLVING DISPUTES COLLABORATIVELY

Collaborative family law is a new mechanism for resolving disputes out of court. Collaborative family lawyers provide comprehensive legal, emotional and financial expertise to clients during their dispute relating to their divorce or separation or the resolution of other family legal issues.

Whilst many negotiations take place in the context of a litigation file, those that take place in a collaborative file do not take place in the shadow of litigation. Just as clients and their lawyers bring personal attitudes and values to the negotiation, there can be significant differences in the outcome of a negotiation which is conducted in an adversarial manner and one that is conducted in a spirit of cooperation. In collaborative negotiation there is a heightened level of good will and trust between the parties to the negotiation. The first step for cooperation is that the clients themselves are motivated to settle their matter out of court. When clients trust one another in this way, they are in a position to instruct their lawyers to negotiate in a cooperative manner with a view to settling the dispute out of court.

The motivation of lawyers themselves to work cooperatively may also affect whether cooperative negotiation becomes an option available to clients to solve their disputes. It may also affect the success of a settlement of a dispute using cooperative negotiation. When family lawyers began working more cooperatively they began to form networks of lawyers with whom they had established a high degree of understanding and trust. They began to work collaboratively in networks to attempt to resolve family disputes
using cooperative negotiation techniques and began to avoid, wherever possible, litigation and the threat of litigation. The unique features of collaborative family law are discussed in more detail in Chapter 2.

CONTRASTING COLLABORATION AND MEDIATION

As we have seen, where conflict leads to a dispute, the parties have a range of options available to resolve those disputes, including litigation as well as other forms of dispute resolution, such as mediation. Negotiation in general, in the context of both litigation and non-litigation files, is the most widely used method for attempting to resolve family disputes. Over the past 20 years mediation has become a popular method for attempting to resolve family disputes.50

This thesis draws direct comparisons between mediation and collaborative law in order to investigate the similarities and differences between the models in theory and practice. Mediation has also received a large coverage in the literature on dispute resolution. Collaborative law shares some of the benefits that have been said to exist for mediation. These are said to include outcomes that are achieved in shorter time but with longer lasting outcomes, as well as possibly lower fees.51 Where relevant, the thesis also makes direct contrasts between collaborative family law and litigation.


Like mediation, collaborative family law actively encourages parties to continue with some form of future relationship, albeit in a different or modified form than the intact family relationship that existed before the dispute. Much of the argument in favor of prolonging some form of relationship between the parties to the dispute is based on arguments about the best interests of children.\textsuperscript{52} There has been a growing trend amongst lawyers, the judiciary and politicians to feel that, where children are involved, parents must maintain a future relationship.\textsuperscript{53} This is seen in contrast to the perceived destruction that occurs to the family when the parties fight in the court-room.

This aspect of mediation has been criticized by feminist scholars who argue that the aim to continue the relationship can sometimes be misguided, especially in situations where there is danger of abuse to woman or children from past or ongoing abuse.\textsuperscript{54} Feminist writers addressing abuse of women have argued that in situations of abuse,\textsuperscript{55} the familial relationship might better come to an end and, in the case of violent abuse or high conflict, that contact between the parties and/or children should cease or at least be conducted in a safe manner.\textsuperscript{56} Much has been written in the mediation literature about

\textsuperscript{52} For instance, in Australia in July 2006 the Federal government passed legislation that aims to ensure that as many children as possible grow up with relationships with both parents. The legislation also introduces a presumption of shared parenting. See the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Australia).

\textsuperscript{53} Under the Australian legislation, one of the ways in which the best interest of children is seen to be met is by “ensuring that children have the benefit of both their parents having a meaningful involvement in their lives”. See the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Australia), section 60B.


\textsuperscript{55} See T. Grillo (1991) supra note 46 for a summary of the process dangers for women in mediation.
the process dangers faced by vulnerable clients, usually women, who attempt to mediate family disputes with their ex-partners.\textsuperscript{57} Conflict between parties can result in abuse\textsuperscript{58}, and power imbalances\textsuperscript{59}, and it is women who are most at risk of abuse in family relationships.\textsuperscript{60}

In some jurisdictions there has become a mandatory requirement for separating couples to attend mediation. For instance, in Australia there is a requirement that parties attend mediation prior to filing an application in the family court. In contrast, at present at least, parties might seek collaborative family law precisely because they do not seek to file an application in the court. Whilst there has been no suggestion that collaborative family law would become mandatory, in some jurisdictions collaborative family law may in practice be the only option available to clients to resolve family disputes. For instance, in some small communities collaborative family law has become so popular amongst lawyers that the court-room alternative is not being offered as an option for clients.\textsuperscript{61}

\textsuperscript{56} It has been argued that violence against women is also dangerous to the children who are in their care. See M. Fineman (1988), supra note 54 at 771. Placing children in the middle of the dispute can also be used by one party, usually the man, to further abuse and disempower the other party, usually the woman.

\textsuperscript{57} See T. Grillo (1991), supra note 46 at 1548.


\textsuperscript{59} P.E. Bryan (1992), supra note 29 at 446.

\textsuperscript{60} D. Zutter (2002), supra note 58 at 65.

\textsuperscript{61} In Medicine Hat, Alberta almost all the lawyers have taken collaborative training and the court list is “almost non-existent because everyone is doing collaborative family law” - See C. Schmitz, “Lawyers Keen On Collaborative Family Law Training” (2001) 21(13) The Lawyers Weekly 13 at 13.
POWER IMBALANCES AND SPOUSAL ABUSE

Not all mediators conceive of power in the same way.62 In looking at the issue of power in this thesis, I start from the perspective of the participants (i.e., collaborative family lawyers) regarding individual client power and power between clients. I note also the issue of power which collaborative lawyers themselves bring to the context of the negotiations. Since this study ultimately focuses on lawyers’ perceptions of whether, and how, cases involving power imbalances could be collaborated, this thesis takes a broad definition of power which includes the individualist viewpoint of power, as well as one’s social position and social environment or context.63

The lawyer participants in this study all come from a background of training in mediation. The interviews look at whether the lawyer participants themselves perceive there may be issues of power among clients in the collaborative process, and if so, what is its nature. In this regard a definition of power also includes power as personal attributes of clients64, power as resources, and power as identity. In addition, this thesis investigates whether power imbalance can be balanced or dealt with successfully to provide a fair outcome for both clients. As Birkhoff has shown in a comprehensive review of mediators’ perspectives on power, when considering resources in relation to

63 Ibid at 104-108.
power, and who has power in a negotiation, power is closely linked to the notion of balancing that power.\textsuperscript{65}

A review of the feminist literature reveals a strong critique of the use of mediation in family dispute cases involving power imbalances and/or spousal abuse.\textsuperscript{66} It has been argued that the private nature of the mediation process places women at a disadvantage because of the way in which women are socialized to deal with negotiations.\textsuperscript{67}

Although studies have produced conflicting results, some show that women and men may tend to have different conflict resolution styles. For instance, women may approach the negotiations in a way that is more relational, whereas men may negotiate from a more individual perspective, with greater expectations and more competitively.\textsuperscript{68} It has also been suggested that some women have a naïve trust in their partner, lawyers and the legal process,\textsuperscript{69} for instance, trusting their partners to treat them fairly in resolving the family dispute.

Others have suggested that the view that women negotiate differently than men can be misleading because women's cooperativeness has erroneously been viewed as a weak,
ineffective negotiation style.\textsuperscript{70} As pointed out by Watson, it is questionable whether gender differences in negotiating behaviors and outcomes exist or whether they are an artifact of status and power differences between individuals.\textsuperscript{71} Similarly, feminists have argued that the differences are not inherent, or inevitable, but rather a product of gendered power relations, inequality, and different responsibilities in the family (for instance, regarding children and child-rearing).\textsuperscript{72}

The issue of power in the context of negotiation, mediation, and collaboration is also discussed in detail in Chapter 3. Power differentials that exist between men and women may have an impact on clients' abilities to negotiate family disputes. In particular this thesis contrasts these issues of power as they arise in the context of mediation and collaborative practice. Since collaborative practice is a new area of the law, very little literature has dealt with collaborative family law, and only passing references have been made to the issue of power specifically. This thesis seeks to make a contribution in this regard.

There also exists a body of literature analysing the ways in which women who are survivors of spousal abuse may be at risk from the process of mediation.\textsuperscript{73} In Chapter

\textsuperscript{70} C. Watson (1994), supra note 27 at 191.

\textsuperscript{71} Ibid at 192.


\textsuperscript{73} D. Zutter (2002), supra note 58 at 67.
3, the various forms of abuse that exist between couples are discussed, and a contrast is drawn between the processes of mediation and collaboration.

OVERVIEW OF THE THESIS

The history of collaborative law is set out in Chapter 2. Chapter 2 also investigates in detail some of the theoretical and practical considerations of the collaborative family law movement. It looks at the participation agreement, the shift in operating paradigm, the role of the lawyers and the clients in the process, and the professional-ethical considerations.

Spousal abuse and power imbalances are addressed in Chapter 3, building on the background literature from the field of mediation. It relates that literature to a direct consideration of some of the concerns that have been raised by feminist critiques of the private dispute resolution setting. It concludes with some cautions about the collaborative process in situations where parties are at a power disadvantage or when there are issues of abuse or domestic violence.

Chapter 4 presents the results of interviews which investigate collaborative lawyers' experiences with the practice of collaborative family law in Vancouver. Collaborative family law began in Vancouver in 1999 and the Vancouver group has become an important working model of collaborative law. The interviews also look at the formalities of the collaborative processes, including the participation agreement and the use of precedent, the shift in operating paradigm, the role of lawyers and clients in the
process, the professional-ethical considerations and lawyers' views of using collaborative family law in situations where parties are at a power disadvantage or when there are issues of abuse or domestic violence.

Chapter 5 summarizes the findings, together with a comparative analysis of the only other recently published empirical study on lawyers' experiences of collaborative family law, and recommendations for practice and future research relating to collaborative family law. It also makes some recommendations for the ways in which the practice of collaborative family law may ensure the appropriateness of its methodology for different types of family law disputes. Finally it raises some concerns for future research and investigations of the collaborative process, including extending the present study to investigate the perceptions and experiences of clients and other professionals in the collaborative process.

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74 In a three year study of collaborative family law sponsored by the Canadian government Professor Julie Macfarlane included interviews with lawyers, mental health professionals and clients involved in the collaborative family law process. See J. Macfarlane (2005), supra note 6.
CHAPTER 2 - COLLABORATIVE FAMILY LAW

This Chapter offers a broad overview of collaborative law. In doing so it outlines the key concepts and terms in the methodology and models of collaborative law. First it looks at the history of the collaborative law movement in Canada and the United States.

A HISTORY

Until recently collaborative family law has been practiced mainly in North America. However, with increasing interest from clients, practitioners, the courts and policy makers in settling matters out of court, collaborative law has been described by its proponents as "a revolution in the way divorces are handled all across North America, reaching into Europe and soon worldwide".75

Collaborative family law was first developed in Minneapolis in 1990 by lawyer Stu Webb.76 The movement aimed to remove family law disputes from the court system, whilst retaining the role of lawyers as advocates for clients in negotiating those disputes. Unlike lawyer-assisted negotiation, collaborative practice takes as its central principle the resolution of the dispute without the use of any court-based processes. This involves clients entering a participation agreement with their lawyers that there will be no applications to the court prior to, or during, the collaborative process. In addition, clients have to agree to contract that the collaborative lawyers will no longer

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75 See the web site of Collaborative Divorce Vancouver at http://www.collaborativedivorcebc.com

represent the clients and lawyers in the event that the collaborative process fails and either party commences court applications.

Lawyers who have entered collaborative family law practice have also often come from significant backgrounds of traditional litigation practice. Many practitioners have written about their desire to leave many years of traditional law practice, with its adversarial battles and court attendances for family disputes. For many of the founding collaborative lawyers there has been a sense of "escape" from litigation practice and into collaborative practice.

Initially Stu Webb came up with the idea of collaborative family law with lawyers working together to get the separating couple not to go to court and not to even threaten to go to court. It was later around the mid-1990's that a team of mental health professionals (psychologists and social workers) joined together with the teams of lawyers that had begun practicing collaboratively. That was the beginning to the interdisciplinary approach to collaborative family law. Within the collaborative team the mental health professionals work as divorce coaches and child specialists. More recently financial specialists have also been included in the team to provide clients with advice when dividing property.

CURRENT PRACTICE

An investigation of the International Association of Collaborative Law Professionals website reveals that there are collaborative law professionals in the UK (England, Ireland and Scotland), Australia, Austria, and Switzerland. The International Association of Collaborative Professionals represents lawyers practicing collaborative law. There are over 1500 lawyers listed as practicing collaborative law on the International Association of Collaborative Professionals website. Of the 210 Canadian lawyers listed on the International Association of Collaborative Professionals website 125 are women (60%).

The history of the collaborative practice movement can be traced across Canada through a number of articles in The Lawyer’s Weekly. The collaborative practice movement began in Canada in Vancouver in 1998. It has since spread to other cities across Canada including Toronto, Winnipeg, Medicine Hat, Lethbridge, Calgary, and Edmonton. As stated in the Collaborative Divorce Vancouver website “[s]ince the year 2000, collaborative practice groups have begun across North America, and are now beginning to form in Europe. Some of these groups are lawyer-only groups, and

78 www.collaborativepractice.com/


80 See B. Daisley (2000), supra note 51.

81 See D. Driver, supra note 79.
some practice in the inter-disciplinary model similar to the Vancouver group”. One of the largest and best known communities of collaborative lawyers in Canada is now in Vancouver, British Columbia. Currently in Vancouver there are 46 family lawyers who are members of the Vancouver collaborative practice community.

The movement was introduced to Vancouver in late 1998 by a small group of local family law practitioners. The collaborative family law model used in the Vancouver legal community involves not just lawyers but also mental health professionals (such as counsellors, divorce coaches, and therapists), financial advisors and child specialists.

Whilst the model routinely incorporates divorce coaches who assist the clients with counseling and communication skills, it uses child specialists and financial advisors on an as-needed basis. At this extreme end of the models, the different professionals work as an integrated team and clients can approach any of the professionals to commence the collaborative process. In the Vancouver team model, the team always

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82 www.collaboratedivorcebc.org/
83 The Vancouver collaborative practice group specifically refers to the process of “collaborative divorce”. See http://www.collaboratedivorcebc.org/
84 I note that whilst social workers have played a large role in managing family disputes, both privately and in government and court-based agencies, it does not appear that any of the current models of collaborative practice routinely involve social workers trained specially for the collaborative team.
85 See the web site at http://www.collaboratedivorcebc.com
86 Typically each client has their own divorce coach, although a “neutral” third party mediator may be called into the team in specific circumstances on an “as needed” basis.
87 Child Specialists and Financial Advisors act as “neutral” third parties in the sense that they do not act for one or other of the clients, but give expert advice on the matter as a whole.
comprises minimally two lawyers and two divorce coaches.\textsuperscript{88} These models are discussed in more detail below.

The Collaborative Divorce Vancouver Group\textsuperscript{89} represents lawyers, divorce coaches, child specialists and financial planners who work collaboratively. Thus far, the group is female-dominated. Of the 44 lawyers listed on the Collaborative Divorce Vancouver website 28 are women (67%). Of the 18 divorce coaches on the website 15 are women (83%). Of the 11 child specialists on the Collaborative Divorce Vancouver website 9 are women (82%). Of the five financial planners on the Collaborative Divorce Vancouver website 3 are women (60%).

Originally it seems that the idea borne of Stu Webb was to form teams of non-litigious lawyers. However, today, as collaborative family law is practiced in Vancouver, at least some of the lawyers have a practice that utilizes exclusively non-litigious methods (such as pure settlement negotiation, mediation, and collaboration), whilst other lawyers are continuing to practice collaborative family law in a mixed practice of litigation and non-litigious methods.

Collaborative law is also now being practiced in small private groups of lawyers such as can be seen in the Collaborative Centre in Vancouver, which comprises several independent lawyers and a psychologist working in close proximity within a purpose

\textsuperscript{88} It has been argued that this model provides consistency for clients in that clients know with certainty what the process involves. See N.J. Cameron (2004), supra note 30 at 12.

\textsuperscript{89} \texttt{www.collaborativedivorcebc.org/}
When a couple comes into The Collaborative Centre they are offered all of the services under the one roof. The clients are each separately represented by independent lawyers who work from the same building and can obtain the divorce coaching they need from the same centre.

SPREADING THE WORD – COLLABORATIVE LAW LITERATURE

From its outset, the collaborative law movement has been very interested in marketing itself to clients and the legal community. As such, much of the writing in this area has been popularized, not peer-reviewed, articles for lawyers or clients about the objectives and advantages of collaborative family law. In fact, this literature has largely been uncritical of collaborative law and written from the standpoint of practitioners who espouse the new methodology or the result of interviews with the founder of the movement. In addition to these articles there are now a limited number of books available on this topic, again written by some of the same people.91

Much of the writing on collaborative practice comes from practitioners within the movement itself. The view from within the collaborative practice community is that the process is client-centered and client-controlled. Despite this, the process begins with an assessment of the individual needs of each client. The question arises as to who is really running the collaborative process – the lawyers or their clients?

90 Small groups of lawyers have started to move their independent family law and mediation practices under the same roof and are opening collaborative centers which are dedicated to helping couples reach divorce settlements without going to court.

91 P.H. Tesler (2001), supra note 77.
collaborative practitioners see themselves as providing clients with professional services using an integrated, supportive, problem-solving approach.92

There has also been a significant amount of marketing from individuals and groups of practitioners practicing collaborative law. For instance the Collaborative Divorce Vancouver web site states, “The result is a modern, flexible process which is customized for each couple. Couples can work with professionals that help reduce conflict, increase communication, and work towards resolution that meets everyone's needs”. The collaborative law movement has been marketed through the use of brochures setting out the approach and the lawyers involved.

There are also now several sub-groups within the Greater Vancouver area including Richmond and the North Shore. Each of the groups has standardized pamphlets which include statements about collaborative family law and how it compares to other methods such as mediation. There appears to have been a push to pitch collaborative as a better option than mediation.

A recent study by Julie Macfarlane at the University of Windsor, Ontario, Canada is the first comprehensive academic and empirical study of the collaborative process. That comprised a three year study funded by the Social Sciences and Humanities Research Council of Canada. It involved interviewing lawyers, other professionals and clients

involved in the collaborative process. Some of the findings of that study are presented below, but first I turn to set out the methods and models of collaborative law.

COLLABORATIVE FAMILY LAW METHODOLOGY

Collaborative law claims to be a new methodology to help clients resolve their family law issues. It has been suggested that lawyers moving from traditional litigation-based family law practices experience a 'paradigm shift' when they commence practicing collaboratively. It is a form of dispute resolution in which clients to a family dispute collaborate to reach a mutually agreeable settlement agreement. The process of collaboration is based on open communication and information sharing, in an attempt to create shared solutions of both clients, based on their interests and values.

Collaborative practice in the arena of family law arose out of concerns about the harm from litigation and the limitations of mediation. The process makes the fundamental assumption that clients and lawyers on both sides of the dispute work together fully as problem-solvers. The process also relies on a commitment from clients to negotiate future-interests in good faith.

There are several central principles of collaborative law, although the ways in which collaborative law works in practice varies with individual legal practices and individual legal practitioners. The broad principles and theoretical models of collaborative law


94 See P.H. Tesler, supra note 77 at 27.


are discussed in detail below. A perspective on the specifics of the ways in which collaborative law works in practice is discussed in Chapter 4, which presents the results of interviews with collaborative lawyers.

PRINCIPLES OF COLLABORATIVE FAMILY LAW

There are several fundamental elements of collaborative practice which cannot be violated. First, both clients must retain lawyers. The extent to which the cost of collaborative family law is prohibitive to some clients has not been investigated to date. Whilst collaborative family law has been pitched as cheaper than litigation, as a private means of resolving family disputes, clients are typically unable to obtain legal aid or government assistance to pay for these services. The result may be that collaborative family law is less accessible to some clients on the basis of class and socio-economic status.

When using collaborative family law the parties are expected to attempt to negotiate a mutually acceptable resolution of their dispute without using court to decide any issues. This means that at no stage prior to, or during, the collaborative process can either party instigate any court applications. The International Academy of Collaborative Professionals' web site\(^97\) sets out the objectives of the collaborative law movement. Collaborative law is to be supportive, considerate, sensible, constructive, and mutual.

\(^97\) [http://www.collaborativepractice.com](http://www.collaborativepractice.com)
The central site for negotiation between the parties is four-way meetings which are attended by both clients and their lawyers.98

**Participation Agreement**

In all collaborative family law both lawyers sign a participation agreement with their respective clients, promising not to go to court and to negotiate a mutually agreeable settlement to their family dispute in good faith.99 An example of a participation agreement used in Vancouver is set out in Appendix A. The rules of collaborative practice, as set out in the participation agreement, effectively function as a set of ground rules for the process. At several stages in the collaborative process clients have input to establish rules which will allow the parties to the negotiation to be successful in their goal of getting things done and, ultimately, settling their dispute.

By signing the participation agreement and promising to negotiate a mutually agreeable settlement out of court the parties also give up their right to bring any applications before a court during the collaborative process. For instance, there is no formal discovery process because there can be no court involvement during the collaborative process.100 The application to the court for interim court hearings, the use of court

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98 Four-way meetings can also take place as necessary between clients and their divorce coaches in those models that incorporate teams of collaborative professionals.

99 Negotiations are to be fully open, frank and honest. See N.J. Cameron (2004), supra note 30.

100 Unless the parties agree to this in the participation agreement in advance. See N.J. Cameron (2004), supra note 30 at 275.
conciliation processes, or applications for orders such as restraining orders are also removed from the process of collaborative law.\textsuperscript{101}

Nancy Cameron notes that since applications for restraining orders require the commencement of court proceedings they are "inconsistent with a collaborative case".\textsuperscript{102} Therefore the possible need for a particular client to apply for restraining orders should be considered by legal practitioners in recommending a collaborative process. This concern is even greater in collaboration than in mediation during which a restraining order may be obtained. This consideration is done during the intake process, prior to the client entering into a participation agreement, when clients are being screened for suitability for the collaborative process. Each of these potential restrictions on the collaborative law process is investigated in the interviews with lawyers practicing collaborative family law.

One of the key elements of the participation agreement from the point of view of the way in which the negotiations between the parties proceed is in terms of the ways in which communication will take place. It does not deal extensively with how clients are to behave during the collaborative process but there are a couple of elements that do address the communication and behaviour between the clients.

\textsuperscript{101} It has been suggested that clients who have been the victims of spousal abuse would not be suitable candidates for collaboration. Pauline Tesler suggests that during the intake process, if the lawyer notes domestic violence present then such clients should be screened out of the option for collaborative family law. See P.H. Tesler (2001), supra note 77 at 95. See also N.J. Cameron (2004), supra note 14 at 152.

\textsuperscript{102} N.J. Cameron (2004), supra note 30 at 152.
Typically clients are asked to agree to “discuss and explore the interests they have in achieving a mutually agreeable settlement”. Clients are also encouraged to speak freely and express their “needs, desires and options”. These clauses can be seen as ground rules for the collaborative process. Although clients have not, in effect, had the opportunity to create these rules for themselves, they are based on shared principles and expectations that the clients can consider for themselves and adopt. In this way the clauses contained in the participation agreement have the effect of ground rules. They reflect core values and attitudes. Since clients have not had the opportunity to brainstorm for themselves in arriving at a set of ground rules, it is important that the participation agreement is explained fully and clearly to clients and that clients have the opportunity to amend them as required. This is especially important in situations in which cultural issues or preferences related to the process may be relevant.

The type of negotiations that take place in collaborative files may be the same as those in pure settlement negotiations. Alternatively, they may be characterized by special processes and interactions between the clients, the lawyers and the clients, and between the lawyers. The distinction is made between settlement negotiations and collaborative negotiation throughout this thesis, and the basis for that distinction is investigated by analyzing the ways lawyers practice collaborative negotiation.

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103 See Appendix A.

Negotiations about how the collaborative process will operate take place at several stages in collaborative law. It is these negotiations that distinguish collaborative family law from other forms of dispute resolution. First, clients negotiate about the collaborative process with their own lawyers at the outset. Secondly, clients negotiate in the context of four-way meetings. That is, in the presence of the other party and that other party's lawyer. The negotiations include discussions about the participation agreement and also how the details of the client-client interactions will take place during the meetings. The remainder of the negotiation concerns the substantive elements of the family dispute, typically matters relating to the children and/or property division. As in any lawyer-assisted negotiations, some negotiation may take place between the lawyers, on instruction from and on behalf of their clients, although this is typically limited in favor of negotiations in four-way meetings.

Withdrawal/Disqualification Clause

A key element of the participation agreement is the withdrawal, or disqualification, clause. For instance, a typical disqualification clause states that "while each lawyer is the advisor of his or her client and serves as the client's representative and negotiator, the parties mutually acknowledge that both lawyers, and anyone in each lawyer's office, will be disqualified from representing them in a contested court proceeding.

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105 As we will see below other professionals such as divorce coaches, child specialist and financial advisors may also be present. In those instances the meetings maybe 5-way, or even 6-way, meetings.

106 In some jurisdictions all negotiations take place in the 4-way meetings. That is, discussions between lawyers, in the absence of clients, are avoided. The purpose of such a model is to avoid having to relay back to clients discussions that take place between the lawyers.
against the other party”. In theory the participation agreement can be amended individually for each case, except for the disqualification clause, which is a fundamental feature of the collaborative process.

If the negotiations do break down and one or other of the clients elects to take the matter to court, both lawyers are required to disqualify themselves from representing their clients in court. All communications that take place between all the collaborative professionals and clients during the collaborative process are without prejudice.

The requirement for lawyers to withdraw from further representing their client if either client goes to court is seen by collaborative practitioners as an incentive to clients to work together in good faith to resolve their dispute without the need for court-based processes. There has been some debate about the inclusion of the withdrawal clause. For instance, some authors have criticized the use of the withdrawal clause as potentially being coercive, with some clients feeling additional pressures to settle on bad agreements rather than risk having to retain new lawyers. On the other hand,

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109 In situations where divorce coaches are retained by both clients in the collaborative process, those divorce coaches are not required to cease working with the clients if the matter fails to settle by out-of-court negotiation. See N.J. Cameron, supra note 30 at 281.
110 See N.J. Cameron (2004), supra note 14 at 278.
111 Ibid at 17.
others have argued that not only do collaborative law clients enter into the participation agreement understanding that the lawyers will withdraw in circumstances where parties resort to threats of litigation, but they also do so having been advised of the full range of dispute resolution options available to them. Once clients are fully informed of probable risks and benefits they should have the opportunity to select collaborative family law.\textsuperscript{113} It has been argued that the requirement to withdraw mitigates the adverse impact of the power-based procedures which are part of the court processes.\textsuperscript{114} For instance, in traditional litigation settings, negotiations take place in the shadow of the ongoing litigation. That process carries with it the real, or implied, threat of further applications to the court if the negotiations do not proceed to the satisfaction of the party(s) making the threat.

\textbf{Four-Way Meetings}

After each lawyer has met with their client individually and explained the collaborative process, including the participation agreement, the parties participate in the first four-way meeting. This involves the two lawyers and the two clients. The aim of the four-way meetings in the collaborative practice is to gradually build up the solution to the problem in a safe and trusting environment.\textsuperscript{115} The four-way meetings are largely


\textsuperscript{114} See the Principle of Collaborative Practice promoted by the International Academy of Collaborative Professionals at http://www.collaborativepractice.com/articles/Principles-Final-Jan24-05.doc

\textsuperscript{115} Arguably this is different to the type of negotiation that goes on between lawyers and clients in such four-way meetings outside of the collaborative context. It has been argued that traditional negotiation
about sharing and obtaining information, listening, focussing on the problem and not
the people, and allowing the clients the power to determine the outcome for themselves.

There appears to be a further assumption that the listening that takes place in these
meetings involves a relational view of others. This involves empathising and coming to
an understanding with the other party. Empathic listening involves overcoming your
own personal viewpoint or perspective and coming to appreciate (and ultimately adopt)
some of the arguments and positions of the other party to come to a resolution of the
family dispute. Where one party or the other is more open to this “empathic listening”
style of negotiation, or able to bring such skills to the negotiating table, then this also
potentially places one party at a disadvantage in collaborative negotiations if, in fact,
one is empathically listening and the other is not.\textsuperscript{116}

During the first four-way meeting the lawyer needs to be skilled in helping the clients
to understand and appreciate client-client interactions. This may be especially
important where the clients have been dealing with high degrees of interpersonal
conflict or where there has been, or is likely to be, impasse.\textsuperscript{117} This meeting also
provides an opportunity for dealing with, and understanding how the group (lawyers
and clients) will work together. Nancy Cameron suggests this meeting is a good

\textsuperscript{116} See also D.M. Kolb and G.G. Coolidge (1993), supra note 26 at 264.

\textsuperscript{117} R. Fisher, W. Ury, & B. Patton (1991), supra note 19.
opportunity for setting the tone of mutual respect, listening and communicating, as well as discussing what is understood by the participation agreement and why they have chosen to collaborate.118 There is usually also an agenda set prior to the meeting and the clients, lawyers and other professionals all receive a copy of the agenda before the meeting. Lawyers may meet with their clients prior to the 4-way meetings to discuss the agenda so that the clients may come to a better understanding of the expectations that they share for the process.

Only once the setting for the process has been established can the meetings get on with the substantive business of attempting to resolve the issues in dispute. As with any negotiation process, the collaborative negotiation process involves working toward joint agreement on elements of the dispute. For instance, the parties may be able to quickly agree on who is to get the car and/or the house, but may have great difficulty resolving the issue of how much time, and when, each is to spend time with the children. Other parties may have more difficulty resolving issues of property division. The complexity and difficulty of negotiation of the substantive issues will, at least in part, depend on the number and complexity of the issues in dispute. Other factors that will affect the negotiation will be the interpersonal relationship between the parties and their lawyers, including the ability to communicate and the degree of trust between the parties. There are many such factors. For instance, the timing and ripeness of the parties each to participate in the negotiations, and the involvement of new partners, are also important factors to consider.

In practice there may be one or more subsequent four-way meetings as required. An important element of the collaborative negotiation is that each of these subsequent meetings provides opportunity for the clients to jointly define further agenda items and collaborative processes.

The four-way meetings in the collaborative process allow the lawyers to continue to help the clients communicate and to help clients arrive at an interest-based solution to the substantive issues in dispute. The four-way meetings in collaborative practice provide an opportunity for clarifying expectations of the parties. This in turn could help the parties to understand their differences and to arrive at a shared commitment to the process and the outcomes they desire for their family dispute. With the help of skilled practitioners the meetings provide opportunity for perspective building. The role and function of four-way meetings in practice was investigated in the interviews with collaborative family lawyers. The results are presented in Chapter 4.

The Role of Trust – Trust between Clients and Lawyers

When clients approach lawyers with a request to deal with their family dispute the lawyers provide the clients with advice on the available options for solving their family dispute. Those include alternative dispute resolution procedures such as mediation, as well as court-based litigation. Some of the lawyers who work in the collaborative model choose solely collaborative files. In those instances, if the client chooses a
litigious option then the lawyers would refer the client to another lawyer. That is, in their legal practice, as a whole, they do not take on files that require litigation.\textsuperscript{119}

Julie Macfarlane notes that legal practitioners feel that the collaborative process is one which is substantially driven by the client's own choices as the ultimate decision maker.\textsuperscript{120} Whilst lawyers do not see themselves as the ultimate decision maker, their relationship to the client determines the procedural and substantive outcome of the collaboration. The interviews with collaborative lawyers also look at the issue of the relationships between lawyers and clients in the process. This is an important issue for collaborative practice and legal practice in general since it has been suggested in previous research that different lawyers behave in different and individual ways when it comes to paternalistic or autonomy principles.\textsuperscript{121}

Once the client chooses the collaborative law option the practitioner provides the client with the information about the structure and process of collaborative practice. This is to assist the client to enter into a voluntary agreement that reflects maximum benefit to both parties.

\begin{flushleft}
\textsuperscript{119} Some practitioners in these instance may combine collaborative legal practice with the practice of mediation or other forms of alternative dispute resolution, but they do not take on litigious matters. See B. Daisley (2000), supra note 51.


\textsuperscript{121} Ibid at 201.
\end{flushleft}
The Role of Trust – Trust between Clients

In the collaborative process the two lawyers facilitate the negotiation between the two clients. Clients, on the one hand, bring their own personality, style and emotions to the negotiations. When a client approaches their lawyer and asks the lawyer to try to settle the matter by negotiation rather than going to court, the client may already have in their mind the outcome they wish to achieve.\textsuperscript{122} Some clients may have interests that they feel are very important and wish those interests to be expressed during the negotiation in an attempt to convince the other side of the importance or reasonableness of their claim. An important part of the collaborative process is that the negotiation is interest-based, in which the parties negotiate on the basis of their goals, values and interests rather than on their bargaining positions.\textsuperscript{123}

The collaborative law environment is intended to be one in which the clients are empowered to achieve a satisfactory outcome to their dispute.\textsuperscript{124} Issues, therefore, arise when considering the gendered nature of empowerment in the context of family disputes, and the individual differences that men and women bring to the negotiation.\textsuperscript{125}

Each party has interests, but the parties to a dispute naturally will often have different views on a variety of interests. The parties may also have different motivations for


\textsuperscript{123} R. Fisher, W. Ury, & B. Patton (1991), supra note 19. The term “principled negotiation” has also been used.


focussing on interests or positions. For instance, if one party is more powerful than the other at the commencement of the negotiation then they may be more likely to focus on their position, rather than their interests or the interests of the other party.\textsuperscript{126} There may also be important gender differences in negotiation styles, which may also interact with power.\textsuperscript{127} Chapters 3 and 4 will address questions of power and abuse.

**Disclosure**

In order to maintain the integrity of the process clients are asked to freely disclose all relevant information. Whilst clients agree to this disclosure when entering the collaborative family law process there is nothing to guarantee that they will comply. The reason for encouraging disclosure is clear: it is to ensure that any agreement arrived at is to the mutual benefit, and fair and equitable, to both parties. Lawyers encourage their clients to disclose and if they become aware of non-disclosure then the lawyers will also withdraw from the collaborative process. It is unclear what exactly constitutes disclosure in collaborative family law negotiations. For instance disclosure may be an informal process of sharing information or alternatively may be a more formal process of completing financial statements. The way in which disclosure is encouraged in practice also forms part of the investigative interviews with lawyers presented in Chapter 4. By encouraging clients to provide information the practitioners are seen to be exercising their duty to help their client make voluntary decisions that are fully informed.

\textsuperscript{126} R. Fisher (1983), supra note 64.

\textsuperscript{127} See D.M. Kolb \& G.G. Coolidge (1993), supra note 26; and J. O’Hare, “Negotiating With Gender” (1997) 8 Australian Dispute Resolution Journal 218.
Screening – Suitability of Clients for Collaborative Family Law

The interviews with collaborative lawyers also look at the issue of suitability of the process for different clients. It has been noted that the process of collaboration is unable to eliminate concerns about irreconcilable differences, disharmony and distrust that existed in the relationship and led to the conflict that is the basis of the negotiation.\textsuperscript{128} The full voluntary disclosure of relevant information and the withdrawal clause for lawyers are seen as essential elements affecting the efficacy of the collaborative process. If clients are unwilling to comply, then they may not be suitable for collaborative process.

The element of trust between clients relates to both structural-procedural safety (going to the issue of the integrity of the process) and to personal or client-centered safety (going to the issue of ensuring safety, and exclusion if necessary, of clients from the process). The safety of clients would seem to only be protected by special training for practitioners in recognizing subtle issues of abuse, power and control as well as formal training in how to screen for, and remove, clients who are vulnerable to exploitation of the integrity and good faith elements of the process.

Family disputes can also create fear in clients. This fear may be especially acute for clients who have been abused or feel disempowered by the separation or divorce, or by the process which they are using to try and resolve the dispute. According to the International Academy of Collaborative Professionals, collaborative practice

\textsuperscript{128} This may be specifically noted in the participation agreement. See N.J. Cameron (2004), supra note 30 at 275.
“represents an opportunity for clients to achieve their best at a time when circumstances frequently encourage fear of the worst”. If collaborative practice is to be able to provide fearful clients with an opportunity to resolve their disputes then collaborative professionals need to be trained in recognizing factors such as spousal abuse and power imbalances that may lead clients to feel fear of the other party, the process or the outcomes of the negotiations.

The suitability of the collaborative process for clients with mental illness or substance abuse problems has also been raised by Nancy Cameron, who suggests that clients who fall into either of these categories should be screened out of the collaborative process.

Abused or disempowered parties, or parties who have a dishonest spouse, who enter into a collaborative participation agreement may be vulnerable to abuse of process. In order to overcome this risk practitioners need to be trained in recognizing and dealing with abuse and power issues and provide support to clients – or to screen them out. It has been suggested that collaborative family law should not be used for clients that are the victims of current domestic violence. The degree to which clients who are

129 http://www.collaborativepractice.com/articles/Principles-Final-Jun24-05.doc

130 N.J. Cameron (2004) at 153, supra note 30. This author also suggests that clients may also be excluded from the collaborative process on the basis of subjective, personal characteristics such as lack of self awareness, ability and desire to communicate, and willingness to engage with the process.


132 P.H. Tesler (2001), supra note 77 at 94.
The victims of current, or past, domestic violence are screened out of collaborative family law is addressed further in the interviews with lawyers in Chapter 4.

The principles of collaborative practice set out by the International Academy of Collaborative Professionals indicate that it is the role of the practitioners to create a supportive process, but it is unclear what that support entails. It appears to relate more to an education and information function whereby practitioners should exercise due diligence in ensuring clients know what process they are entering into and to providing a safe environment in which to negotiate.133

The Role of Trust – Trust between Lawyers

Lawyers’ understanding of the principles of collaborative law, including honesty, integrity and participation with full disclosure, are central to the success of the negotiation process in collaborative family law. There is an assumption that the parties and their lawyers will negotiate in good faith. This assumption is stated specifically in the participation agreement used in Vancouver. The participation agreement states “the parties acknowledge that participation in the collaborative law process, and the settlement reached, is based upon the assumption that both parties have acted in good faith and have provided complete and accurate information to the best of their ability”.

Lawyers must have a clear understanding of the processes and assumptions built into the collaborative methodology. One of the particularly important aspects of representing client interests in collaborative negotiations is recognizing the different

133 http://www.collaborativepractice.com/articles/Principles-Final-Jan24-05.doc

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role lawyers have here as advocates. Compared to settlement negotiation, mediation or litigation, collaborative family lawyers must not only advocate for the interests of their client but also recognize and where necessary point out the interest of the other party. This ability relates to an understanding of the requirement for voluntary and full and frank disclosure, and to the degree of trust between lawyers. The degree of trust between lawyers representing both their own client, and often challenging their own client in the interest of the other party, as well as the potential for conflict of interest, is explored in the interviews with lawyers presented in Chapter 4.

The Role of Trust - Advocacy and Solicitor-Client Privilege

In the traditional approach to family law files, involving negotiation and preparation for trial, the lawyer is interested primarily in their client’s position and the interests of the other party are secondary only in consideration to achieving an outcome. In collaborative family law, both lawyers must understand that they are an advocate for the own client but also that they are working towards a consensus building process. Collaborative lawyers tend to try to meet the interests and needs of both parties. For instance, in the participation agreement used in Vancouver parties agree to “uphold a high degree of integrity, and will not take advantage of inconsistencies or miscalculations of the other, but will disclose them and seek to have them corrected”. This is a significant philosophical shift for lawyers who traditionally would be ethically bound to advocate strongly for their own client’s needs. This is part of what has been referred to as the paradigm shift.134

134 P.H. Tesler (2001), supra note 77 at 27.
In collaborative family law discussions between lawyers and their client remain privileged. However, as stated above, often in practice four-way meetings take place between the lawyers and their clients. New information may arise in those meetings and may form part of the negotiations between the parties. There is the opportunity in collaborative family law meetings for lawyers and the individual clients to meet privately to discuss issues as they arise, before reconvening the four-way meetings. Whether or not meetings are adjourned so that individual lawyers can discuss issues with their clients is a matter for the individual parties and their lawyers, and may vary across collaborative files and across collaborative family law models.

Furthermore, communications that take place within the four-way meetings are also without prejudice. For instance, in the participation agreement standardly used in Vancouver the parties agree that “all communication exchanged within the collaborative law process will be confidential and without prejudice”. This agreement seeks to maintain the confidentiality of communications that take place between lawyers and clients. Interestingly this agreement also seeks to extend confidentiality to communications that take place with any of the collaborative professionals (such as divorce coaches, child experts and financial experts).\textsuperscript{135}

\textsuperscript{135} At the time of writing this thesis the author is not aware of any court cases that have dealt with the issue of the claimed extension of confidentiality in the collaborative participation agreements.
MODELS OF COLLABORATIVE FAMILY LAW

Whilst lawyers are always involved in the collaborative process, some models of collaborative family law also include other professionals and some do not. Where other professionals are involved the clients, lawyers and other professionals work as a team. Nancy Cameron, in the book “Collaborative Practice – Deepening the Dialogue” suggests three broad models of collaborative practice which reflect the differing degrees of involvement and roles of professionals (lawyers, divorce coaches, financial analysts and child specialists).

The model in which the collaboration is greatest among the professionals is called the Team Approach. This model always uses a team approach. Clients may come to the collaborative practice through an initial meeting with mental health professionals, financial advisors, or lawyers. In this approach all clients who wish to use collaborative law to negotiate their dispute will each have a divorce coach and a lawyer. They may also share a financial analyst and child specialist as required. The lawyers and divorce coaches work individually with their clients and also in four-way meetings. Also in this model the team approach extends to team meetings between

\[\text{\footnotesize 136 N.J. Cameron (2004), supra note 30.}\]

\[\text{\footnotesize 137 The Team Approach is specifically the process adopted by the Vancouver collaborative practice community. It has also been called the “collaborative divorce” approach. See N.J. Cameron (2004), supra note 30. The term is somewhat misleading in this context so I have not used it further throughout this thesis.}\]

\[\text{\footnotesize 138 In this sense both the financial analyst and child specialist are “neutral”. See N.J. Cameron (2004), supra note 30.}\]

\[\text{\footnotesize 139 The four-way meetings include meetings between clientA-lawyerA-clientB-lawyerB and clientA-divorcecoachA-clientB-divorcecoachB. There can also be six-way meetings between clientA-lawyerA-}\]
the professionals to discuss the case and if the negotiations break down none of the professionals can appear in court.\textsuperscript{140}

An alternative model makes use of a group of professionals (lawyers, divorce coaches, financial analysts, child specialists, and mediators) on an “as needed” basis.\textsuperscript{141} Therefore, in this model each client will not necessarily have an equivalently constituted team. Four way meetings in this model are typically only possible between clients and lawyers. Four way meetings between clients and other professionals are possible in situations when both clients retain the same professionals. Similar to the team approach, these professionals work closely together and clients may approach any of the professionals to commence the process.

A third model is one in which lawyers retain the central role in running the negotiations for clients but work with other professionals.\textsuperscript{142} In this model, clients may seek counselling, mediation or financial advice, for instance, on the advice of their lawyer.

Some of the practice considerations of the various models are considered in the results from the interviews in Chapter 4. Clearly the models which rely more standardly on the involvement of other professionals become increasingly expensive for clients.

\textsuperscript{140} This model uses “without prejudice” negotiations for all meetings and this is a feature of the participation agreement.

\textsuperscript{141} This has been called the Lego Approach by Nancy Cameron. See N.J. Cameron (2004), supra note 30.

\textsuperscript{142} This has been called Lawyers Working with Other Professionals (LWOP) by Nancy Cameron.
Where other professionals are involved separate participation agreements are also
signed between those professionals and the clients. In addition to the participation
agreements, which are behavioural agreements setting out the collaborative law
processes, individual clients enter into standard legal retainer agreements to pay their
lawyer’s costs.

TRAINING OF COLLABORATIVE LAWYERS

Professionals in collaborative practice (including lawyers, divorce coaches and
financial specialists) undergo ongoing and specialist training in dispute resolution
skills. In the team approach all the professionals that are involved receive collaborative
training. The training has recently been codified as a set of guidelines by the
International Academy of Collaborative Professionals.143

According to the International Academy of Collaborative Professionals the minimum
training for collaborative lawyers includes understanding of interest-based negotiation,
dynamics of interpersonal conflict and communication, and family and divorce theory
from a developmental perspective.144 Most notably for the purpose of this thesis,
lawyers working in collaborative practice are expected to be trained in “[n]egotiation
theory, including the characteristics of competitive and interest-based negotiation”.145

143 See the resources at http://www.collaborativepractice.com/ The International Academy of
Collaborative Professionals is the largest organization representing collaborative lawyers with currently
over 1400 lawyers, including from Australia, Austria, Canada, England, Ireland, Scotland, Switzerland
and the USA.

The other general areas of expertise that have been developed by collaborative professionals include family relationships and dynamics (including psychological, emotional, legal and financial elements), interpersonal relationships (and in particular, interpersonal conflict), communication skills (particularly in the context of family separation), and team building skills (for clients and lawyers).

Clients are empowered to negotiate their own agreements face-to-face, assisted by their lawyers. Whether clients are in fact empowered will depend on the individual context in which the client finds themselves. For instance, a client’s interpersonal relationship with their ex-partner may have an important impact on determining whether the client is able to be empowered to negotiate their dispute. Furthermore parties who have been abused during the relationship or who are the less powerful figure in high conflict disputes may be disadvantaged in negotiating because of the relatively less power they have in the negotiation than their ex-partner. Another factor that will affect whether a client can be empowered to negotiate is the skill and support available from the individual lawyer. It has been suggested that lawyers working with family disputes should receive specialized training to help them better recognize and respond to issues of spousal abuse and power imbalances. In theory, meetings are possible where clients remain in separate rooms whilst the lawyers meet and convey the communications to their clients. This may be an alternative use of collaborative family

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146 Other collaborative professionals may also be involved in the process of assisting clients.

147 N.J. Cameron (2004), supra note 30 at 156.
law in some instances, such as in cases involving a history of spousal abuse. Whether such “breakout” or “satellite” meetings for collaborative family law are used in practice is discussed in more detail in the context of the lawyer interviews in Chapter 4.

While the guidelines for training require collaborative family lawyers to be trained in ways that aid them in assessing clients’ capacity to participate effectively in the collaborative process, no mention is made about what specific skills this may require. For instance, no specific mention is made of how the lawyers are expected to develop their skills in assessing and dealing with issues of abuse and power imbalances. The ways in which lawyers deal with these issues in practice are discussed in Chapter 4.

Chapter 3 turns to a detailed discussion of the complex issues of spousal abuse and power imbalance in negotiating family disputes. As a new method of resolving family law disputes, collaborative family law involves two clients and two lawyers (and, often, some other professionals) working together. It therefore offers some unique possibilities for dealing with complex and difficult situations in which one client maybe at a disadvantage in the negotiation because of a history of spousal abuse or power imbalance.
CHAPTER 3 – POWER, ABUSE AND PRIVATE DISPUTE RESOLUTION

This Chapter discusses power imbalances and spousal abuse in the context of dispute resolution, and in particular how these two important issues may impact on the practice of collaborative family law. There has been much debate in the literature, informed particularly by feminist legal theory, as to whether private mechanisms of dispute resolution such as mediation can be effective in situations where one of the parties to the dispute, usually the woman in opposite sex relationships, has been the victim of spousal abuse or where there is a power imbalance.

The background literature for this discussion comes from the field of mediation where the issues have received most attention in the professional and academic literature. The articles discussed are representative of the discussion in the mediation literature about the way in which power dynamics and abuse between parties may influence the negotiation process. This discussion on the mediation context will be used to raise the question of whether the same concerns arise in the collaborative family law context.

The nature of negotiating a private resolution to a family law dispute using mediation or collaborative family law is discussed. The roles of mediator and clients in mediation, and lawyers, clients and other professionals in collaborative negotiations are

148 Whilst the articles on power and mediation are a selection of articles in the area, they are representative of the discussion that has centered on power and mediation. It is not intended to be a definitive coverage of the issues that arise in the mediation literature, such as a feminist analysis of the process dangers of mediation for women, or of the debate about whether victims of spousal abuse can safely participate in mediation. For a summary see D. Zutter (2002), supra note 58; T. Grillo (1991), supra note 46.
also described. Family mediation will be discussed first, before analysing collaborative family law and comparing and contrasting it to mediation.

POWER AND ABUSE

Abuse, power, and control are closely related. It has been argued that women who are in the process of leaving an abusive relationship are especially vulnerable to injustice or unfair results from the negotiation process. In the context of spousal abuse there is no equality of power between the parties. It has been suggested that consequently victims of spousal abuse do not enter mediation voluntarily. When a party to negotiations has been the victim of abuse, that party may feel coerced to enter into the negotiations because abuse and power are closely linked. The abused party may want the dispute to be over at all costs and therefore may enter into private negotiations to avoid an ongoing dispute involving court process and further abuse.

Abuse and power are discussed separately below: I also contrast ways in which clients, especially women, may be at risk as victims of abuse or power imbalances in negotiations of family disputes in mediation and collaborative law.

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149 E. Pence & M. Paymar (1993), supra note 44

What is Power and Power Imbalance?

Power and power relations between parties in family law disputes are important variables in understanding the outcomes of dispute resolution processes. Power, in one form or other, exists between parties to any dispute. In a very general sense, power in one form or another exists not only during the relationship, but it also exists when the relationship comes to an end. For instance, the party to a family dispute who receives a better negotiated outcome can be said to have had greater power in the negotiation.

There are many different ways in which power can be exhibited by, and between, the parties in a family dispute. For instance power can be expressed in the form of economic power, emotional power, physical power, referent power, psychological power, status, language, and information. It is also important to note that power fluctuates across different issues and between parties. Power within a family also relates to the complex dynamic between the couple and children of the relationship. For instance, it has been suggested that children form a nexus of power between parents.

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Many of the discussions in the literature on power do not include a precise definition of the term, despite the fact that power is often mentioned in passing as a possible explanation of injustice or inequality in the process of negotiating disputes. I take this opportunity to reflect on the meaning and definition of power, because what may appear self-evident, may not be that clear.

There are many different ways in which mediators conceive of power. The concepts of power, power imbalance and empowerment are similar, and possibly overlapping, but not synonymous. As Joan Kelly states “power is not a characteristic of a person, exercised in a vacuum, but is instead an attribute of a relationship.”

In “The Dynamics of Power in Mediation and Negotiation”, Mayer notes that the concept of “power” often has negative connotations. In this sense, power is a negative factor against the fair and just resolution of the family dispute. This is especially so in the context of negotiations in which the parties should see themselves as fundamentally resolving the dispute in a collaborative manner. For instance, when one party’s needs and interests conflict with those of the other party, one of the

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155 C. Smart and S. Sevenhuijsen (Eds.), *Child Custody and the Politics of Gender* (Routledge, 1989).


157 J. Birkhoff, “Mediators’ Perspectives on Power: A window into a profession” (2000), Doctoral Dissertation, George Mason University, Fairfax, Virginia at 109


159 B. Mayer (1987), supra note 153 at 76.

160 P.E. Bryan (1999), supra note 156 at 1005.
important factors that determine the way in which the dispute is resolved is the relative power of the parties.\textsuperscript{161}

Mayer describes power as follows:

\textit{\"[P]ower is equated with coercion, a non-cooperative spirit, and a break down in communication. Yet power also provides the motivation for collaboration and defines the range of settlement options available to the parties. Power is a factor in all interpersonal relations, and it has a significant effect on even the most cooperative dispute resolution process. All negotiators have some power or influence over other parties\"}.\textsuperscript{162}

One of the most important ways of characterizing power is in terms of the power “imbalances” that exist between the parties. Important power imbalances can arise between the parties to a family dispute where the parties control different resources.\textsuperscript{163}

Whilst power in theory exists in all relationships, people are often unaware of their own power. In other instance, power may be exercised by a party (or parties) consciously.\textsuperscript{164} A party may be in the more powerful position but because of views on

\begin{enumerate}
\item[\textsuperscript{161}] B. Mayer (1987), supra note 153 at 76.
\item[\textsuperscript{162}] B. Mayer (1987), supra note 153 at 75.
\item[\textsuperscript{163}] P.E. Bryan (1992), supra note 29 at 447. It has also been suggested that men and women may tend to use different negotiation styles. See R. Charlton (1998), supra note 23.
\item[\textsuperscript{164}] D. Ellis & L. Wight (1998), supra note 152 at 229.
\end{enumerate}
fairness and equity may not use it. Power imbalance occurs in mediation when one party takes advantage of the other by influencing the outcome adversely for the other party or influencing the process in such a way that the other party does not articulate their needs or make demands.\textsuperscript{165} In this regard a definition of power also includes power as personal attributes of clients and power as resources.\textsuperscript{166}

Unlike power and power balancing, empowerment relates to the party's feeling of self-worth, self-determination and autonomy as a result of the process they have undergone.\textsuperscript{167} Parties to a negotiation are empowered when they are able to participate in an interactive manner. Parties are disempowered if they are unable to have an effective role and presence in the negotiation, mediation or collaborative process. It has been suggested that the inability to have an effective role in the process arises from relational, external and psychological factors, and that the mediator or collaborative practitioner must understand and assess these factors in order to intervene to balance the power relations between the parties or to screen the parties out of the negotiation process.\textsuperscript{168}

\begin{itemize}
  \item \textsuperscript{165} J.B. Kelly (1995), supra note 151 at 87.
  \item \textsuperscript{166} R. Fisher (1983), supra note 64.
  \item \textsuperscript{167} S.G. Pope, "Inviting Fortuitous Events in Mediation: The Role of Empowerment and Recognition" (1996) 13(4) Mediation Quarterly 287 at 289.
  \item \textsuperscript{168} J.B. Kelly (1995), supra note 151 at 87.
\end{itemize}
Power in Mediation

Power in mediation has been defined as “the ability of a person in a relationship to influence or modify an outcome”. In a simple sense a party who gets their needs satisfied is thought to be more powerful. Some authors have challenged the fairness of negotiations in mediation for the weaker or less powerful party. In the context of mediation in family disputes, power has been related to both potential power and actual power. Potential power relates to the resources that a party has and ways in which that power could be used. Actual power, on the other hand, relates to the way in which the power is actually used in the negotiation process.

Joan Kelly has identified at least eight factors that can create power inequalities in mediation. These include history and dynamics of the relationship, personality and character traits, cognitive capacity, economic and knowledge base, as well as institutional, cultural, social, gender and age stereotypes.

One common way of looking at power in a practical sense has been in terms of resources. Resources can include factors such as economic, financial or income resources. They also include physical resources, emotional resources and educational

170 T. Grillo (1991), supra note 46 at 1547.
172 J.B. Kelly (1995), supra note 151 at 89.
resources. Violence itself can also be seen as a power resource. It has been suggested that to understand how power works in a relationship or negotiation one must weigh the whole set of resources. Possession of one particular resource does not necessarily result in great power for that party. Women participating in mediation, for instance, may perceive themselves as being equally or more powerful than men who possessed greater resources. For instance, this may arise if the woman has the children with her and may lead a woman, who otherwise might have fewer resources in other ways, to be less likely to articulate her needs, or make demands, when negotiating a family dispute.

Resources may also be intangible, but nonetheless important in determining power in negotiations. Intangible resources include guilt of initiating the divorce, diminished self-worth from feelings of rejection, and aversion to risk. Underlying factors such as status, dominance, depression and self-esteem are also important in determining power.

Parties to a family dispute may, and almost always do, have different tangible resources and different capacities to use those resources either within the marriage or in

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174 Ibid at 228.
175 Ibid at 229.
176 Ibid at 228.
177 P.E. Bryan (1992), supra note 29 at 457.
178 Ibid at 458.
negotiations, mediation or collaboration that take place when a family dispute arises.\textsuperscript{179} For instance, family law being clear that child support and access are separate issues, parties may bargain one for the other. One party to a separation, usually the woman, may be in need of financial resources but may have custody of the children of the relationship. The other party, usually the man, may have financial resources but want increased access the children. In this example, in reality, the resource of money and access are potentially complementary because they can provide the basis for exchange between the disputing parties. On the other hand, such resources could be non-complementary if they do not provide the opportunity for exchange, such as when one party is wealthy but the other party does not want increased access to be given. For instance the wealthier party may be willing to relinquish a custody claim if the less wealthy party agrees to less money or property.\textsuperscript{180} It has been suggested that the impact of resources on the balance of power is greatest when the difference between the disputing parties is greatest for non-complementary resources.\textsuperscript{181}

\textbf{What is Spousal Abuse?}

Many forms of abuse can occur in relationships between individuals. One type of abuse which is the focus of this thesis is that which occurs between spouses or partners. Whilst spousal abuse is directed from one spouse to the other, other significant forms of

\begin{itemize}
  \item \textsuperscript{179} Ibid at 449.
  \item \textsuperscript{181} D. Ellis & L. Wight (1998), supra note 152 at 228.
\end{itemize}
abusive behavior also occur in family relationships between parents and children.\textsuperscript{182}

Whilst child abuse is not the focus of this thesis, abuse in any form in a family can result in significant harm not only to the couple but also to the children of that relationship, who may witness the abuse.\textsuperscript{183} The flip side is that abuse of children by one parent will have a significant psychological and physical impact on both the children and on the non-abusive parent, both directly and indirectly.\textsuperscript{184}

The term spousal abuse is an often used term, but it is also often misunderstood. Throughout this thesis the term “spousal abuse” is defined very broadly to include all forms of domestic abuse between partners,\textsuperscript{185} including not only physical and sexual abuse, but also includes psychological abuse, verbal abuse and economic abuse. Other terms that have been used include partner abuse, wife abuse, woman abuse and wife-battering, as well as family abuse and domestic violence.\textsuperscript{186}

\begin{thebibliography}{99}


\bibitem{184} Whilst the abuse of children is not the focus of this chapter it is noted here that child abuse is also a site of abuse and threat to a non-abusive, protective parent, usually a woman.

\bibitem{185} See also D. Zutter (2002), supra note 58 at 66.

\bibitem{186} See D. Zutter (2002). supra note 58, for a detailed description of types of behaviors that constitute spousal abuse. The terms domestic abuse and family abuse are even broader terms and can include abuse of children. Also see E. Peled (2000), supra note 182.

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Abuse perpetrated in domestic violence situations is complex behaviour and does not come in one single form.\textsuperscript{187} Spousal abuse is not typically an isolated event or action and can only be properly understood in its context. Intimate relationships involve a complex set of behaviours and we can only properly understand abuse within a relationship if we understand the dynamics of the relationship and the consequences of any abuse that occurs.\textsuperscript{188} Pence & Paymar suggest that the range of abusive behaviours is wide and includes not just physical or sexual violence, but also using intimidation, coercion, threats, and isolation. It also includes using emotional abuse and denial and blaming, as well as male privilege.\textsuperscript{189} Abuse can also involve the use of children. For instance, the abusive parent could threaten to prevent the non-abusive parent from seeing the children again, or threaten to harm the children. All of these forms of abuse intersect with issues of power and control.\textsuperscript{190}

The emotional abuse in a relationship can be more subtle, yet no less insidious, than other forms of abuse. Emotional abuse includes behaviors that are designed to put down another person, play mind-games, or ultimately aim to make them depressed. Such behavior could include name calling or trying to make another person feel humiliated or guilty.\textsuperscript{191}

\textsuperscript{187} Ibid

\textsuperscript{188} Ibid. Also see L. Neilson, \textit{Spousal Abuse, Children and the Legal System: Final Report for the Canadian Bar Association, Law for the Futures Fund}, 2001 at www.unb.ca/arts/CFVR/spousal_abuse.pdf

\textsuperscript{189} E. Pence & M. Paymar (1993), supra note 44.

\textsuperscript{190} See P.E. Bryan (1992), supra note 29.

\textsuperscript{191} E. Pence & M. Paymar, supra note 44.
Victimization reports that spousal abuse should be viewed in the context of controlling behavior and emotional abuse within which it occurs.\textsuperscript{192} For instance, when women use violence in relationships they are much more likely to do so as a means of escape or defense. Furthermore, women are much more likely to suffer greater consequences of spousal abuse because the abusive acts perpetrated by men are more violent. Men may also suffer spousal abuse, although women are in the majority as victims when one takes into consideration the dynamics of the relationship and the context in which the abuse occurs.\textsuperscript{193} As many as 40-60\% of disputes at separation and divorce involve abusive relationships.\textsuperscript{194} Furthermore, one in three women experiences some kind of spousal abuse in their lives.\textsuperscript{195}

There has been criticism of the way in which various components of the legal system deal with abuse in family relationships.\textsuperscript{196} For instance, the complexity of abuse in family relationships makes it especially difficult for legal practitioners, mediators, or judges to identify and deal with the abuse. What is even more problematic is the suggestion that abusive relationships may be at times overlooked and unrecognized by mediators.\textsuperscript{197} Whilst some mediators are also trained as lawyers, this is not always the


\textsuperscript{193} See D. Zutter (2002), supra note 58.

\textsuperscript{194} Ibid at 69.

\textsuperscript{195} Ibid at 66.

\textsuperscript{196} P.E. Bryan (1992), supra note 29. Also L. Neilson (2001), supra note 188 at 138.

\textsuperscript{197} D. Zutter (2002), supra note 58.
case. In any case, it has further been suggested that lawyers also underestimate the prevalence of spousal abuse amongst their clients.\(^{198}\)

Feminist scholars have argued that in situations of spousal abuse the critical elements for equality are absent.\(^{199}\) Equality in a relationship relates to the relative bargaining power of the parties.\(^{200}\) When there is an imbalance of power the outcome of negotiations can be unfair and unjust to the weaker party. Equality is far more likely to occur in a non-abusive situation. Factors that are important for equality in a relationship include non-threatening behaviors, respect, trust and support. Equality also involves honesty and accountability, as well as economic partnership, shared responsibility, negotiation and fairness. In an abusive relationship these values and factors are often absent or lacking.\(^{201}\)

**MEDIATION AS PRIVATE DISPUTE RESOLUTION**

Private-resolution mechanisms involve attempting to reach an agreement which is in the interest of both parties. They are client-controlled processes and often seek creative and personalized solutions to issues in dispute. Private negotiation of family disputes may be attractive to parties for its promise to be cost effective and allow parties to control their own outcomes without having a decision imposed on them by a court. The settlement agreements arrived at may not reflect what a court would have otherwise

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\(^{198}\) Ibid.

\(^{199}\) T. Grillo (1991), supra note 46.

\(^{200}\) The issue of power in negotiations is the focus here. See D. Ellis & L. Wight, (1998), supra note 152.

\(^{201}\) D. Kolb & G.G. Coolidge (1993), supra note 26 at 262.
ordered for the parties to the dispute. Proponents of mediation have, however, argued that mediation achieves better outcomes for clients in family disputes because it enables the parties to contextualise their dispute, to express emotion during the process, and to take control of their own self-determination.

Problems may arise with a number of aspects of private agreements arrived at in this way. For instance, one or both parties may not be fully informed as to the nature and consequences of the agreements into which they are entering. Sometimes agreements that are produced from these private negotiations are filed in court as consent orders, such as the case where the parties are seeking a divorce. Other private negotiation processes may end with the parties entering into an agreement which is not the subject of scrutiny of any outside person or body.

An advantage of mediation is usually seen to be the neutrality and impartiality of the mediator. That very condition, however, can lead to a problem when one party starts out, or during the negotiation becomes, unable to negotiate with the other party. For instance, if the conflict is already highly entrenched when the parties come to mediation, then mediation may be unable to assist the parties to resolve their family dispute. Where one party becomes unable to negotiate with the other party, it may become difficult for the neutral and impartial mediator to assist the parties to resolve

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their dispute, such as where impasse occurs. The challenge for mediators, in their neutral role, is being able to balance their role to help both parties and at the same time to arrive at an agreement that is fair to both parties.

The inability of one party to negotiate with the other party may also arise because of power imbalances between the parties. The difficulty in identifying power imbalances in the context of family disputes creates a great challenge: how to adequately protect the interests of all parties to private negotiation? It can be problematic for a single mediator in the neutral and impartial role to equalize power. Some mediators may also not believe it is their role to attempt to equalize power. The ability for parties in mediation to consult lawyers outside of the mediation may also have only a limited capacity to protect the client who is ineffective in the negotiation since it assumes that party will be effective in at least seeking legal advice. Similarly, the lawyer who is consulted by a party who is ineffective in the negotiation may not be present in the mediation. It is debatable whether the role of the mediator is to protect a vulnerable party’s interests, which may be problematic if the more powerful party is determined to take unfair advantage of the power imbalance.

Power imbalances and abuse in a relationship create a complex dynamic between the parties to the negotiation. It is difficult to assess allegations of abuse and to identify power imbalances between parties. It has therefore been questioned whether it is ever

204 J. Lande & G. Herman (2004), supra note 47 at 289, footnote 15.

appropriate to privately mediate family disputes in situations where one spouse, usually the woman in opposite sex relationships, says she has been the victim of spousal abuse or that there is a power imbalance.\textsuperscript{206} Whereas, in some instances the abuse may be documented or evidenced by reports by authorities, such as police or family experts, in other cases, there may be no way of easily corroborating the allegations. Nonetheless, allegations of abuse must be taken seriously and therefore raise serious doubts over the efficacy of private negotiations between those parties.

A review of the feminist literature reveals a strong concern about the use of mediation in family dispute cases involving spousal abuse or in situations falling short of abuse where there is a high degree of conflict.\textsuperscript{207} It has also been suggested that there may be unequal bargaining power between women and men in current mediations because of the unequal role and position of women in society today, although this has been critiqued by others.\textsuperscript{208}

One major critique of mediation has come from feminist literature on the processes involved in mediation.\textsuperscript{209} In private negotiation processes, such as those which take place in mediation, those clients who are the most vulnerable may be at most risk of

\textsuperscript{206} D. Zutter, (2002), supra note 58 at 70.


\textsuperscript{208} Ibid at 364.

\textsuperscript{209} Another major critique of mediation is based on a class analysis, see L. Nader & H. Todd, The Disputing Process: Law in Ten Societies (New York, NY: Columbia University, 1978).
abuse from the process. Since the process is between the parties to the dispute, and not
overseen by state representatives such as judges, vulnerable parties may be exploited.\textsuperscript{210}

Feminist authors such as Tina Grillo have been particularly critical of the use of
mandatory mediation as a possible source of ongoing discrimination and abuse of
women.\textsuperscript{211} Based on the current inequality of women in society and the different ways
in which men and women tend to approach negotiation, women may be vulnerable to
further discrimination in a process in which they have no ability to control their
involvement.

The role of women in families, and in particular the role of women in caring for
children and the dependency of the mother-child relationship may also impact on the
way in which women negotiate in family disputes.\textsuperscript{212} Even proponents of mediation
have suggested that the level of coercion and intimidation in the relationship at the time
the mediation process is going to be attempted is one of the most important factors in
determining whether mediation should take place.\textsuperscript{213}

There are many pressures on victims of abuse to enter into private negotiations. For
instance, proponents of mediation claim that the privacy of the negotiations allows

\textsuperscript{210} S.A. Goundry et al (1998), supra note 66.

\textsuperscript{211} T. Grillo (1991) supra note 46 at 1551. See also A. Bottomley, “What Is Happening To Family Law?
A Feminist Critique Of Conciliation”, in J. Brophy & C. Smart (Eds.), \textit{Women-In-Law: Explorations In

\textsuperscript{212} See also M. Fineman, \textit{The Autonomy Myth: A Theory of Dependency} (NY: The New Press,
2004) at 235 for a discussion of the dependency of the relationship between mother and child.

\textsuperscript{213} K. O'Connell Corcoran & J.C. Melamed (1990), supra note 203.
parties to arrive at agreements which are more creative and flexible to the needs of the
parties. Yet, this claim is based on a presumption that both parties are effective
negotiators. This may be particularly problematic for victims of abuse who may have
had a history of dealings with the court, or welfare, system that does not understand her
plight as a victim of abuse.\textsuperscript{214} Whilst abuse does not always arise from conflict, one of
the parties to the dispute may have power issues which also negatively effect on the
ability of the other party to participate in the negotiations fully as an equal.\textsuperscript{215}

Proponents of mediation also point to the fact that parties can keep issues in dispute
very private using mediation. Yet, by privatizing family law disputes, the outcomes are
less available to public scrutiny and may result in neglecting broader social values. The
rights and entitlements of an individual, particularly an individual who has been
abused, may not be properly protected within the private process of mediation.\textsuperscript{216}

Mediation does, however, have the potential to arrive at creative and flexible solutions
to issues in dispute, including possibilities that would not be available strictly on the
basis of possible court outcomes.

\textsuperscript{214} M. Fineman (1988), supra note 54. Also C. Smart, “Losing the Struggle for Another Voice: The

\textsuperscript{215} D. Zutter (2002), supra note 58; T. Grillo (1991), supra note 46; C.L. Chewter, “Violence Against
Alexander, “Family Mediation: Friend Or Foe For Women?” (1997) 8 Australian Dispute Resolution
note 29.

\textsuperscript{216} S.A. Goundry et al (1998), supra note 66 at 38.
Those in favor of mediation have also suggested that mediation is a less expensive form of dispute resolution process. As a result, there has been pressure on policy-makers to move more disputes out of the public arena of the courts and into private dispute resolution.\textsuperscript{217} The high cost of court-based justice is more prohibitive to those who can least afford lawyers, such as women who are generally financially less well-off than their ex-partners.\textsuperscript{218} One the other hand, the pressures a party may feel to enter into private negotiations for this same class of people may be very great. A party may feel compelled to choose mediation because they cannot afford to litigate, yet the process may not ensure that party’s interests are protected. The party may also be driven more by lack of financial means that a consideration of how they might achieve their fairest and best outcome to the family dispute.

Mediators do not provide legal advice, although they may provide legal information to clients and often the negotiations may concern legal issues. However, the role of the mediator as a neutral third party also prevents the mediator providing advice or advocacy to one or both parties. The extent to which mediation of a family dispute actually involves negotiation and discussion of legal issues and possible court outcomes varies and depends on the mediator. John Lande and Greg Herman have suggested that whether legal issues are discussed may depend on the training and preferences of the

\textsuperscript{217} J. Behrens (2002), supra note 202 at 408.

mediator, and mediators may sometimes refer clients to lawyers for professional advice. In many jurisdictions this may be required by law.\textsuperscript{219}

Voluntary and mandatory mediation should also be distinguished. In voluntary mediation, the parties choose the mediation process from among a number of available options, including litigation. In mandatory mediation, which is used in some jurisdictions in North America, the parties are required as part of court proceedings to undertake mediation at some stage during the court process. This raises more serious concerns in relation to mediating in situations where one of the parties could become the victim of that process.

Sandra Goundry, Yvonne Peters and Rosalind Currie make a number of recommendations in relation to the provision of mediation services. The authors suggest that mediation should remain in the public domain, in full view, and be accountable.\textsuperscript{220} For instance, agreements reached through a process of mediation should be subjected to rigorous scrutiny by courts, and not just rubber-stamped. They also suggest that mediators need to be aware of systemic substantive inequality faced by women and provide safeguards for women’s rights and entitlements in family disputes. In order that mediation can remain a truly voluntary choice for clients, there needs to be increased funding from government for a family court system, including family mediation, as well as women’s and men’s resource groups.\textsuperscript{221} Then mediation,

\textsuperscript{219} J. Lande & G. Herman (2004), supra note 47 at 282.

\textsuperscript{220} The other side of that coin, however, is that such a step takes away from party autonomy.
along with all other appropriate dispute resolution mechanisms, could become a realistic choice for all parties.

COLLABORATIVE FAMILY LAW AS PRIVATE DISPUTE RESOLUTION

In collaborative family law both clients are represented by lawyers but the negotiation process involves settlement of family disputes without recourse to courts or judicial decision making. Collaboration, like mediation, is a method of private dispute resolution. When parties choose collaborative family law they do so in order to avoid having to take their dispute to the court. The negotiation and decision making process takes place out of the view of the public eye and behind closed doors. The negotiations take place between the parties and their lawyers, and divorce coaches and financial specialists may also be involved. But there is no neutral third party assisting the parties, in contrast to mediation.

The private nature of those negotiations and the wish to keep those private matters within the family may be one of the very reasons one or both of the parties may choose collaborative law and collaborative lawyers to help them resolve their family dispute. In this way collaborative family law does not differ from choosing to privately negotiate issues post-separation, as in standard settlement negotiations. The key difference for collaborative law is that those negotiations would take place in the absence of any threat to litigation. Those parties who seek to control their own destiny and do not wish an outside body, such as a court, to impose a decision upon them, may wish to keep decision-making power in their own hands.

Two criticisms of mediation include possible mediator bias towards one or other family outcome, such as joint custody or shared parenting, and the difficulty of ensuring full financial disclosure. These issues are also important considerations in the context of collaborative family law, where lawyers bring to the negotiating table their own set of expectations and views on appropriate family arrangements. The informal financial disclosure in collaborative family is also open to the same risks. These issues are discussed in more detail in Chapter 4.

The aim of the private negotiation process is to arrive at an agreement that is mutually acceptable to both parties. This can, and often will, involve one party compromising on an issue in dispute. Over the course of an entire negotiation, with numerous issues in dispute, either or both parties will have made a compromise at some stage. If one or both of the parties have entered into the negotiations without fully understanding the nature of the negotiation, or is at a negotiating disadvantage due to lack of information, incorrect information, powerlessness or feelings of threat, such as direct or indirect coercion, then the agreement may be neither fair nor just.

Whilst in theory courts have the ability to refuse to incorporate an agreement in an order that has arisen from mediation or collaborative family law, in practice the courts have little in the way of time or resources to look deeply behind the negotiations to determine whether the clients arrived at an agreement on equal negotiation footing.


Courts may also be more willing to accept orders for a consent agreement where lawyers have been involved, as with collaborative family law. In this regard there is a special skill and emphasis needed by collaborative family lawyers to identify and deal with a range of issues, including abuse and power imbalance.

In summary, private negotiation of family disputes may be effective and embraced by some parties who are each effective negotiators. Concern arises in mediation of family disputes where a vulnerable party has to make compromises to get agreement on issues in dispute, coupled with any lack of protection of the vulnerable party. A party who is an ineffective negotiator is not adequately protected from unfair agreements in such a situation where they have to face the other party, represent themselves in the context of the private negotiation, and make compromises in the process. The question is whether collaborative family law is able to deal with these problems, or is better able to deal with them than mediation.

MEDIATING OR COLLABORATING IN THE CONTEXT OF SPOUSAL ABUSE

Some authors have argued that mediation can be carried out in abusive situations, whilst others have suggested that should only be attempted in very limited situations. Barbara Hart suggests that “mediation is an inappropriate and dangerous alternative to the legal process in the resolution of custody disputes between batterers and battered women. The process of mediation offers promises to battered women – promises of

224 K. O’Connell Corcoran & J.C. Melamed (1990), supra note 203.
cooperation, honest communication, safety, amicable post-divorce collaboration in parenting, improved communication and fairness\textsuperscript{226}. These promises may well be false promises, however, if the context of mediation is unable to offer the protection needed by the abused party. A neutral mediator may be unable to protect an abused spouse from ongoing abuse.

Feminist analysis requires that family mediation be examined in relation to other dispute resolution options in family law system. Accordingly, mediation should not be viewed as discrete and separate from traditional negotiation without a mediator\textsuperscript{227} or traditional court-based processes.\textsuperscript{228} Family mediation is seen as most beneficial for parties who are fully empowered.\textsuperscript{229} Parties who are fully empowered exercise a genuine choice to enter the mediation process, and continue to remain empowered throughout the process.\textsuperscript{230} In contrast, feelings of powerlessness, worthlessness and intimidation may lead victims of abuse to be particularly vulnerable to further abuse when it comes to negotiations being entered into during mediation or alternative dispute resolution.\textsuperscript{231} The consequences could involve making unfair compromises on issues in dispute or achieving an overall unjust result.

\textsuperscript{227} Also called lawyer-assisted negotiation.
\textsuperscript{228} T. Grillo (1991), supra note 46.
\textsuperscript{229} See R. Alexander (1997), supra note 215.
\textsuperscript{231} T Grillo (1991), supra note 46.
Mediation in the context of an abusive relationship raises many difficult issues. It becomes difficult to judge whether clients are voluntarily entering into the mediation. The examples of abuse during the process may be difficult to detect, but may also be pervasive and insidious. As such, it has been argued that in these situations, face to face negotiation between the parties is the key problem.

One way in which unequal bargaining power may be overcome is the use of lawyer-assisted negotiation. In lawyer-assisted negotiations, the parties need not necessarily be present and the process dangers faced by an abused woman may be reduced to the extent that she can be empowered to have her instructions voiced in those negotiations. Where a client is unable to voice her instructions because of the inherent fear she has derived from an abusive relationship, the ability of the lawyer to both recognize the abuse and provide an environment conducive to the taking of instructions may help to overcome (or, partly overcome) a situation of unequal bargaining power. Similarly, the question arises whether collaborative family law can offer some of these protections.

Attempting to negotiate privately to resolve a dispute is most problematic for women clients who retain less bargaining power than that of their ex-partners. Traditionally mediation has tried to screen out abuse by using screening protocols, and then removing those cases from the mediation process. Alternatively it may involve

screening for abuse and then attempting to protect the abused party from further abuse by conducting satellite mediation sessions or removing her from face to face negotiations. In the latter situation, the dispute may be able to be negotiated using lawyer-assisted negotiation or collaborative family law.

It has also been suggested that the suitability of collaborating on family disputes involving spousal abuse should be carefully assessed. Pauline Tesler has argued that cases with active domestic violence are “unsuited to collaborative practice”. As a general guideline she suggests that active domestic violence presents serious problems for collaborative family lawyers and that those cases should be screened out. The question is how effective the screening processes can be. Furthermore, it may also be possible to collaborate on cases involving a history of abuse by using power balancing techniques.

POWER BALANCING TECHNIQUES AND SCREENING

Power and abuse in family relationship are closely interrelated. The attempts to overcome problems associated with power and abuse in negotiations involve attempting to balance the power between parties and screening for power imbalance and abuse.

235 N.J. Cameron (2004), supra note 30 at 274.

236 P.H. Tesler (2001), supra note 77 at 95, footnote 1.
Power can involve modes of communication, such as the threat of abuse between the parties. Such threats can also be subtle, being used covertly by one party against the other to keep that party under control. Abuse and power imbalances can therefore be difficult, if at all possible, to detect and therefore difficult to neutralize by using power balancing techniques or screening out by removing the client from the negotiation.

One practical way in which to balance the power relationship between parties to a dispute is to assess the ability of both parties to the dispute to be involved in the dialogue of the negotiation and participate in reaching outcomes by influencing the process, expressing their needs, generating and exploring options, and evaluating the consequences of potential settlement agreements. Where power imbalances are thought to exist, an attempt may be made by the practitioner to balance the power between the parties. The mediator might point out the issue of power imbalance to the parties, and implement reframing and questioning to control the process. This might also involve giving the less powerful party more time to consider options and more time to formulate counter-offers and to more fully participate in the negotiation process. Alternatively, in other cases it might be thought appropriate to screen such clients out of the private dispute resolution process, if the mediator foresees that the power difference between the parties is unable to be balanced. Where power imbalances are identified during mediation, and the mediator is unable to balance the

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237 E. Pence & M. Paymar (1993), supra note 44 at 3.
238 For a discussion of power balancing techniques see J.B. Kelly (1995), supra note 151.
power differences between the parties, it may be necessary to cease the mediation because of the risk of obtaining an unfair and unjust outcome.

Screening for cases of abuse may be particularly difficult to measure and ascertain, partly because of secrecy and the complex nature of abuse which relates to power and control issues.\textsuperscript{240} This may be a particularly difficult problem for negotiating any dispute in which there has been past or current abuse because of the risk that one or both parties to the abuse may remain silent on the issue.\textsuperscript{241} Screening methods typically involve a written intake interview and ongoing assessment during the negotiation process. It has been suggested that a better way of screening may be to “screen in” cases that are suitable for mediation and negotiation.\textsuperscript{242}

A more novel way of addressing power imbalances has been suggested by Juliet Behrens. That author suggests that legislation could be drafted to presumptively favor those who are likely to be less powerful in private negotiations, such as women who are the primary caregivers, with most to lose. If the legislation was drafted in this way then parties negotiating privately may be better able to turn to the legislation and bargain in the shadow of the law.\textsuperscript{243} She suggests that this legislative guidance may have the effect of making private negotiations more effective and equitable. However, law

\textsuperscript{240} D. Zutter (2002), supra note 58 at 77.


\textsuperscript{242} S.A. Goundry et al. (1998), supra note 66 at 72.

\textsuperscript{243} J. Behrens (2002), supra note 202 at 411.
reform trends are, in fact, away from the use of such presumptions.\textsuperscript{244} Moreover, in order to negotiate on the basis of presumptions found in legislation it is first necessary for parties to the negotiation to have knowledge of that legislation.\textsuperscript{245} This condition will often require the advice of lawyers who may, or may not, be available to client who are going through the mediation process. In contrast, collaborative practice of necessity involves lawyers representing each client during the negotiations. The possible impact of collaborative lawyers in negotiations is discussed below.

Where power imbalances are identified before or during negotiations, it may be possible for a practitioner to attempt the balance the power differential between the parties. For instance, the role of collaborative lawyers in negotiations is to ensure that the parties contribute fully to discussion of issues in dispute. As set out in the typical participation agreement parties are expected to assert their needs and interests. Where lawyers perceive their client is not asserting their needs and interests, the lawyer assists that client to do so. For instance, this may involve the lawyer noting the power imbalance in the negotiations and requesting that their client’s needs and interest be stated more clearly or be added back onto the agenda. Alternatively, lawyers may request that the more powerful client take a more passive role and allow the less powerful client more time and space in the negotiations to state and assert their needs and interests.


\textsuperscript{245} J. Behrens (2002), supra note 202 at 411.
In mediation, on the other hand, it may be more difficult for the neutral mediator to address power imbalances by using power balancing techniques. Whilst the mediator may be able to identify the power imbalance, and even draw it to the attention of the parties, it may be difficult to assist the weaker party to assert their needs and interests without compromising mediator neutrality. The difference between mediation and collaborative family law is the role of the two independent lawyers in the collaborative process. Whilst the two collaborative lawyers share a commitment to the collaborative process, each of them is able to represent fully their own client’s needs and interests and not those of the other party. In contrast, although most mediations of family disputes, especially involving divorce, involve legal representation, not always will lawyers be present in the mediation room.

ABUSE AND POWER IN COLLABORATIVE LAW

Like mediation, collaborative law relies on cooperation, honest communication, safety, amicable post divorce collaboration in parenting, improved communication, and fairness. These attributes may be very hard to find in couples where abuse or serious power imbalances have prevailed. Collaborative law is also promoted as informal and personal, as well as cost-saving and a way of helping to free up court resources for more important matters. When power and control issues are a factor in a family dispute, perhaps because of an underlying issue of abuse for instance, it is difficult to imagine what matters may justify the more urgent attention of the courts and judicial scrutiny, or at the very least, non face-to-face, lawyer-assisted negotiations.

246 See N.J. Cameron (2004), supra note 30 at 275. These features can be seen in the participation agreement which speaks of such factors as "participation with integrity" and "negotiation in good faith".
A key element of collaborative family law is four way meetings between clients and lawyers. Such meetings require the involvement and input of clients and are therefore face-to-face meetings, usually in the offices of one of the lawyers, at a round table. The problem in such a situation is apparent when an abused party is placed in a vulnerable bargaining position by having to face their abuser in the negotiation setting.

That said, unlike mediation, collaborative practice always involves lawyers present in the context of the negotiations. Collaborative lawyers may therefore be able to assist clients who are less powerful to balance out the power differential. In order to do so, one or other of the lawyers must recognize the power imbalance in the first instance. This option is, however, largely dependent on the ability of clients to afford lawyers, which may be especially prohibitive for clients from lower socio-economic status or those who rely on a legal aid system. Unfortunately legal aid is increasingly difficult to obtain for family law matters, and furthermore legal aid lawyers are unlikely to be trained in collaborative practice and unlikely to have the resources to offer their services to clients who seek to resolve their family dispute collaboratively.

In collaborative law clients can choose to share the cost of retaining lawyers and other professionals. It remains to be seen in practice what arrangements can be made by

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247 Lawyers may sometimes be present during mediation negotiations, contingent upon the financial means of the parties. Most often mediation clients who can afford lawyers, especially those seeking mediation for family dispute and divorce, retain lawyers for legal advice.

disputing clients for sharing the costs of jointly retaining collaborative practitioners, and in particular whether this would be practical and even ethical in cases in which one party is the victim of spousal abuse.

Recently the International Academy of Collaborative Professionals published guidelines for professional and ethical conduct.\(^{249}\) Unfortunately there is no clear statement in these guidelines to protect against abuse, or make the screening for abuse in family disputes a priority for collaborative practice. Nothing in the objectives specifically sets out how victims of abuse are to be dealt with when they enquire about collaborative practice. Understanding and screening for abuse is left to the discretion and skills of the collaborative professional.

No detailed analysis in the existing literature has been undertaken on the role power imbalance plays in collaborative practice. It has been suggested on the one hand that power imbalance alone can better be dealt with in the context of collaborative practice because each clients' lawyer is always present in the negotiations. The role of the lawyers in collaborative practice is to provide the parties with independent legal advice and also to be present in, and facilitate, the collaborative negotiations. The lawyers also always attend the four-way meetings with their clients. For this reason it may be especially useful for collaborative lawyers to receive additional specialist training to recognize power imbalances and to use power balancing techniques.

It has also been argued that collaborative practitioners must be careful not to assume that collaborative process is free from the risk of power imbalance.250 Penelope Bryan points out women clients generally have less power than their ex-partners and are also more easily influenced in the negotiation process to settle, partly based on socialization which may encourage some women to accept the values of their lawyers.251 For instance, some women clients may lack the ability to resist her lawyer’s suggestions that she avoid alienating her ex-partner because she has already got custody of the children. This problem may occur even if she has real concerns for her or her children’s safety. It is important therefore for practitioners, whether they be mediators or lawyers, to recognize gender differences and socialization patterns.252

Collaborative law practitioners need to take every precaution at the stage of the initial interview and also during the subsequent four-way meetings to establish the suitability and safety of clients’ ongoing involvement in the collaborative process. Once in the collaborative process clients may further be at risk of entering into settlement agreements without fully considering the, often binding, result of the agreement into which they have entered. This may be less of a problem in collaborative practice than in mediation, since lawyers are present with their clients throughout the four-way meetings.253

250 P.E. Bryan (1999), supra note 156 at 1005.
251 P.E. Bryan (1999), supra note 156 at 1004.
Another aspect of collaborative practice that should be considered in terms of its potential to hide, or perpetuate, abuse within a family relationship, is the participation agreement. The participation agreement sets out the process for the negotiation between the parties and the ways in which communication will take place. It does not deal extensively with how clients are to behave during the collaborative process but some elements do address the communication and behaviour between the clients. Typically clients are asked to agree to “discuss and explore the interests they have in achieving a mutually agreeable settlement”. Clients are also encouraged to speak freely and express their “needs, desires and options”. Abused women may not be able to do so freely, even if they sign the participation agreement “voluntarily”.

Under the participation agreement clients give up rights such as applying for restraining orders and interim court hearings during the collaborative process. This raises particular concerns for clients who are leaving abusive relationships. It is potentially very dangerous for an abused client to give up the right to applying for restraining orders on the implicit “understanding” in the participation agreement that their ex-partner stop abusing them for the duration of the collaborative process.

253 But given the extent to which some lawyers are so keen on collaborative family law, it is important to question the extent to which they will be able to be cautious, particularly if they are so invested in it working in all circumstances.

254 See Appendix A – Sample Participation Agreement.

255 Whilst the right to formal discovery process may be included in a participation agreement if both clients specifically agree, the right to apply for interim court hearings and restraining orders are never part of the participation agreement. See N.J. Cameron (2004), supra note 30 at 274.
Another problem with collaborative family law is that lawyers who help to negotiate family disputes out of court may not feel bound to follow previous decisions of family courts. In fact, Shields, Ryan & Smith have suggested that in the pursuit for fairness and acceptability of outcomes of settlement negotiations lawyers need to turn to look at the needs and concerns of the parties beyond legal precedent. Abused clients may therefore remain vulnerable to the risk of negotiating for less than they should receive, for the wrong reasons, remain problematic for collaborative practice. Whilst negotiation always involves compromise, the question is whether the compromise is acceptable on a principled basis and whether one party compromises too much for the wrong reasons (such as abuse dynamics).

During the first four-way meeting the lawyer needs to be skilled in helping the clients to understand and appreciate client-client interactions, especially where the clients have been dealing with high degrees of interpersonal conflict. This meeting also provides an opportunity for dealing with, and understanding how the group (lawyers and clients)

256 In the standard participation agreement there is no specific mention of the understanding behind giving up one’s right to apply for restraining orders.

257 J. Behrens (2002), supra note 202. Some higher courts also address issues relevant to principles that should be considered when determining how to address inequalities and disadvantages of the parties. For instance, see Moge v. Moge, [1992] 3 S.C.R. 813 on using spousal support to address economic disadvantage.


259 The presumption is that clients will be more likely to give up some of their rights in private negotiations. It is also conceivable that clients could do better in private negotiations than they would do if the matter proceeded to court, especially given the cost, in time and money, to the parties proceeding to court.

will work together. Nancy Cameron suggests this meeting is a good opportunity for setting the tone of mutual respect, listening and communicating, as well as discussing what is understood by the participation agreement and why they have chosen to collaborate.\(^{261}\) It must be questioned whether a party who has survived abuse in the relationship can take full advantage of such an opportunity. The advantages are that clients may come to a better understanding of the expectations that they share, and those that they do not share, for the process – if they are open and frank. It must also be noted again, however, that many people divorcing are under stress and may not be able to make or express good process choices, especially if abuse is an issue.

Ironically, where clients in collaborative practice may be more at risk is where four way meetings take place between the two clients and their two divorce coaches. In this situation, the individual divorce coaches may also require special training. In the context of mediation, Martha Fineman challenges the role of helping professions involved in the mediation of family disputes. She argues convincingly that helping professionals are often not truly neutral because they have a specific interest in a particular substantive result such as shared parenting or joint custody of children.\(^{262}\) This problem also exists in collaborative practice, especially in models where helping professionals such as divorce coaches and child specialists are integral in the process.

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\(^{261}\) Ibid.

Abuse may be very subtle and the high chance of negative emotions and psychological coercion suffered by victims of spousal abuse may mean that the ongoing abuse may not be reported to the practitioner. This issue may be partly dealt with if the professional bodies regulating the field of collaborative practice provided guidance for ethical and professional conduct to ensure that the appropriate level of attention is given to the issue of abuse, how to screen for it and how to protect clients from further abuse (including recommending litigation or traditional lawyer-assisted negotiation where necessary). As discussed by Astor, it may be impossible to screen for abuse if the issue remains silent.263

The lack of equality in an abusive situation is problematic in the case of both mediation and collaborative practice. The processes are built on issues of integrity, negotiating in good faith, and freely electing to participate in the process. Yet, the process of collaboration (which is present in both mediation and collaborative practice) cannot eliminate issues of distrust or irreconcilable differences between the clients that arose from the family dispute.264 At least in some cases, whether a client who has been abused during the relationship can fully consent to participate in the collaborative process becomes an issue.265


264 In fact, this qualification is specifically written into the participation agreement. See N.J. Cameron (2004), supra note 30.

265 Ibid
Furthermore, it has been suggested that many practitioners embrace collaborative practice because they themselves have had negative and uncomfortable experiences of litigation. In small communities the risk is that all family law practitioners in that area may end up practicing collaborative law exclusively, thereby effectively removing choice from clients. This situation would appear to be particularly dangerous to justice and one which could have severe negative consequences for victims of violence or parties who are unable to communicate with their ex-partners or lawyers. Lack of legal representation and the fairness of a full trial when the circumstances make it impossible to solve a matter by negotiation raise fundamental professional practice and access to justice issues for the legal profession.

Practitioners and local family lawyer groups must therefore be cautious not to restrict client options for court-based litigation, especially in cases where there has been evidence or accusations of spousal abuse. This concern arises especially among practitioners who work on a model which purports to offer only collaborative law or where collaborative practitioners take on only collaborative files.

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266 Ibid


268 P.E. Bryan (1999), supra note 156 at 1005.

269 I understand that this practice differs amongst practitioners. In some models, practitioner incorporate collaborative law into their regular practices, which involves not only other forms of alternative dispute resolution, such as mediation, but also court-based litigation.
A final issue of power is that professionals such as mediators or collaborative practitioners have power over their clients. This arises through the control that professionals have over the process and communication that takes place during the negotiation. This type of power is important to the extent that the professional becomes a negotiator in the collaborative process. Collaborative practitioners bring with them certain ideas and knowledge about how the process will work and the outcomes that will be obtained.

Collaborative professionals are trained to be aware of the client-focused nature of the process and the process should be client-centered. Inevitably, however, clients are influenced by the advice of Counsel. Moreover it has been suggested that even in mediation the practitioner becomes a negotiator to some degree, whether they do this deliberately or not. This possible problem exists for collaborative law also. It suggests that practitioners need to be very familiar with issues of power imbalance and they need to be trained to assess and screen clients who may lack power in the negotiating process, or offer them appropriate assistance.

Abused clients who are disempowered especially need the choice from a full range of available options, including traditional negotiation and court. Practitioners who exclusively practice on collaborative files must be cautious not to create a situation in which collaborative practice becomes effectively mandatory. In such circumstances it

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270 D. Ellis & L. Wight (1998), supra note 152 at 240.

271 Ibid
is important for practitioners to advise their clients, especially those who come from abusive relationships, of other available options and to provide appropriate referrals.272

The element of client choice in deciding which type of dispute resolution process will be used for their family dispute is important. Similarly, collaborative processes may not be suited to all types of disputes. The issue of the party’s true freedoms to enter into contracts is also an important consideration when entering into mediation or collaborative processes.

It remains unclear to what extent in practice collaborative lawyers adopted these guidelines and this issue will be discussed in more detail in Chapter 4, which presents the results of interviews with collaborative lawyers.

CHAPTER 4 – LAWYERS' PERCEPTIONS OF COLLABORATIVE FAMILY LAW

INTERVIEWS

This chapter summarizes the results of twenty (20) interviews with collaborative family lawyers. The interviews involved questions about lawyers' perceptions of their role in resolving family law disputes collaboratively. They were directed at comparing collaborative family law and other processes for resolving family law disputes. In doing so they investigated how collaborative family law is defined and how it relates and compares to other dispute resolution processes such as mediation. The role of trust in the collaborative negotiation process, the importance of disclosure, and the role of conflict, power and abuse between the parties to the dispute were also investigated, as well as the types of matters family lawyers perceive to be suited to the collaborative process.

Method

The interviews involve a structured form of questioning to gather primarily qualitative information from lawyers regarding their perceptions of the practice of collaborative family law. The structured interviews involve a standard format in which a set of 26 open-ended questions were posed. The structured interview technique was used in order to collect the broadest information possible on defined topic questions, within the limited time available for the interviews. The use of open-ended questions also enabled

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273 This study was submitted to and reviewed by the UBC Behavioural Research Ethics Board, from which it received approval. A copy of the approval is found at Appendix E.

274 See Appendix D for interview schedule.
lawyers to expand on their responses to achieve a rich set of personal perceptions and experiences which would include the nuances of lawyers' individual collaborative family law practices. The structured interviews were analyzed using NVivo 0.7, which is a computerized data management program. After carefully reading the transcripts, the author used NVivo 0.7 to search the data for key concepts and themes. The program was then used to organize the interviews into a categorized system of quotes which related to the recognized themes and concepts.

The lawyers sampled in this study were identified from the Vancouver collaborative practice group website. Since collaborative family law has become well established in the Vancouver family law community, it was decided to interview those family lawyers working in currently active collaborative family law practices. Informal discussions with members of the Vancouver collaborative family community provided the author with a sample of experienced practitioners in their professional community. Twenty collaborative family lawyers were asked to participate in the study. A letter of introduction and informed consent form were forwarded to each lawyer. All 20 of the lawyers who were invited to participate in the study agreed to do so. Each lawyer committed to speaking with the author in a confidential, tape-recorded interview. Each interview involved one hour long session, conducted at the lawyer's

275 See www.collaborativedivorcebc.com

276 See Appendix B for Letter of Introduction. See Appendix C for Participant Informed Consent Form.
firm. All interviews were conducted by the author. The interview comprised 21 substantive question and 4 demographic questions.\(^ {277}\)

The interviews resulted in 300 pages of type written transcripts. The participants remain anonymous and each interview was given a number code. Where quotations from the interview transcripts are used in this thesis, reference is given to the interview number and page on which the quotation can be found.

**Participant Profiles**

The participants in this study comprised twenty (20) experienced collaborative family lawyers from the Greater Vancouver Area, all members of the Vancouver collaborative practice group. As well, some practitioners have recently started forming more localized practice groups, including groups in Richmond and the North Shore. Each of the groups has standardized pamphlets which include statements about collaborative law and how it compares to other methods such as mediation.

The sample comprises 15 females and 5 male collaborative family lawyers. This proportion of 75% females and 25% males is comparable to the proportion of female and male members of the Vancouver collaborative practice group. At the time of conducting the interviews in May – July 2005, the split of male and female collaborative family lawyers in the total Vancouver group was 12 males (26%) and 34 females (74%). There was a total of 46 collaborative family lawyers in the Vancouver

\(^ {277}\) See Appendix D for Interview Schedule.
collaborative practice group.¹²⁷⁸ There were 19 Caucasian participants and one Asian participant.

All members of the Vancouver collaborative practice group are required to have a minimum of five days mediation training and two days collaborative training.¹²⁷⁹ All the practitioners interviewed also have some direct experience dealing with collaborative files. The lawyers in the current sample have between 5 to 28 years practice experience since admission (with an average of 18.1 years post-admission experience). Keeping in mind that collaborative family law has been available in Vancouver since 1998, the practitioners in the sample have between 2 to 6 years collaborative practice experience (with an average of 4.75 years collaborative practice).

It can also be noted that 18 of the 20 participants were experienced litigators with 7 or more years of experience prior to commencing collaborative law. Given the relatively brief 6 year history of collaborative law in Vancouver, the less experienced practitioners (those with less than 5 years post-admission experience) have been practicing collaborative law since close to the beginning of their legal careers.

Two practitioners were working predominantly as mediators. The remaining 18 worked predominantly as lawyers. Of those 18, all trained as mediators.

¹²⁷⁸ Note that the Vancouver collaborative practice group was previously called Collaborative Divorce BC and the website is www.collaborativedivorcebc.com

¹²⁷⁹ This requirement for mediation and collaborative law training is also a requirement for membership of the Vancouver collaborative practice group for divorce coaches and child specialists. The requirement for collaborative practice training is a requirement for membership of the Vancouver collaborative practice group for financial specialists.
All participants held an LLB degree. Seventeen participants held first degrees in Arts, Science or Education. For the remaining three participants the LLB was their only degree. One participant held an LLM degree. Two participants held a Masters degree in areas other than law. All participants indicated long-term and ongoing interests in continuing legal education in the areas of alternative dispute resolution.

The sample comprises mainly lawyers working in sole or small practices. Eleven participants were sole practitioners, 3 small firm practitioners (up to 5 lawyers), 4 medium firm practitioners (up to 20 lawyers), and 2 large firm practitioners (over 20 lawyers).

VARIATIONS IN COLLABORATIVE FAMILY LAW PRACTICE PROFILES

Of particular interest is the finding that only five (5) of the 20 lawyers interviewed were involved in “pure” collaborative practices, taking on no litigious family law files. The remaining 15 lawyers had “combined” collaborative practices, taking on both collaborative and litigious files. Of the 15 lawyers who take on litigious family law files, five (5) lawyers did so only extremely rarely, in general stating that they were interested in moving more and more away from taking on any litigious family law files because they were “not their favorite matters”. The remaining 10 lawyers stated that they took on as many, or more, litigious files than collaborative files.
Participant responses also revealed that the level of exposure to collaborative family law files in daily practice varies greatly among family law practitioners. The spectrum varies from, at the one end, those practitioners who have successful practices based solely on collaborative files, to, at the other end, practitioners who have practices which combine largely traditional litigation based files with smaller numbers of collaborative files.

The original idea for collaborative family law arose amongst teams of non-litigious lawyers. However, as collaborative family law is practiced today in Vancouver, whilst a few of the interviewed lawyers have practices that utilized exclusively non-litigious methods (such as pure settlement negotiation, mediation, and collaboration), others are continuing to practice collaborative family law in a combined or integrated practice of litigious and non-litigious methods.

This pattern of results is contrary to the suggestion that there is “paradigm shift”, involving a fundamental choice by practitioners to move away from litigation and towards the collaborative family law process. For the majority of the interviewed lawyers there was no fundamental, radical shift, in their practice philosophy. Any change in outlook of the majority of interviewed lawyers did not result in such a radical change as to reject litigious approaches to solving family law disputes. Rather, the majority of lawyers who participated in this study practiced in “combined” collaborative practices, with 10 (50%) of those lawyers interviewed indicating that their practices involved what can be termed a more “integrated” practice approach,

offering clients collaboration (or other forms of out of court dispute resolution) or litigation, depending on the individual context of the file.

All of the lawyers, however, noted that they perceived that their traditional role as combative lawyers had changed. That is, there does appear to be a personal philosophical shift away from adversarial and towards cooperative dispute resolution. All participants perceived the roles of trust and cooperation had been significantly altered by a change in their philosophical outlook as to which files and which types of family law matters were suited for litigation. This is discussed in more detail below.

COLLABORATIVE FAMILY LAW AND FAMILY LAW DISPUTES

For all participants family law formed a significant part of their practices, involving the broad spectrum of both children’s and financial/property matters, including spousal support and child support. Nineteen of the interviewed lawyers dealt predominantly with family law matters in their daily practices. One practitioner had predominantly a child protection practice. In addition to family law files, two lawyers had substantial personal injury files, two lawyers had substantial commercial practice files and one lawyer had substantial debt collection files. All participants stated that they believed that litigation was least suited for children’s matters.

Whilst there has been a push to promote collaborative family law as a better option than mediation in some of the promotional pamphlets, results suggest that participants perceive mediation and collaboration to be on a continuum of appropriate dispute
resolution methods. Collaborative family law is seen as one of the spectrum of appropriate dispute resolution processes that can be effective in resolving family disputes. One participant described the spectrum as follows:

The worst thing that collaborative law can do is to say that it is "the" way. It is "a" way. As some people are mediators, some people are specialists in this way. Once you start saying "this is the way" then you have changed it into the "right" way and everything else is wrong. That's where some of the beginners and advocates of collaborative law really alienated other forms of lawyers. We will need them all. There will always be the need for court and there will always be the need for other conflict resolution models. (Interview 4, 50)

Another noted the role of collaborative practice in same-sex family disputes:

I think with the change in legislation the same sex couples are going to be more moved to collaboration because the relevant factors relating to the separation of their assets are going to be a little more standardized. (Interview 21, 299)

DEFINING COLLABORATIVE LAW AND THE PARTICIPATION AGREEMENT

The practitioners' definitions of collaborative family law were broad and included elements of dispute resolution, out of court settlements, the participation agreement, cooperation, trust, respect and disclosure.

The importance of the contractual commitment between lawyers and clients not to resort to court processes to resolve disputes is summed up as follows:

I think one thing that all collaborative clients share is that they really have a desire not to be in a courtroom. That's an overarching desire for all collaborative clients, and they may come at that from a lot of different ways. They may know they have the beginnings of an amicable resolution and that is important for them. They may also have a very high conflict relationship and not want the conflict to be any higher, and they choose it
because of that, not because they have any ideas that they think it's going to be amicable. (Interview 14, 11)

The voluntary entry into the collaborative process and the role of trust for clients were perceived as important elements in the collaborative model. Some key principles of collaborative practice that participants identified are as follows:

For me the key principles are clients don't want to go to court. They want to resolve it outside of the court system. They want to resolve it reasonably. There has to be, to my mind, a basic trust kind of relationship. If that is not there then that is when the files fall apart. (Interview 9, 126)

The key principles would be trust, transparency, and communication. (Interview 12, 168)

The principles of collaborative for me are defining a process where each participant is represented by counsel, is supported to the extent that they need to be supported, where there is a voice for the children if necessary, and where decision making is non-coercive, voluntary, based on mutual disclosure where there is a commitment not to resort to a trial or judicial decision. (Interview 5, 58)

The central principle of collaborative law, which I tell my clients, is that you are not threatening to, nor will you, go to court. The other central part of that is that if you do choose to go to court then I will withdraw as your counsel. I think the other hallmark in my opinion is trusting disclosure. So you are having full disclosure, but you are trusting that the other person will make full disclosure and you are not going to bring pressure to bear on that. What I tell my clients is, the reason I don’t take court cases is that I work for settlement always. The collaborative framework gives me a method for doing that. It’s not wimpy. I’d certainly have to say it's not like holding hands ... but what it does mean is that you have total control of privacy, of costs, and of timing within the framework of the two of you. My other hallmark...I think it would be three. Full disclosure, no court, and the other one is that you have the opportunity to deal with your legal and non-legal matters. The court does not give any opportunity to deal with that. (Interview 3, 31)

The removal of the “threat of litigation” in collaborative practice is captured by comments from several participants, for example the following:
I think the other principles are really continuing a dialogue with the other Counsel. I think that what lawyers tend to do is they discuss things so far, and then they sit back when there isn't a solution and go “well, that’s it. Now we have to go to court”. If that going to court arrow isn't in your quiver then I think you have to find some other way of doing it and I think is really what collaborative practice is about. It is being innovative and creative, not with respect to practice or ethics or giving legal advice but innovating ‘process’ to reach settlement. (Interview 16, 223)

The relationship between the two lawyers in the collaborative process is also perceived as important in the process and is summarized as follows:

The relationship between the two lawyers in collaborative is really quite different. It's lovely in most cases. It is supportive relationship and I have had files where the other lawyer has made a mistake and then corrected it (where it was to my advantage). So you do see that happening. And the client will go “gawd, you just cost me!” but adhering to the principles, the relationship is really important. (Interview 4, 54)

Also the commitment of the lawyers to the process was seen as important. For instance:

[The key difference in collaborative] is the commitment on the part of everyone to resolve. When I have gone into collaborative files with other lawyers who haven’t been trained, they don’t understand that commitment and usually it breaks down. Not always, but usually, because when you get to the hard part of the negotiation, which you always do, there is the typical, trained, ingrained response of “ok, we will just go to court”. Or we will use power. Which, of course, court is one form of power. We’ll use power to get our way here. In the collaborative process the use of power isn’t going to work. It’s tried, and it isn’t going to work. (Interview 5, 60)

Whilst the paradigm shift spoken about in the previous literature was not spoken about strongly in this sample, the commitment of the lawyers to the collaborative process also seems to be related to a broadening view of alternatives to court-based processes. For instance:

I think one of the most important, key, elements, is integrity, especially on the part of the lawyers. I understand and accept that the parties might not have much of a desire, certainly at first, to honestly embrace that principle.
But I think a key element is that it has to start with the lawyers. I think as part of that is open-mindedness, avoiding labels and positions, and not providing those labels and positions to their clients because the clients are going to run with that once they have it. Flexibility in thinking, open-minded problem solving, and the recognition, and this is what everyone calls the paradigm shift, the recognition that it is not me against you or us against them. But it is a common problem that everyone is trying to solve. I think recognition that it is not going to be an easy process. That it is different. So that injects another element of I think harder work because it takes self-awareness and willingness to change points of views if necessary. Those are some of the key things I think are very important. (Interview 8, 107)

The participation agreement, which sets out the rules of engagement for the collaborative process was viewed by several participants as central to the definition of collaborative family law. For instance:

The participation agreement is key. The clients are contracting to stay out of court. (Interview 18, 248)

I think the central principle of collaborative practice is, first and foremost, signing the participation agreement. I think if you don't sign the participation agreement then it can't be defined as a collaborative file. (Interview 16, 222)

If I was to criticize myself and my own practice in term of how much time I have spent on collaborative files in doing that, I realize that if you adhere to the principles that are set out in that [participation] agreement then it defines both your conduct as well as your expectations for yourself and for the other lawyer and for your clients as well. I think everything flows from that. (Interview 16, 222)

The withdrawal clause, as set out in standard participation agreements was also seen as an important principle underlying the collaborative process:

Well the essential element is the disqualification agreement. Certainly the way we practice here, and our participation agreement, the essentials I would say are the disqualification agreement, a signed participation agreement that includes a disqualification agreement. In Vancouver that also includes a mandatory requirement on the lawyers involved to terminate the case if they find out there is not disclosure on a critical issue, full disclosure, respectful communication and modelling of respectful
communication and working toward a resolution that meets both clients' needs, that in doing that references the value-frameworks of the clients, and that I have confidence which withstands judicial scrutiny. (Interview 14, 183)

This statement is particularly interesting because it raises the concern, and criticism, of collaborative process relating to what happens if there is a discovery of less than full disclosure by one side part-way through the process. The parties, including the innocent party, could suffer significant losses by having to start again with new counsel. Similar criticism has been raised by John Lande, who suggests a version of collaborative law process, called cooperative law, which adopts other key aspects of collaborative law but does not include parties entering into an agreement involving a withdrawal clause.281

Some participants perceived the signing of the participation agreement as a central element for a file to be defined as a collaborative file:

Yes, I am pretty cut and dry with that. I don't like this word "cooperative". If it is collaborative then you have signed a participation agreement. If you don't want to sign it then it can still be a negotiated settlement and we can do "friendly" if you want to call it that. But I don't like some people saying it's a "quasi-collaborative". (Interview 9, 129)

The timing of the signing of the participation agreement was also seen as important, typically taking place at the first four-way meeting:

The four of us all have to sign the participation agreement together. I usually do it as, we sign four copies and everybody keeps one. Ideally we do that at the first meeting. (Interview 11, 151)

Another key element is communication and trust between lawyers. For instance:

281 J. Lande (2003), supra note 12.
They are approving the concept of open communication between among all participants, but specifically between the lawyers. Open sharing of information. I think those are the key elements. (Interview 18, 248)

The high level of trust between collaborative lawyers arises, at least partly, from the standardized training undertaken by collaborative lawyers and the level of familiarity between lawyers:

Essential components of collaborative law are, for me, there must be the training in collaborative law. So at least we have the same sort of idea of what we are doing. There has to be some type of training. There is the need for the participation agreement. (Interview 4, 47)

I find that what is key to my success as a collaborative lawyer is how well I work with the particular lawyer on the particular case...I have come to a place where the number of people with whom I am working with right now is very narrow. (Interview 18, 249)

PARTICIPATION AGREEMENT NOT NECESSARILY REQUIRED BY ALL COLLABORATIVE LAWYERS

Differences emerged in the data as to how participants defined collaborative family law files. Fourteen participants defined collaborative files only as those in which a participation agreement had been signed. For instance, the following participant felt very strongly that a collaborative participation agreement must be signed in order for the file to be considered a collaborative file as follows:

I think that to say that you are doing collaborative and you don’t sign the participation agreement then it’s not collaborative. I don’t buy that. (Interview 11, 151)

Another participant commented strongly on some of the negative aspects of the participation agreement:

I really can’t stand the participation agreement. I have learned to hate it because I think more people would resolve their matters more amicably and
more to their benefit and with less expense and less pain if they had options where they don’t get forced into a process. I can’t stand it for when you are just starting out, they are separated, trust is usually at an all time low, if they didn’t trust during the marriage then they certainly don’t at separation, or they don’t know whether they can trust their spouse and they are asked to take a leap of faith sign and agree that the other person is going to act in good faith and disclose. You also don’t know how long it is going to take, how much money you are going to invest in the process and then, only if it doesn’t work out, to fire your lawyers and restart with somebody else. Not only financially but after you have told your story to somebody else that is pretty exhausting for people to be restarting. (Interview 20, 279)

Other participants noted that in some files they never get around to signing the collaborative participation agreement. There was disagreement, however, between participants as to whether such files are still “collaborative”. For instance, some participants expressed the opinion that a file can be collaborative even where a participation agreement is not signed:

[S]ome of us have had files that are collaborative files where we never signed a collaborative agreement. (Interview 7, 101)

It was also noted that the participation agreement may be signed at different times during the process. For instance one participant stated as follows:

You can amend it. You can do various things with it. Sometimes what I have done is gone two or three or four [4-way meetings] meetings before I have signed the agreement just to make sure that I am not giving away something that is of benefit to my client. That there is a real basis for proceeding. Although I would never go that far if I thought I was going to litigate. It is for the purpose of clarifying what we are doing collaboratively. (Interview 11, 151)

In theory, before signing a participation agreement it is important for the parties to understand that they are on the same page when it comes to not only understanding the
general conduct and behavior for the collaborative meetings and negotiations, but also the range of issues that are in dispute. Therefore the discussions in the first four-way meeting address the expectations of the parties and the matters in dispute.

In some instances it may not be possible for the parties to completely understand the range of issues in dispute by the end of the first meeting. In such instances, parties may not complete signing the participation agreement at that meeting. For instance this was noted by one participant as follows:

*I find that doing it that way, the one time I remember really doing this and making a difference was a case ... where we said we wouldn't sign this until we had an understanding about what expectations were around one topic. Not settlement. It didn't even have to be close but we had to understand that this was not on the table. As long as this was not on the table, let's say unequal division of assets, say in a case where there is $2M, and that's it. Are we arguing about an unequal division of assets in addition to all these other things or not. If we are then my client may not want it. We have to have some idea that we are at least on the same page. So we sorted that out, signed the agreement, and settled the case. (Interview 11, 153)*

Sometimes collaborative lawyers may enter into negotiations with lawyers who are not collaborative lawyers although one participant who had done so noted that there is “obviously a debate about whether that is appropriate” (Interview 5, 60). In those instances, something akin to collaborative negotiation may take place but typically the non-collaboratively trained lawyers and their client will not sign a participation agreement. For instance:

*I have had files with lawyers who are not collaborative, most of them will decline to sign the participation agreement because it prohibits them from doing the litigation and they feel that (this is what has been told to me by
them) they cut themselves out of potential work. So that's a bit of a problem. But with collaborative lawyers we usually sign with a bit of a ceremony. I do sign up a participation agreement with everybody at the first meeting. I think most people do it that way. (Interview 1, 1)

This difference appears to be related to the perception of collaborative family law as a unique and separate form of dispute resolution, alongside mediation and litigation. Whilst most practitioners defined collaborative family law as contingent on the participation agreement, including the withdrawal clause, a smaller number of practitioners defined collaborative family law more in terms of the style of negotiation which takes place in four-way meetings between clients and their lawyers. In the latter, collaborative family law is similar to standard settlement negotiation which takes place in many family law files, including those that fall outside the formal definition of collaborative family law.

DISCLOSURE AND ROLE OF “GOOD FAITH” IN NEGOTIATIONS

In collaborative practice there is a greater reliance than in litigation on honesty of clients to make full and frank disclosure of financial details. The disclosure clause is a feature of the participation agreement. The importance of early disclosure is also paramount to both a fair and timely resolution of the family dispute at hand.

The results of the present study indicate that lawyers perceived that their clients could be trusted to fully disclose relevant materials during the collaborative negotiations. There was, however, no indication that the interviewed lawyers do anything to encourage their clients to provide full and frank disclosure beyond what a client would
be inclined to do in any matter. Therefore lawyers are largely reliant on the parties to
the dispute entering into the collaborative agreements and the subsequent collaborative
negotiations in good faith. Future studies may benefit from investigating further the
perceptions of clients involved in collaborative processes of their own and their ex-
partners’ motives and actions regarding full and frank disclosure. The tactics used by
clients within collaborative negotiations to maintain negotiation advantages need to be
investigated further. At a minimum, it is important to note the possible disadvantage to
an honest party of another party’s dishonesty in this process.

The importance of disclosure is summed up by one participant as follows:

Well, I think it is a commitment to be very fair with one another and as part
of that commitment to be completely open about financial and other
matters. To me that is kind of the heart of it. It is not, as in litigation or as
litigation can some times be, catch me if you can. People have an
obligation to make full and fair disclosure but do they always? This I don’t
know. But in the collaborative process it matters. That is what they are
there to do. (Interview 17, 236)

Disclosure is a voluntary process and may involve other professionals such as financial
planners. For instance one participant noted as follows:

It’s totally different. Again, the client participation in the process. Instead
just of them instructing a lawyer who then goes and presents the argument
on their behalf, the whole way it is prepared, there is cooperation in
preparing the material and the disclosure for each of the lawyers and the
clients are very involved in that process. If we draw in financial planners
for one of the parties, then that is completely different, you would never see
that in a litigation model or an arbitration model. It is very unusual
because it is the lawyer that would be educated, not the client. All the
divorce coaches, and all of those roles wouldn’t exist either. (Interview 6,
77)
Some collaborative lawyers ask their clients to complete the standard court disclosure form, although this does not appear to be done by all practitioners on all occasions.

Practitioners varied in their responses, as follows:

*With property ones I think you need a sworn financial disclosure. Well, my view is that because it is collaborative you have to be that much more vigilant about financial disclosure because I think that some people are attracted to the collaborative process because they think they can get away with something.* (Interview 11, 151)

*I regularly give them [financial disclosure forms] to my client. Probably in 60% of my cases we exchange them. Usually not sworn, although there are certainly occasions where I have felt it necessary to have them sworn. I said 60%, maybe as high as 70%. The other 30 or 40% my practice is to do the Table of Assets and Liabilities, to create it jointly in session. Then attach that to the separation agreement and acknowledge that all their assets are disclosed in the separation agreement.* (Interview 14, 184)

*I cannot think of too many situations in which we did not have a financial statement and we exchange them. Apart from anything else, it is really handy when you do the separation agreement because then you have the schedules.* (Interview 2, 22)

Other participants suggested more informal disclosure in the collaborative process as follows:

*Note, I didn’t mention financial disclosure as a linchpin of this process, because I think it is required in any event. Whatever your process. Now, typically in a collaborative file, because we are having this open conversation, I like to go through the information gathering within our sessions. Everybody is a witness and partner to it and you are immediately able to check out the level of knowledge. A spouse is going to say, “yes, I know all about that”. Sometimes they are very involved. If they don’t then they are going to say so. The idea is ‘disclosure to the satisfaction of the parties’. Again, within limits. If my instincts tell me that something is glaringly missing then I am going to be alive to it but it is not really my judgment to what is enough. I think it is the client’s judgment as to what is enough.* (Interview 18, 248)

*I am more likely in a collaborative file to take the other lawyer’s word for it in terms of document disclosure. So that, if the other lawyer tells me that he or she has seen a copy of the statement and yes it does show XYZ, then I*
am more inclined to accept that than to require the document to be produced. (Interview 7, 95)

Two participants, on the other hand, did not get their client to fill in a financial disclosure form. For instance:

_That phrase is certainly in my participation agreement but I never do a formal [financial statement]. Partly because I am of the option that it can be very positional and it entrenches distrust. Others are doing it to cover their butts._ (Interview 3, 31)

_You know, I have got files of lawyers that demand sworn financial statements. My experience is that those lawyers do litigation or they have been burned in some way on non-collaborative cases. I think that the very principle of collaborative law we should not be asking for sworn financial statements. I mean, I do it when the lawyers want it. I don’t encourage it. I don’t know what it serves. If the agreement does not fully disclose in the end then you have every reason to set it aside because it is not full and complete disclosure. You know, also it’s another expense and I am trying to reduce the expense for clients. To me it’s really being pushed by the litigation lawyers._ (Interview 4, 48)

This last statement highlights the fact that there remains the possibility for a client to go to court to have any agreement, including a collaborative agreement, set aside.

**COOPERATIVE AND COLLABORATIVE NEGOTIATION**

Over the past seven years in Vancouver, the practice of collaborative family law has evolved to include smaller sub-groups of practitioners building up rapport with one another and thereby finding themselves on the opposite sides of a large number of shared files. Of the 20 lawyer participants, seven dealt with more than 10 files per annum on a regular basis.
Two areas of cooperation can be identified in the collaborative family law framework. High degrees of cooperation are required between lawyers and also between clients.

The higher degree of trust and familiarity between collaborative lawyers may have benefits in collaborative negotiations such as when it comes to balancing power between the parties. For instance one participant noted as follows:

*But, yes, I think it can address it a lot better than a regular negotiation because if I am just dealing with some lawyer that I don’t know that well I can’t really just chat about the power imbalance so much.* (Interview 9, 134)

However, three participants stated that they perceived the type of negotiations that take place in collaborative files to be the same as those in regular settlement negotiations. For instance:

*Well, I think it kind of depends. It could be very, very similar. It depends on the other Counsel to a large extent. It could be almost identical except there is no participation agreement. If the approach of other Counsel is pretty collaborative and you feel it is somebody you can rely on, it can be very similar.* (Interview 17, 240)

Also:

*I have done cases where they [collaborative] look exactly like a regular negotiation. I have literally gone into the meeting room with the two clients and the other lawyer and I, and had the clients tell us “we don’t want to waste any time on this bullshit” going through the participation agreement. They have read it. Let’s get on with it. We have one meeting. We just discuss our first few steps through the collaborative process and they say “we don’t want to do this any more” and one of us gets instructions, we draft a proposal and send it over to the other side. Just as you would in a normal litigation process.* (Interview 6, 76)

On the other hand, 17 participants stated that collaborative negotiations may be characterized by special processes and interactions between the clients, the lawyers and
the clients, and between the lawyers themselves. For instance this concept is captured in the quote as follows:

> I know a lot of lawyers will say “you know I do collaborative all the time”. In essence they are really not. They are just negotiating but they always have the threat of court. I really believe there is this shared view when you sign the participation agreement. And that there is a shared view of what our intent is. And our intent is to really work cooperatively and respectfully. I believe that there is a difference. (Interview 4, 50)

Well, what I was going to say is I do see that there is an opportunity for much more creative settlements in the collaborative process for sure. So you would see maybe wording in a separation agreement that might be kind of out of the ordinary or you might not see, say, in a settlement achieved in a litigation of a negotiated settlement. (Interview 9, 132)

**COMPARING COLLABORATIVE FAMILY LAW TO OTHER DISPUTE RESOLUTION METHODS**

Collaborative lawyers still are advocates for their clients and give advice to their clients based on the law. There is however more flexibility in the outcomes that are possible in agreements that are achieved in collaborative files, as with any private dispute resolution mechanism. For instance, one participant commented as follows:

> When I do collaborative files I don't treat them that much different in terms of how I advise clients. When I am having my meeting with my client I will tell them what the law is. ... But then I always say “this is your agreement”. Just because that is what the law is, while we can't let you negotiate an agreement that is fundamentally unfair (because I think that is going to be a waste of your money because that is going to be set aside at some future point in time), but that's just what the law says. You can give more than the law, they might accept less than what the law will allow. (Interview 1, 3)

For collaborative family law to successfully resolve family disputes the parties to the dispute must genuinely want their matter to settle out of court. For instance, one participant summed this up as follows:
Well parties have to "want" to resolve their matters collaboratively first. I mean I think they have to come in really not wanting to go to court. Most clients do not come in and say I have $50,000 in my bank that I have no better use for so why don't I give it to you and you can fight. I do think clients have to have in their own mind that they really want to resolve it by agreement. (Interview 1, 7)

Collaborative Family Law vs Litigation

All participants suggested that the types of family law matters most suited to litigation involved those in which there were significant aspects of spousal abuse and those in which there were high levels of intractable conflict. Collaborative family law, on the other hand, was perceived as well suited to cases involving conflict, including high levels of conflict, where the parties wished to negotiate without the threat of going to court. In those cases, collaborative family law was most suited to those cases in which the parties could respect and trust one another to the level that they believed each other would participate in good faith, respectfully and with full and honest disclosure, although this may be a difficult criterion for divorcing couples, many of whom are acrimonious.

In general collaborative family lawyers experience a greater degree of trust between one another than between litigation lawyers. For instance, one participant stated:

_I think that there is, on one level, a greater amount of trust with the other collaborative lawyer because you sign a participation agreement. You don't need to be concerned that you will end up in litigation._ (Interview 1, 4)

Whilst this present study did not specifically investigate trust between the parties, the increased level of trust between lawyers may have an important impact on trust
between parties. For instance, trust between lawyers may reduce their advocacy, or perceived advocacy, on behalf of clients. The impact of trust between the parties is currently unknown, and deserves further study.

Some participants noted that collaborative family law and litigation/court processes may differ significantly in terms of how much communication takes place directly between the clients. For instance one participant noted as follows:

Yes, a lot of times litigation lawyers tell their clients don't speak to your spouse. I often say [in collaborative] whatever you can resolve outside of this room makes it easier, or will make this process move forward more quickly. With the caveat, sometimes we say "please don't talk about things until the next meeting" because things are very, very hot. Interview 14, 191

Another noted as follows:

For lawyers our traditional thinking is that settlement is the only thing, so in collaborative process you certainly have opportunities to do more than settlement. To work out lowering the conflict, resolving some of the underlying issues, to look at improving communication. Whether or not that happens, absolutely, as I say, it doesn't happen in all collaborative cases, but at least, number one it has the potential there, and number two, there is really a do-no-harm philosophy as the base of collaborative practice, that isn't there at the base of litigation practice. (Interview 14, 192)

Some participants also felt that litigation can be more detrimental where there is already conflict between the parties. For instance:

[T]he litigation system is only going to entrench the conflict further. It is just so challenging to bring any kind of an intervention. (Interview 14, 195)

The collaborative process was also noted to be more economical and timely than the litigation and court processes. For instance, one participant noted:
In the litigation that I did recently ... [a] week before [trial] we got the documents we needed to put together an offer to settle. That's insane. We spent a year doing interim applications. $50,000 in legal fees. We wouldn't have had to do that if it was a collaborative model. We would have been able to get the information by agreement much, much earlier on and then get on with actually settling it. There is a lot of pressure in the collaborative model to get at things more quickly. (Interview 6, 76)

The nature of the decision imposed by courts in the litigation process was also noted by one participant as follows:

*Arbitration and litigation are just externally imposed solutions so they don't address it at all, although they may give teeth. The problem is that power imbalances will normally exist around money and access. The court will order a money payment, so you have teeth there. But, while you can order someone to comply with an access arrangement, functionally enforcing an externally imposed access arrangement is almost impossible.*

(Interview 3, 43)

**Comparison of Collaborative Law and Mediation**

Fewer than half of the participants, all of whom were trained in mediation, had any significant experience as mediators. This could mean that those practitioners are not offering mediation, but instead are offering collaboration as a preferred option. Several participants who practiced both as mediator and lawyer noted that they saw collaborative as another valid option, alongside mediation, for resolving disputes. One mediator participant noted the following:

*Since we have been doing collaborative law, so the last 3 or 4 years, I have been doing more mediations than otherwise. I think it is that just people are trying to find alternatives to litigation.* (Interview 6, 71)

Some lawyers may prefer the role of lawyer/advocate they play in the collaborative model as opposed to mediation. For instance:
Yes, I do find mediation is harder to do than the collaborative because there is only one person and two clients. It's hard to kind of stay tuned into both of them and your hands are tied behind your back because you can't give them legal advice. (Interview 6, 71)

The key difference is that I really do have a relationship with one of the participants as their lawyer. I am not neutral. I am really there to advocate, in a different way. (Interview 4, 49)

One participant noted both the collaborative process and mediation are based on trust:

Collaborative process and mediation has to be based on trust. I couldn't work as a mediator if I am working individually or together with this couple who are separating and found out that one of them was physically abusive, I couldn't continue to work with them unless they were admitting there was a problem and getting some assistance with it. I mean, there is always some, to my mind, some element of emotional abuse in relationships. I think any relationship has its times and if people are splitting up there is some element of I think abuse. It's a pretty broad term anyway. (Interview 9, 134)

Several participants contrasted collaborative process and mediation in terms of the ways in which power can be balanced between the parties in the two methods.

Anything that is suited to mediation will be good for collaborative, and those cases in which there are power imbalance, and otherwise would be excellent cases for mediation except for the power imbalance, move them into collaborative. (Interview 5, 63)

The wonderful thing about the collaborative process over mediation, whenever I am working with power imbalances in mediation I find it extremely challenging to try and balance the power in the room while at the same time not being perceived as being biased. (Interview 14, 196)

I am, of course, as a mediator trained to deal with that power imbalance, but it is way easier to do it in a collaborative setting where the lawyer on the other side of the table can also see what's going on and can work together with you to make sure that power imbalance is not ignored. (Interview 15, 217)
One participant expressed some caveat about the ability of collaborative to deal with power imbalances:

“So we are nominally alert to power imbalances but what was happening is that you won’t see power imbalances in a really stark way in the 4-way. You’ll hear them reported afterwards. But, out of any of the processes this one [collaborative] is the best one for dealing with power imbalances. Mediation is significantly worse because the weaker person in the power imbalances doesn’t have the skills or the ability or the inclination to rise up and the mediator can only do so much. So you end up, as the mediator, managing the power imbalance and not dealing with the substance of the dispute when they want to. (Interview 3, 43)

As a team approach, in collaborative family law both lawyers work in the interest of both clients. In contrast to mediation, for instance, one participant noted the following:

Generally speaking I think it is different from mediation to the extent of both the direction and support of the lawyers. I know that there are a number of people who simply cannot deal with their partner. They can’t deal with it at a kitchen table and they don’t feel prepared to deal with it in mediation. They feel totally intimidated and uninformed. Sometimes uninformed, and it is not a power imbalance. Lack of knowledge. So, you use the [collaborative] lawyer for both information purposes and you use the lawyer to help you to articulate your concerns. (Interview 16, 225)

One lawyer noted that collaborative process may have a benefit over mediation for clients in high conflict situations. For instance:

“I am going to talk about practical difference first and then the technical difference. Practical difference is that clients have to be fairly high functioning, in my opinion, to be in mediation. So for the higher-conflict, lower functioning couples, they have to come to collaborative because otherwise one of them gets swamped in mediation. When I say high-functioning, I mean knowledge. It’s usually financial knowledge, or if there is an emotional imbalance, particularly if one party is devastated that the relationship is over. It is almost impossible, as a mediator, for me to take care of them enough. That is because in mediation you have to be totally neutral. (Interview 3, 33)
An important difference between collaboration and mediation is the role of advocacy.

For instance, one participant notes the role of advocate in the collaborative setting as follows:

*It's the encouragement and the advocacy that's really missing out of mediation. Now I am a big mediation proponent, I love it. But parties have to be relatively equally equipped with knowledge and they still have to be able to talk. Whereas in collaborative there is enough room to actually give them some skills to talk in the room. (Interview 3, 33)*

One participants also noted that in collaborative cases the lawyers are able to support their clients to come up with creative agreements. For instance, one participant stated as follows:

*Mediation there is a third-party neutral. The clients don't necessarily have lawyers with them. They may or may not. When I do mediation it has just tended to be situations where I am the mediator and then they resolve it through my assistance, I draft up a draft agreement and then they go and get their independent legal advice. Whereas collaborative, you're along for the ride. That's the big difference. Using similar skills though. (Interview 9, 128)*

**CHANGING ROLE OF LAWYER AS ADVOCATE**

As stated above, interviewed lawyers perceived that a heightened degree of trust was required in the collaborative negotiations, primarily between lawyers. Eleven interviewed lawyers noted an important and somewhat novel advocacy role emerging in collaborative files. The collaborative lawyer walks a fine line during collaborative negotiations to encourage full and frank disclosure and “fair play” by their client. Lawyers perceived their role to be one in which they maintained the interests of their own client and also the interest of the other client.
The participation agreement, in fact, requires clients to enter into the collaborative
negotiation in "good faith" and to fully and frankly disclose as well as not take unfair
advantage from the other party. If the lawyer senses that their client is not acting in
these "good faith" terms then the lawyer is obliged to cease the collaborative process.
This aspect of "fair play" to be enforced by a client’s own lawyer, places the lawyer in
a different position than a lawyer advocating solely for their own client’s interest within
the litigation framework.

For instance one participant summed up the role of lawyers as advocates in relation to
discussing clients’ short and long term goals, as well as discussing the law and clients’
personal choices:

So one of the things that is important is to really find out what my client’s
long-term goals are. Both short-term and long-term goals, and if there is
conflict between the short-term and long-term goals, talk about that and
kind of tease those apart. And it’s important for me to talk about the
backdrop of the law. My client always want to know the kind of, the way
they are headed is not inequitable, given their options [or court, etc]. And
sometimes it is an educational piece, if people think “I’ll get everything I
want and the other person shouldn’t have anything”. So those are all
pieces of advocacy. (Interview 14, 190)

Another stated as follows:

Advocacy in collaborative is not the same as advocacy in litigation process
and that is important to be aware of. I think I am a pretty adamant
advocate for my client but what I am advocating is what they told me their
goals are. (Interview 5, 65)

The level of trust and openness between the collaborative lawyers is also important.
One of the participants noted the following:
...we are saying things to each other that we would not say in a privileged situation because our clients have given us that permission to do that.

(Interview 5, 61)

Another noted the following:

_in the collaborative files the clients give you, in the retainer and in the collaborative participation agreement, more latitude to share information with the other lawyer. They still each have the right to say you cannot tell anybody what I just told you, and the right to get advice from you that you don't share, and it's broader. So in the collaborative process, I can and do give advice to my client in front of the other lawyer and the other client. That is very unique._ (Interview 5, 64)

Another difference in advocacy in collaborative files seems to be the starting point for defining advocacy. Rather than advocating for their client's interests, some practitioners are taking on the goals of their clients. These may include non-legal goals since agreements reached in the collaborative negotiations may be more creative than those arrived at in standard settlement negotiations or court outcomes. For instance, one participant stated the following:

_No, I think it is very different in the collaborative process than it is in the typical litigation. I think it is partly because of this third-party decision-making. When we talk about the regular definition of advocacy it's "to persuade" and so it implies that there is a third party. Whereas in collaborative process you only reach agreement if there is truly agreement, and because we tend to work on a needs-based model, it is less about persuasion and more about exploring, and giving your client the support throughout those negotiations and the support in really being able to do it. What's important to them, and prioritizing._ (Interview 14, 185)

Collaborative lawyers also work together in the joint best interests of their clients. For instance the types of conversations between collaborative lawyers may be quite different to those that take place between litigation lawyers, as indicated by the statement from one of the participants as follows:
We always have discussions about, "what are we going to do for these people?" Really, that is the way we talk. Those are discussions that you have with a collaborative lawyer. You see yourselves being involved in doing something collectively that will respect both parties' needs. (Interview 16, 226)

It is different on the part of the lawyers. We are not, per se, representing our clients just in their interest, but we are working together to bring both clients to an agreement that they will feel good about and will serve the interests of both of them and the children. (Interview 17, 236)

I think the key is that you are non-positional. You're more open-minded rather than closed. You are trying to create solutions rather than getting the best deal, as such. But that is the very difficult area I find. Just that, and in terms of how are other lawyers approaching that. I certainly have had the situations where I have had the disquieting feeling that the other counsel is using the process to maximize benefits for their clients. It may be that other people might have said the same of me, I don't know. It's a perception. (Interview 8, 110)

Some lawyers noted that lawyers may not get as close to their clients in the collaborative process because there is less taking of sides in the collaborative process.

For instance, it was noted by one participant as follows:

We spend a lot of time in the first session going through the agreement itself, making sure that they understand that. Then information gathering. Doing it together because you learn a lot about what they know about each other too. So, you save time in that sense. So, you might not be as close to a client, in that sense, in the collaborative process because you are leaving more to work on together. (Interview 19, 270)

One participant summed up the collaborative process as follows:

I see my job as I am still a lawyer ... Coming to me, they phone me up because they need a lawyer. When they sign an agreement it is my job to ensure that the agreement fits within the parameters of fairness on a judicial review. It can be very different and creative but ultimately whatever is worked out must somehow fit within those parameters. I also explain that to clients in the collaborative process because they are concerned about their interests. That's why they are hiring me and they are a little bit, there are often times, when they are a little tentative about the collaborative process thinking that I will collaborate so much with my
fellow collaborative lawyer that I will give away the farm on them. I always ensure that they know that I cannot do that. (Interview 2, 20)

It is worth noting that advocacy in collaborative family law still requires lawyers to give legal advice. This is summed up by one participant as follows:

Yes. I think that it is important to give people legal advice for a number of reasons. First of all they come to you for legal advice and I think it would be foolish to think that you couldn’t or wouldn’t or shouldn’t do that. Secondly, I think, at least in our law in British Columbia suggests that as far as property is concerned, the only time that a court would intervene is if the agreement is unfair. So you have to have certain parameters of fairness as defined by the courts. I don’t think there is any other way of looking at it. (Interview 16, 221)

Also:

I think it is important that the clients have an understanding of the legal principles but I always try to tell them that those are the legal principles in the litigation model. So if someone asks me about spousal support obligations and responsibilities I will tell them in a general sense what the principles are but I always try to explain to them that in their particular case there might be other ways to come up with a solution that might vary somewhat from those principles. It is not necessarily what they might end up with and also it is for the parties to find out what might work for them. (Interview 8, 107)

Within the reasonable range, the settlement that was reached, there was give-and-take all along. I am quite comfortable that the person had a very good outcome given their facts. Not fabulous, not crappy, but a good outcome. If they are content, and they are well within the range, and they have gained some things, they might have given other things, there is a lot of that give-and-take. What is important to my client might not be important to me. But if it is important to them, and it puts them within that range, then all the power to the settlement. I am not going to stand in the way of it. (Interview 15, 215)

The role of legal advice and legal standards was, however, also questioned by some participants. For instance:
I think ultimately what the parties do come up with does have to meet some kind of a rough "fairness" test or you have to meet some standard; otherwise if there are not going be any legal standards applied then there is no need for people to pay us money as lawyers. So the big analogy I think of is, if someone is going to reject classic medical principles in terms of their treatment then they are the ones who don’t see doctors. They take all their advice, and their cues, from non-traditional, non-mainstream practitioners. I think the same applies to us. If people are going to pay us money as lawyers then they should have some measure of legal standard applied. I think it can be done without applying rigid labelling but I think it is harder sometimes to do that. (Interview 8, 108)

It was also noted that collaborative lawyers should be covered by the same ethical considerations as any other lawyers. For instance:

*What has always surprised me from the time I have started to attend collaborative meetings is people always bring up this issue of ethics, and I have never understood what it is that you are doing differently in collaborative that you think would fall outside of your ethical boundaries. I think it is this idea that you can do anything you want and call it collaborative. You can never ever, ever leave your ethics at the door. ... Don’t do things that your canon of ethics say cannot and should not do. Conflict, etc. Those ethical rules are there for lawyers for a very good reason. I think once you think you can relax those standards because it is collaborative, then we all have problems.* (Interview 16, 230)

**THE PERCEIVED ROLE OF OTHER PROFESSIONALS**

The Vancouver group, from its inception, has been an interdisciplinary team. Within the collaborative team the mental health professionals work as divorce coaches and child specialists. In the strictest form of the Vancouver model divorce coaches are present in all cases, although this is not always the case in practice. The use of other professionals in Vancouver also makes the process more expensive for clients. Today most of the divorce coaches and child specialists in the Vancouver collaborative family law group come from the field of psychology.²⁸²

²⁸² see www.collaborativepracticebc.com
Despite the involvement of non-lawyers, all of the interviewed lawyers indicated that in practice they still perceived that the lawyers retained the role of running the files. For instance one participant said the following:

_Sure, the lawyers run it. That is what it is about really. Coming to an agreement about legal issues arising from the end of a relationship._

*(Interview 17, 245)*

Four lawyers indicated that they had considered the use of a file “manager” from amongst the team of collaborative professionals, and that person could be any collaborative professional. Since most of the interviewed lawyers had rarely used any other professionals except divorce coaches, the file manager would most likely be the lawyer or divorce coach.

One participant noted the following:

_If I get stuck on a file, I can phone a coach, I can phone a child specialist, I can phone anybody else in the collaborative group, and in particular on the North Shore group, and talk about my perception about being stuck. Very good, because then we come up with something for the client._ *(Interview 5, 61)*

All of the interviewed lawyers indicated that they had been involved in files that included a divorce coach. All of the interviewed lawyers indicated that in their experience the mental health professionals that they have been working with are from the field of psychology or counseling. However, all participants also noted that they had participated in some cases that did not involve divorce coaches.
It is also apparent from the interviews that different terminologies were used to describe the other professionals, in particular the counselors. The term “divorce coach” was most commonly and consistently used to describe the mental health professional who worked separately with the separating couple. Some interviewed lawyers variously referred to divorce coaches as parenting coaches and child specialists. All these terms were used to refer to the mental health professional who worked individually with the clients on either parenting issues or issues relating to their children.

It is unclear from the present study to what extent child specialists have been used, or are currently used, in collaborative family law files. Less than half of the interviewed lawyers indicated that they used child specialists, or a therapist, to work with the child. Future studies interviewing child specialists could investigate the level and type of involvement child specialists have in collaborative family law files.

The role of child specialists is specifically to give advice to the parties about what might work best for their child in the circumstances. Where the collaborative lawyer, or lawyers, feels that one or both of the parties are seeking an unworkable parenting plan then they may seek the assistance of a child specialist. For instance, one participant had used a child specialist as follows:

*A lot of people will have worked out, if they are that high functioning to be able to reach a collaborative agreement they will usually often be able to work out a parenting plan themselves. Or I will often refer them to a child specialist to work together on a parenting plan and come up with some ideas around parenting. I will especially use a child specialist if there is a conflict. A really good example of this is “shared parenting”. If they want*
equal time and I see it (usually with the other collaborative lawyer) as being really not workable, that is when I will often send them to a child specialist and that specialist can help one client or the other realize that perhaps that is not the best thing for their children at this point in time. And I always tell them too that agreements are living things and they can change as the children age and grow. (Interview 1, 4)

Whilst all interviewed lawyers had been involved in collaborative files that involved divorce coaches, only four of them had been involved in six-way meetings with the divorce coaches. This suggests that the use of six-way meetings is currently a far less significant development in collaborative family law. It appears that where divorce coaches are being used they are involved in additional four-way meetings with clients. That is, lawyers are not present at those meetings. An extension of the present study, to include interviews with divorce coaches, will be necessary to ascertain the prevalence of four-way meetings between divorce coaches and their clients.

**SPOUSAL ABUSE, POWER IMBALANCE AND CONFLICT**

The lawyers' definitions of collaborative practice outlined above indicate that collaborative practice does not specifically rule out dealing with disputes in which there is a background of abuse or power imbalances. While there appears to be an implied presumption that the collaborative process itself takes place in an environment that is free from abuse and power imbalances between the parties, the lawyers remain open to the possibility that parties for whom there had been abuse or power imbalances might still be able to benefit from the collaborative process. Participants' views of how collaborative negotiation can be used in the context of spousal abuse, power imbalances, and high conflict are discussed in more detail below.
Spousal Abuse

Participants offered a rich array of comments on the issue of spousal abuse which are reported below.

It was noted that cases involving abuse may best be dealt with by using lawyers, whether it be in the context of the collaborative process or in mediation. One participant noted the important role that the presence of lawyers at meetings may play in dealing with situations that involve a history of spousal abuse. The way in which lawyers may work together in the collaborative process is indicated as follows:

*In one of the cases I did, it was this abuse case, the meetings that we had with the other professionals were very, very important, partly in keeping the lawyers on track because when you have got abuse situations, you've got that blaming and that really nasty entrenchment. Of course, the people that you are dealing with want to pull their lawyer in with them. So in order for us to keep our heads clear of that stuff, our meetings as lawyers, with the divorce coaches were really, really valuable because they could reassure us that the abusive nasty guy was actually working really, really hard at trying not to be, and what the challenges were for him that made them more real for us. For me, acting for the abused woman, that was really important to keep that perspective and on the other hand to inform them about where my client was at and what kind of security I needed for her in order for her to negotiate something because when she was terrified, or when he kept imposing on her, in the different way that he would, like coming to the house and yelling at her from the driveway, or coming into the house repeatedly just to show her that he could. That kind of stuff, we could deal with it, with a much stronger hand, to push his conduct back to becoming more acceptable. So we had very strict rules by the end of it about what they could discuss, how they could discuss it, only over the telephone or by email. I think at one point it was restricted just to email. It is much more control over the parties so that you can make sure that they are not only just safe, because he was at risk of being charged, so he is being kept safe as well in the process and by using all these different people.* (Interview 6, 83)
Another participant highlighted the importance of training for collaborative lawyers, especially in terms of knowledge and skills about recognizing violence and abuse:

One of the problems with collaborative practice generally is because a lot of the lawyers who are coming into it from two streams. One, they perceive it is going to make a better practice life for them. Two, because they are generally interested in helping people, but my sense is that lawyers generally overreach their skill levels. There are hardly any lawyers that actually know about emotional abuse. Everybody can recognize slapping, hitting, punching, kicking, choking, but the skill level in terms of a control dynamic is quite low I think. And I think lawyers are very arrogant thinking that they can prevent it. Because we do not have the skills, we have not been trained to deal with this. (Interview 3, 36)

In the team approach to collaborative family law used in Vancouver other professionals, such as mental health professionals, are also used. Several participants raised concerns about dealing with abuse and noted role of other professionals. For instance:

I would say all family matters. It is more about client suitability and with the caveat that if there is domestic violence you need to do careful screening, and have a, I would say a highly skilled team. I say you would have to have two highly skilled lawyers and two highly skilled coaches. (Interview 14, 190)

Psychologists in the collaborative process could help the clients deal with the abuse issues. There are those kinds of safeguards but it is just like where there is abuse, domestic violence, and the couple go in for marital therapy, it's great until she says anything about the abuse. Then going home can be a very dangerous time for her. That would be the same concern I would have in the collaborative process even with psychologists. (Interview2, 24)

I think on those files there has to be a rule that there are coaches. I think if a practitioner happens to get one of those [abuse cases] then he/she needs to insist that a coach comes on and he/she needs to look at and decide whether they [the practitioner] have the skills. If they don't have the skills then they need to hand it off or work as co-counsel with someone who does have the skill. You can make a mess of it on either end of the file, with the person who is abusive or with the person who is the victim. Both of those are frightened, both of them are behaving in that way that they are not
particularly happy about, and finding the courageous person in each of them is really hard work. (Interview 5, 67)

One of the practitioners related an anecdote from a course they had attended, about the possible problems associated with using collaborative process in cases involving domestic violence:

At the end of the course they had a support group of women come and talk about what their experience was. One of the people had been in collaborative process and it was devastating for her because no-one picked up on the fact that he was continuing to abuse her because it was so subtle. It was a control dynamic and they had to abort the collaborative process, which cost all the money for that. Then they had to go through and litigate but her resources had already run out. So she didn’t have an opportunity to litigate. She was double victimized financially and emotionally. That made a really big impact on me. (Interview 3, 36)

Another practitioner felt that collaborative family law did not work well in some abuse cases:

I don’t think it works very well when they are highly entrenched. I think that is a real problem because then there is usually abuse stuff going on and power and control issues going on in the background. That then gives another venue for that to occur with no possibility with no possibility for reconciliation between the two issues. (Interview 6, 82)

However, three practitioners specifically noted having had a positive outcome for a client who was the victim of spousal abuse. In these instances, “positive” outcome was equated with achieving a resolution of the dispute. For instance, two practitioners successfully used collaboration to achieve an outcome for an abused client in a situation where the client’s next best option would have been to end up with nothing from the property settlement because the client was willing to walk away with nothing.

For instance:

I actually have had one collaborative case where there had been a history, but it had been quite a few years previously, of abuse ... We were able to successfully resolve it. It had been a situation where the abuse had
happened a long time ago. My client was the husband and had been abusive but he had gone to counselling for years and how I had gotten the file was through his counsellor. So they both went to coaches during the process and we had a child specialist involved. (Interview 9, 134)

The success of such outcomes from a client’s perspective requires further investigation.

Two participants suggested that cases of spousal abuse should be screened out of collaborative processes. For instance:

*If there is unacknowledged abuse and/or physical violence then I think you have to use litigation.* (Interview 3, 37)

Another participant suggested that the circumstances surrounding the abuse could be taken into consideration, but generally felt they would not collaborate on a case involving spousal abuse.

*If I was aware of any kind of abuse, I would want it to be upfront and I wouldn’t handle it collaboratively if, let’s say the alleged abuser said “no, that didn’t happen, she’s totally exaggerating”. In that case I had he admitted that it had happened and that he was very ashamed of it, he had spent the past five years in anger management, counselling, etc. He was genuine. So we dealt with it that way. So I think it is possible but it requires a lot of boundaries and rules and you have got to deal with people who are prepared to admit that they had a problem.* (Interview 9, 134)

The most common reasons stated for considering it possible to allow at least some cases of spousal abuse to proceed to collaborative process were based on client requests and practitioner skills and qualities. These include, for instance, the suggestion that for some clients, despite being victims of spousal abuse, some clients may get more out of the collaborative process compared to litigation and court processes. Alternatively, it
may be less traumatic for the client to proceed in collaborative negotiation than to take
a possibly more protracted and hostile approach in the litigation process.

It has also been suggested that this issue of whether or not to collaborate on a file which
involves a history of abuse may also involve a consideration of “choice” by the parties:

So I have sat on panels where we have talked about mediation where there
is abuse. [There are arguments that] there is no way you can do it, it is not
appropriate to use mediation, and then walked away from that with another
panel member going “you know, isn’t there some way we could give this
alternative to these women, so they can get something instead of nothing,
and have their lives too?” We have decided to try some of those mediation
cases. So we have mediated them with lawyers present and a skilled
mediator who is skilled in the power and abuse issues. By the same token,
the reason I took that abuse case, that collaborative abuse case, was that I
believed she needed to have a choice. (Interview 6, 80)

Yes, I think collaborative has something to offer in this regard [abuse].
Very much … and it was actually very awkward because I had a client who
was telling me that she did not want me to tell that this had gone on, and I
didn’t know until we were halfway through our first meeting that this had
gone on. So it can be really awkward to deal with but I think that there is a
certain amount of value, a lot of value, in having the abuser sitting across
from the abused, like the restorative justice in criminal. The sentencing
circle. To be held to account. I think the person, the victim, is more likely
to be honest about the extent of the abuse and the assault because there is
an audience there. It is harder to exaggerate, harder to misrepresent, and
there is an immediate response from the perpetrator. I think it’s really
useful, and important, and works very well, but that surprised me. We had
more or less been told it probably wouldn’t work and certainly in mediation
you wouldn’t touch it. But, yes, I think it works very well. (Interview 7,
101)

Another participant suggested that the skill of the abused spouse’s lawyer in
understanding spousal abuse, or the skills of both lawyers in the particular matter, may
be able to be used to “shield” the abused client from further abuse in the collaborative
process. A protective environment needs to be provided to a client who has been the victim of spousal abuse as follows:

Absolutely. I think definitely it could work. But there has to be a lot of thought put into the protections and just the way the process goes. It is even more touchy. It is bad enough in the collaborative process that people feel attacked if the other lawyer asks them a question but in those abuse cases you just have to be so, so careful. (Interview 6, 82)

Some participants noted that skills for screening abuse cases out of collaborative process may vary or be lacking amongst collaborative family lawyers:

Now I am saying that maybe we have to be a little more conscious about screening and it is not for everybody. (Interview 18, 259)

I don’t think we have enough skill at present in Vancouver to be dealing realistically with family violence. I still am very concerned that lawyers are not screening appropriately for abuse. So if you are coming into my office and I say to you “can you describe to me what fighting is like in your family?” I can usually tell right away, depending what body language there is. I usually follow that up with “is there ever any slapping”. I usually pick the lowest common denominator, if there is violence they will always acknowledge slapping. Then I screen from that. I have found though that other people aren’t even asking those questions. (Interview 3, 42)

Some practitioners acknowledged they may also have difficulty identifying all types of abuse. For instance, one participant stated as follows:

The trouble is “what is abuse”? In litigation cases there are a number of different things you can do to say that you have been abused and different people have different biases about what is abuse and what isn’t. So, for instance, if a man is considered controlling and has control of all of the money and raises his temper and once said to his wife “if you do that, I am not paying you any more money”. Is that abuse? If that is abuse, then I would say that 50% of my clients come in with that kind of weakness. So I don’t know what that means. What abuse means. (Interview 11, 160)

It is an issue of ongoing abuse in the situation. I am not someone who thinks you can’t mediate abuse necessarily, but you need a skill to be able
to recognize the abuse and provide some kind of protective mechanism for it. (Interview 11, 160)

The circumstances in which cases involving spousal abuse might be included in collaborative files were also discussed. One participant suggested that collaborating in cases of abuse could work if the abuser recognized the abuse. For instance:

*I think really very key to this would be the perpetrator being willing to acknowledge fault and address it...If there was not a very extensive history of abuse and the perpetrator acknowledged it, and was maybe getting some counselling, and was prepared to move forward on the basis that "yes it happened and it wasn't good and I am dealing with it and I don't feel good about it and I am sorry". If you are on that stage then I think that could possibly work especially if the other spouse is not intimidated. (Interview 17, 244)*

Other participants perceived that abuse could be dealt with adequately in the collaborative process so long as the lawyers were able to recognise it. However, the inherent difficulties for lawyers in this regard were also noted. For instance:

*I think any process, whether the spouse has been abused or not abused, will work depending upon the lawyer that they hire. If the lawyer is aware that the abuse has occurred, and the abuse is real, not perceived because sometimes it is perceived, then that lawyer, in the collaborative process, should be able to ensure that their client's interests are protected. The same within the mediation process. (Interview 15, 216)*

*You know what, if I have got a person who says to me that they have been abused during the relationship and I accept that has occurred, then all it does it puts antennae on. Really sensitive antennae that during the negotiations, through the collaborative process, if I see my client backing down from something I will always say, "what was that all about" and "why did you back down because that is really important in the long term for you" and we would have a dialogue around that. I would be much more likely to be very firm [with my client] and say "no, we are not going to let that go". As opposed to someone who is a business woman and no abuse and she says, "you know what, I don't want to pursue that". I would accept that. (Interview 15, 216)*
It is just very difficult to protect people who have been abused because either they capitulate because they are so used to being manipulated. I think that is where the skill of the lawyer comes in because you are always at, some point in time, you start off fighting for your client and then sometimes you are fighting against your client’s instinct to do something that is against their interest. So it is a very difficult path to walk. (Interview 16, 231)

Power Imbalance

The ability of the two lawyers in collaborative practice to balance power between the parties was also discussed. Overall, compared to the discussion on the issue of using collaborative law in cases of spousal abuse, there was more consensus amongst participants when it came to discussing power imbalances between the parties. For instance general comments about power imbalances include the following:

On the other hand, if there is just a power imbalance I think collaborative is great because I think you can actually remedy the power imbalance by empowering your client in the process. But I am not sure with actual abuse that you should do it. I guess you could. You just need to be very aware of it and very skilled. (Interview 1, 10)

I do think it can actually readdress the power imbalances in large measure. Also the other thing is, in working as a collaborative lawyer if you recognize that the lawyer’s client is flexing their muscles, you can actually talk to the other lawyer and ask them to rein in their client because this is the effect it is having. (Interview 1, 10)

The issue of power imbalance between parties in dispute was raised by the participants in relation to any method of dispute resolution, including collaborative family law. For instance, one participant stated as follows:

I think that it [power imbalance] has a pretty big effect. Yes, and it can be somewhat cushioned by the parties’ Counsel being aware of that, and maybe even pointing it out to the parties, and acknowledging it to one another. Yes, it is a problem just like in any other forum of dispute resolution. (Interview 17, 244)
I think there most definitely is more opportunity for lawyers to deal with power imbalances. My experiences is again depending who you are dealing with as the lawyer on the other side, because the dynamics with power imbalance is that first-and-foremost you have to recognize them and a lot of lawyers won't recognize it. The litigation model is, of course, my client is right and your client is wrong. It's a blame model and there are a lot of collaborative lawyers who still follow that. You have to go beyond that to actually look at what really is the dynamic that is going on with this couple and then recognize there is a power dynamic here, there's a power imbalance. Recognizing it is again only the first step. That is only opening the door. Then you have to be able to deal with it and that is bringing in the psychologists and, I think, higher level training for lawyers. (Interview 2, 24)

Some participants were quite confident that lawyers could detect and compensate for power imbalances between the parties as follows:

Well, you know the mediator has to try and even that out, to some degree. I think what happens in a collaborative process is that the power imbalance is obvious and everybody compensates. The counsel for that party, for the over-bearing party, compensates. (Interview 10, 140)

Power imbalances could be dealt with by a collaborative process because it is a bit of a to and fro thing, it is not something that is a set thing. It might even have to be adjusted as time goes on, but it is an open process where the lawyers can talk in front of their client, with the other client and lawyer there, and say “we need to deal with this, you need to come back a bit”. (Interview 10, 145)

I do [think power imbalances can be redressed by lawyers]. Absolutely. That is what we are there to do. (Interview 12, 177)

I tend to see power imbalances as something multi-layered, in that, one of the pieces of work I sometimes do with my clients, particularly if my client is feeling particularly non-powerful, and feeling that their spouse has all the power, one of the pieces of work I do with them is to have them identify the places that their spouse has the power in the relationship and then identify the places where they have the power in the relationship. Then they often go, “me, how, who, none”. The fact is that person may have all the power around the children, and that they don't identify that as being a source of power. So, one of my pieces of advocacy that I really see is to work with my clients in those to identify their places of power so that they can actually let those shine in the negotiations, and they can come from that place in the negotiations. (Interview 14, 195)
It was also suggested that the lawyer for the more powerful client has a role to play in addressing the power imbalance with their client to attempt to achieve a power balance between the parties. For instance:

Once again it is the responsibility of the lawyer representing the party having the most power to try to deal with that, and have the other person understand that vulnerability of the spouse, the other party, and to open it up. A lot of people initially look at the collaborative process as an easy way to get what they want. I am always trying to be on the watch for that, so it is a factor. (Interview 8, 120)

The balancing of power may also be more attainable in collaborative files due to the higher degree of trust and familiarity between collaborative lawyers. For instance:

But, yes, I think it can address it a lot better than a regular negotiation because if I am just dealing with some lawyer that I don’t know that well I can’t really just chat about the power imbalance so much. (Interview 9, 134)

Other participants were less optimistic about lawyers’ abilities to balance power between the parties. For instance:

Power imbalances in society, I don’t know. To think that a 3, or 4 or 6 or 8 hour session is going to change a power imbalance, I think that is pretty optimistic. I don’t think so. I think what it does is, it doesn’t create a level playing field, it creates a safe playing field. Thing is, somebody who has a high income and somebody who has no skills, they are just not going to have a level playing field and that’s life. (Interview 11, 161)

I don’t think it works very well when they are highly entrenched. I think that is a real problem because then there is usually abuse stuff going on and power and control issues going on in the background. That then gives another venue for that to occur with no possibility for reconciliation between the two issues. (Interview 6, 82)
High Conflict

It has generally been suggested by the participants that high conflict cases can do well in collaborative process. For instance:

Yes, high conflict is suited to collaborative but, for whatever reason the practitioners are shying away. The perception in the general public, and by that I mean non-collaborative lawyers, who may be referring is that they don't think collaborative is appropriate for high conflict. So I hear it all the time – “I was going to refer this person to you but there is a high conflict” – and I say “yes, those are the people”. That hasn't yet made the transition point. (Interview 3, 34)

I do think high conflict cases are suited to collaborative because I believe high conflict comes out of an emotional issue and courts simply are not equipped to deal with emotional issues. So at that point though I think you have to do high conflict with 6-way meetings. (Interview 3, 37)

One participant noted that high conflict cases also require special skills for lawyers:

It still is most difficult in high conflict families, because the lawyers are not trained for high conflict and we are still not incorporating coaches all the time. It is absolutely most difficult when there are control and abuse dynamics. (Interview 3, 41)

TRAINING OF COLLABORATIVE LAWYERS

Eighteen of the participants mentioned the importance of mediation training for practicing collaborative law, but one noted a possible downside to prior training in mediation. Since a skilled mediator takes on a neutral role, there may be a tendency for professionals trained in that method of dispute resolution not to provide the strong advocacy required for individual clients in the collaborative process.

One participant noted directly why it was important that collaborative lawyers were trained specifically in the collaborative model:
Essential components of collaborative law are, for me, there must be the training in collaborative law. So at least we have the same sort of idea of what we are doing. There has to be some type of training. There is the need for the participation agreement. (Interview 4, 47)

Practitioners are trained to be familiar with the specific model. Professionals from outside the community, and who do not have experience working with this model, may be unfamiliar or reluctant to represent clients in these meetings. In the worst case scenario a client in a remote location may be unable to participate in the collaborative process simply because there may not be enough collaboratively trained professionals in their local area. For instance:

I have entered into a collaborative participation agreement with non-collaborative lawyers. There is obviously a debate about whether that is appropriate. Regardless of where you stand on the issue of whether it is appropriate, whether it works is more important. I am convinced now that it does not work. So if somebody was to come to me (another lawyer) and says I want to do a collaborative file with you and I am not trained it would have to be someone that I know very, very well, someone who I am able to confront about their behavior and say “what do you mean by this” or “when you’re doing this it’s bothering me” because I have to understand what is going on here because we are working together on this one. You may be representing your client and I am representing my client, and we are working together on this one so we have to be able to have that extensive dialogue and trust ... but with someone who I didn’t know and who wasn’t trained, my answer based on experience is “no”, it will cost the client too much money and that chances of breaking down are too high. (Interview 5, 60)

TIME COURSE AND COST TO CLIENTS OF COLLABORATIVE PROCESSES

The results of the interviews indicate that financial costs to clients of collaborative family lawyers may be significant, depending largely on the number of four-way
meetings needed to resolve issues in dispute. The average cost of a collaborative file depends on the number of meetings that it takes to resolve the dispute.

The shortest matters resolved collaboratively involved a single meeting of each client with their lawyer, followed by a single four-way meeting. However, interviewed lawyers suggested that it was more standard for two or three four-way meetings, a few meetings between lawyers and clients, and a few meetings or phone calls between lawyers. All participants perceived collaborative process to be relatively cost effective compared to litigation. However, they also noted generally that costs depended largely on the number of four-way meetings, the complexity of the matter, and the level of conflict between the parties. For instance:

I think generally speaking, yes, my collaborative files that have been resolved, tend to be cheaper. Not by as much, though, as you would hope. I think part of the reason for that is that at the end of the day you have got an agreement. What we are talking about is everything. There is a lot of dialogue that goes back and forth ... There is a lot of fine tuning that goes on which ends up costing a lot of money, but I think it is generally cheaper. (Interview 7, 103)

Another participant stated as follows:

My guess is that it is a minimum of 3x4-ways, absolutely minimum 3x4-ways because you can’t do it any faster. You have your introductory one where you sign the participation agreement, you can settle it in the second one, and then you have a final 4-way to sign the agreement. I don’t think you can do it in less than three. So normally I tell people between 3-5 meetings but I think what I should be saying is between 5-7. Average around 5x4-way meetings. The fact is I average between 4-6x4-way meetings. (Interview 3, 44)
The shortest matters reported by interviewed lawyers could be resolved collaboratively within a few weeks, up to and including the completion of a consent agreement. The longest collaborative files have lasted up to two years.

In general it was also noted that the timing of the meetings and hence the length of time that it took to resolve the matter in dispute could also be more directly controlled by clients in collaborative process compared to a similar matter in litigation. In situations where both clients were motivated to resolve their matter quickly there was a greater chance that the meetings could be arranged within weeks or months. However, it was also noted that the same matters in collaborative process could take more time to resolve because there was less external pressure on the parties and their lawyers to keep the matter moving forward. In such cases, in practice the matter could go “off the boil”.

Overall, 12 interviewed lawyers perceived the cost of collaborative process to be less than what it would have been for a similar matter had that matter proceeded by negotiated settlement. Eight interviewed lawyers perceived the cost of collaborative process was equal to or greater than the cost of negotiated settlement in the shadow of litigation for a similar matter.

One participant noted that those matters that were dealt with by mediation were possibly more cost effective that matters dealt with in collaborative process. One participant spoke about costs as follows:
I think collaborative is middle of the road expensive. In terms of specifically probably most of my files settle for around $5,000. That usually involves 3 x 4-way meetings, plus a few meetings with clients, some lawyer meeting, usually informal or over the phone. We usually agree that the parties will share the costs of drafting the agreement because I don't care how you draft an agreement I can't do it for less than $1,200. So it is pretty cost effective. That doesn't include the cost if they have retained other professionals, they are not my agents. (Interview 1, 12)

The estimated cost of collaborative cases varied widely between participants. For instance, participants discussed costs as follows:

I would be guestimating [the cost of a collaborative file] but I tell clients who come to me for mediation, with the usual constellation of issues to resolve, I say, including the cost of your independent legal advice, your separation agreement and divorce will cost you in the range of $3,000 – $5,000. If you decide that you are not going to do it through mediation, and you are going to go to court, that goes up by $10,000 each, easily. Collaborative law, I would say that the range is $10,000 - $25,000 for the same package at the end. This is the lawyer's cost, not including the cost for other professionals. (Interview 10, 147)

Generally my collaborative files settle in between the range of $3,000-$6,000, and then the issue is an agreement to be drafted up and/or a divorce. Usually what I discuss at the end is that one of us does the divorce and one of us does the separation agreement. Those are about $2,000 items and we split that. (Interview 11, 163)

Cost is seen to be reduced in collaborative files because of the reduction in letter writing between lawyers, with most communications taking place in the 4-way meetings. For instance:

We do a lot with emails and phone calls, and stuff like that. In fact, we have usually tried to really reduce the paper-work and I think there is an understanding that if you put stuff in a letter, even if you try and be very gentle about it, a client reads it and it can seem very inflammatory. (Interview 9, 133)

Well, there isn't nearly as much paperwork. You don't have all those ridiculous letters going back and forth telling ... You can skip over a lot of
that sort of stuff. I am really careful in a collaborative file to take careful notes. I write down as much as I can in a memo form, but I don’t have all the correspondence going back and forth because there isn’t a need for it. (Interview 7, 95)

OUTCOMES

One participant questioned how far dispute resolution, whether it be collaborative family law or mediation, still has to go to offer a truly satisfying and productive outcome for clients. For instance:

I think clients are not ready for this, the whole entire process, whether it be mediation, collaborative or anything else. What we need and what they need in terms of outcomes is to have a quick, short term, interim, non-binding agreement until they have adjusted to being separated and then go into the collaborative process to help the couple with their decision-making. We are not offering that yet. We stumble into it sometimes. This is a design feature that needs to be improved on. I think we need to offer it up front and I think it is also something that could help to improve mediation. (Interview 5, 66)

It is also important to note that as a process of private dispute resolution, collaborative family law may be expected to offer some notion of autonomy in decision making to the parties. It is unclear from the quotes above to what extent clients have or are afforded that autonomy in decision making. Future research will benefit from investigating further the extent to which collaborative law can be seen as a lawyer-centered, or client-centered, process.

The outcomes of the collaborative family law process have only little been spoken about. One participant summed up to possible outcomes for clients as follows:

It is pretty hard to gauge how lasting the results are. I do think there is one outcome you can gauge. I think collaborative clients are generally happier
with the outcomes because they have ownership of the process. They have more control in the process. It is not the lawyers who are running the file, or the vagaries of the judicial system, and the court system and the time lines. You do more on their time lines. And the fact they have participated actively in coming up with the agreement. I think that they are generally happier. Compare the saying: “You always know the judge has achieved a good result in family law litigation when both sides are unhappy. Both sides end up with less than what they wanted.” In collaborative, both sides can end up in many senses with “more” than what they wanted (or at least as much as what they went into hoping they would come out of with). Which is quite amazing when you think about it. (Interview 1, 9)

However, one participant noted that even in the interdisciplinary model of collaborative family law that operates in Vancouver, the lawyers still in practice run the files. For instance:

You know why [in reality lawyers are running the files]? It’s because, my personal sense is that psychologists are trained to devolve their power and lawyers are trained to keep their power. So when given the option lawyers just revert to what is natural. (Interview 3, 39)

Chapter 5 turns to a summary and conclusions based on the background and results of the participant interviews.
CHAPTER 5 – CONCLUSIONS

RESOLVING DISPUTES

Collaborative family law attempts to provide a client-friendly process for resolving family disputes. The collaborative family law process is a private dispute resolution process. The negotiations take place in four-way meetings between the two lawyers and the two clients. The negotiations attempt to arrive at agreements to all issues in dispute that meet the needs of both parties. The parties are encouraged to seek creative, forward-thinking, client-centered solutions, to issues in dispute. Where necessary the parties may jointly retain other professionals such as divorce coaches and financial specialists whose aim is also to aid the parties to settle issues in dispute out of court. If the parties find it necessary to resort to court processes, they cannot use the collaborative lawyers who assisted them.

As set out in Chapter 1, this thesis set out in part to present the results of 20 interviews with collaborative family lawyers who practice in Vancouver. At the time if the study, the Vancouver collaborative family law group had a practice history of over 6 years and provided an opportunity to investigate the models and methods of collaborative family law used in practice. The interviews investigated how collaborative family law is defined and how it relates and compares to other dispute resolution processes such as mediation. The role of trust in the collaborative negotiation process, the importance of disclosure, and the role of conflict, power and abuse between the parties to the dispute were also questioned.
A SHIFT AWAY FROM LITIGATION

The first finding of interest is that the majority of the participants interviewed conducted practices that included both collaborative files and litigation files. As Chapter 2 showed, the background literature on collaborative family law had revealed that many lawyers who started practicing collaboratively were doing so because they were rejecting the litigation model. Most of the participants in the present study combined both litigation and collaboration, together with other methods of dispute resolution, as a spectrum of options they offer to their clients.

Participant responses in the present study suggest the fundamental philosophical shift away from the litigation model amongst collaborative family law practitioners is not as strong as it may have been previously thought. Whilst all of the practitioners interviewed were strongly supportive of collaborative family law being a valuable alternative to litigation, three quarters of them still maintained significant litigation practices. Furthermore, those practitioners noted that they were also satisfied with combined practices, in which both litigation and collaboration were offered as appropriate alternatives to clients.

Both practitioners who embraced “collaborative only” and those who embraced mixed “collaborative and litigation” models viewed collaborative family law on a spectrum of options (along with mediation and litigation) available to clients for resolving family disputes. For all participants litigation was seen as a valid alternative for some clients.
In those instances where participants were not in the business of litigation, they referred such cases to other family lawyers.

VANCOUVER COLLABORATIVE PRACTICE

The results of the present study provide interesting insights into a very active and established collaborative practice community in Vancouver, Canada. They help us to consider the elements of what may constitute key principles in collaborative family law. Collaborative family law should be viewed as part of a spectrum of appropriate dispute resolution including litigation, lawyer-assisted negotiation, mediation, and arbitration. All of the available options should be discussed with clients at the first meeting.

Whilst the present study focused on the established and thriving collaborative family law community in Vancouver, Canada, it should be noted that community has chosen to adopt a team approach to collaborative practice. Collaborative practice in Vancouver involves a strong commitment to interdisciplinary collaborative family law and, typically, involves clients working together with lawyers and other professionals such as divorce coaches, child specialists and financial specialists. Further research may be productively directed at investigating the practices of other communities which adopt other models of collaborative family law, such as the lawyer-only model.283

283 See N.J. Cameron (2004), supra note 30 for a review.
SOME KEY ELEMENTS

Collaborative family law was defined differently by different participants. Several of
the key elements included agreement amongst clients and lawyers not to go to court,
the lawyer withdrawal clause, mutual respect and openness between clients, trust
amongst lawyers, 4-way meetings and collaborative and cooperative negotiation. It
was commonly stated by participants in this study that the participation agreement was
a central principle underlying the collaborative process.

In collaborative family law both lawyers for both parties facilitate four-way meetings
with their clients. Whilst one or both clients in mediation may retain lawyers for
independent legal advice, a feature of the collaborative process is that both clients must
always retain lawyers. In collaborative family law, each client’s lawyers always attend
the collaborative negotiation meetings with their clients. Unlike litigation, in
collaborative practice both lawyers focus exclusively on negotiation from the outset.
The lawyers and the parties undertake to resolve the dispute without going to court and
in a civilized manner. Collaborative lawyers enter into an agreement with their clients
that the lawyers will withdraw from the process if either party seeks an order of the
court or threatens to do such.

It was noted by several participants that in practice the participation agreement may be
signed at the first four-way meeting between clients or later, depending on whether the
clients could agree on the key terms in the participation in relation to the specific
circumstances of their matter. In the latter circumstance, some practitioners reported
that in some instances participation agreements had not been signed but that the file still proceeded as a collaborative file.

The participation agreement sets the ground rules for both parties and is important in setting the context of the meetings and negotiation that takes place between the parties. Whilst all participants agreed that the key elements of the process are set out in the participation agreements, an interesting finding was that participants disagreed whether signing the participation agreement was a key element of the collaborative process. This finding differs from previous findings which suggested that every case of collaborative law involved a withdrawal clause. The stipulation that lawyers must withdraw if issues proceed to litigation is considered in the literature to be a defining feature of collaborative family law. In this way collaborative family law differs from what has been referred to as cooperative family law. In cooperative law the family lawyers also work together to assist the parties to attempt to resolve issues in dispute, also by focusing on negotiation from the outset but, unlike collaborative family law, the lawyers may represent parties in litigation if they later chose to go to court.\(^{284}\)

**A NEW WAY TO NEGOTIATE**

The present result is also consistent with a tentative conclusion suggested by Professor Macfarlane, that it may not be absolutely necessary for a withdrawal clause which

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\(^{284}\) J. Lande (2003), supra note 12.
requires an absolute commitment not to litigate. Rather, collaborative practice may require a commitment to a particular period of negotiation outside litigation.\textsuperscript{285}

Collaborative negotiation is fundamentally different to settlement negotiation that occurs in either the presence of litigation (traditional settlement negotiation) or the absence of litigation (pure settlement negotiation). Whilst the collaborative negotiations that take place are similar to those negotiations that take place in settlement negotiations in the shadow of litigation, they are characterized by lawyers' problem-solving skills relying heavily on cooperation between both lawyers and both clients, forward/future looking solutions and mutual trust and respect. The collaborative negotiations may differ most from regular settlement negotiations in the level of trust created between the parties and their lawyers, because of the absence of any threat of litigation, and also may therefore result in more creative outcomes that may not have been otherwise possible.

In general participants reported that it was not possible to undertake a collaborative file unless the two lawyers were both collaborative lawyers. This appeared to be related to the perceived importance of the two lawyers both understanding the collaborative model as a starting point for the collaborative negotiations and the type of cooperative decision making that takes place in the 4-way meetings. The results also show that the high degree of cooperation and trust between the two collaborative lawyers is fundamental to the collaborative process.

\textsuperscript{285} See J. Macfarlane (2005), supra note 6 at x.
The high level of trust between lawyers who work together collaboratively was perceived by participants as a key to the success of the process. This seems to be related to the role of lawyer as an advocate who provides advice and information to their client during the collaborative process and also to the requirement for full and honest disclosure, which is an important element of the collaborative process, and set out in the participation agreement.

Participants noted that the collaborative lawyers as advocates also provide legal advice to their clients. The types of agreements reached in collaborative process may, however, be more creative than agreements reached in the context of regular negotiations conducted as part of a litigation file. Agreements reached in collaborative process may be less likely to be based on court precedents. Clearly, however, agreements reached in collaborative process must comply, to some degree, with legal entitlements. The results of the present study suggest that it is important for collaborative family lawyers to recognize the somewhat novel situations they may find themselves in, without clear precedents on which to draw. As many new and unfamiliar situations arise with changed advocacy and negotiation procedures in collaborative family law it will also be important for lawyers, and the profession, to exercise care in determining appropriate ethical standards.

The duty for full and frank voluntary disclosure is an important aspect of the process and both lawyers need to trust that each other is doing everything possible to ensure
their client complies. Lawyers also agree to withdraw if their clients are not participating in the collaborative process honestly and respectfully.

Lawyers in the collaborative process need to place special emphasis on firmly reminding their own client to be completely honest and transparent. Lawyers also point out unreasonable expectations of their own clients and may provide additional information to the other lawyer and the other lawyer’s client. For instance, participation agreements typically require disclosure of "relevant" information, although standards for relevance may vary between practitioners. In the context of the participation agreement, it is made clear that each lawyer will not condone dishonest behavior or misinformation and incomplete disclosure form their client. This is a possible flaw in the collaborative process because the lawyer may not know, and cannot compel. In the event that the collaborative lawyer perceives that their client is not being honest and respectful to both the other client and the collaborative process, then that lawyer will withdraw from the collaborative process on those grounds also.

In some instances, skills that lawyers obtain through practicing collaboratively, such as cooperative approaches to decision making, may also transfer to negotiations with lawyers who are not trained collaboratively. For instance, although collaborative lawyers may not undertake full collaborative files with lawyers who are not trained collaboratively, they may engage in negotiations with other lawyers that are more in the spirit of cooperation found in the collaborative process.
From a practical perspective, trust between the two lawyers is also very important. Lawyers are unable to control who is the lawyer on the other side of any particular matter. In collaborative practice, lawyers representing two parties to a dispute also always come from different law firms. However, in cases where one party already has engaged a collaborative family lawyer it may be possible for the second party to engage a lawyer who is sufficiently confident that they will be able to successfully collaborate with the other lawyer.

COLLABORATIVE FAMILY LAW IS NOT FOR EVERYONE

The types of family law disputes that are suited to collaborative family law are varied. Participants indicated that collaborative family law can be used successfully to resolve children matters, property division and support issues. Furthermore, participants noted that since collaborative family law requires that both clients retain lawyers, in some cases the lawyers may be able to work together to help clients manage high level conflicts as well as power imbalances, and spousal abuse.

Some participants perceived that clients should be screened out of collaborative process in some instances. Since the process relied on honesty and face-to-face meetings, any clients or their partners who cannot, or may not/will not, participate honestly in the process should be screened out and given other appropriate processes for resolving their dispute. For instance, if there is reason to suspect that one or other of the parties is not honestly disclosing relevant matters then that couple should be screened out of the collaborative process. This suspicion may arise if one of the parties has all of the
financial knowledge and it is therefore not possible for the other party to be sure that what is being disclosed is full and frank. Screening needs to be assessed on an individual basis.

The possibility of using collaborative process in cases where the parties are not in the same location was not investigated in the present study. Future research may benefit from investigating whether, and under what circumstances, collaborative process could be used in such circumstances where the parties reside in different jurisdictions. The use of teleconferencing may open up the possibility of using the collaborative process to more clients.

**POWER, CONFLICT, AND ABUSE**

Participants generally felt that collaborative lawyers could work with their clients, or together, to help balance power between the parties. For instance, where one client has more of the power in the negotiations then lawyers might work to help the clients recognize and compensate for that during the collaborative negotiations. Similarly, if the two lawyers recognized that one of the parties had less power in the negotiations then they could work together to bolster that client’s contributions to the collaborative negotiations. Participants acknowledged that power is dynamic, that it can shift during the negotiations and that various parties may have different sources of power. The ease, or difficulty, with which power might be dealt with, or balanced, in the context of collaborative process is a complex issue, which will benefit from further research and interviews with a cross-section of lawyers, clients and other professionals.
Most participants also felt that collaborative process could be used successfully in cases involving high levels of conflict between the parties. In family disputes, where emotions are typically high, collaborative lawyers and divorce coaches can work together. They do so by assisting clients to reduce the emotions of the situation and facilitate clients in participating fully in face-to-face four-way meetings. Several participants in fact perceived that collaborative process was a much better process for dealing with disputes involving high conflict because it was less likely than litigation, for instance, to result in embitterment or entrenching of the conflict further.

The issue of using the collaborative process in cases of spousal abuse, however, generated much less consensus amongst participants. Some participants reported that they would not act as lawyer in cases in which there had been a history of spousal abuse, typically citing their own inexperience or lack of expertise to deal with these matters. Those participants who indicated that they would consider being lawyers in cases that involved a history or spousal abuse also indicated they had some experience or training in recognizing and dealing with spousal abuse. The level of training in spousal abuse amongst collaborative family lawyers was not investigated in this study but given the potentially severe consequences for placing victims of spousal abuse in the collaborative process, future research should investigate this further.

Participants generally suggested that cases of spousal abuse could be dealt with in the collaborative process where lawyers had advanced training in recognizing abuse or
where other professionals, such as divorce coaches, with expertise in abuse and domestic violence, were involved. Other requirements are that the abused spouse wanted to attempt to negotiate the dispute out of court, the lawyer for the abused spouse was sufficiently trained and experienced in understanding the complexity of spousal abuse, and the abused spouse was protected during the collaborative negotiations.

In a couple of instances, such as where lawyers lacked advanced training and experience in domestic violence, or where appropriately skilled divorce coaches are not available, participants suggested that cases involving spousal abuse should be screened out of the collaborative process. Most family mediators would also screen – as a matter of ethics and competence – for spousal abuse. As noted in Chapter 3 there is also a difference of opinion amongst mediators about whether mediation is available in cases with a history of spousal abuse.

In all instances, where participants indicated that collaborative process could be used for files involving spousal abuse those files would also incorporate divorce coaches as part of the team approach. Divorce coaches were not interviewed as part of this study but future studies may benefit from studying the perceptions of divorce coaches on this issue, including the level of training in spousal abuse amongst divorce coaches.

Resolution of disputes in which there is power imbalance, a high level of conflict between the parties, or spousal abuse are all areas in which collaborative lawyers might actively seek further and ongoing specialist training. All of the collaborative lawyers
interviewed indicated they actively participate in continuing professional education including seminars on conflict resolution, managing conflict and power imbalances, family dynamics and spousal abuse. Participants also showed a keen interest to continue this education and to encourage a wide selection of ongoing educational choices for collaborative lawyers.

ROLE OF OTHER PROFESSIONALS

It was also noted that an integral part of the collaborative team was the involvement of other collaborative professionals, particularly divorce coaches, child specialists and financial specialists. In Vancouver, the model practiced by the collaborative family law community is one that includes the standard use of divorce coaches. Most participants reported having sometimes used divorce coaches, however few had participated in 6-way meetings involving client-lawyer-coaches. In general 4-way meetings take place between clients-lawyers or clients-coaches.

DISPUTE RESOLUTION CONTINUUM

In general, the results from the lawyer interviews suggest that it is important for lawyers to provide clients with a complete choice of a full range of options available to them for resolving family disputes. Whilst practitioners differ in the extent that they practice collaborative family law as purely non-litigious lawyers or not, each client’s and each couple’s circumstances and that nature of their family dispute are unique and should be taken into consideration.
Collaborative practice has been seen as a fundamental shift from the litigation model for dealing with family law disputes. It has been suggested by authors such as Nancy Cameron\textsuperscript{286} and Pauline Tesler\textsuperscript{287} that there may be a “paradigm shift”, with the collaborative practitioner viewing collaborative practice as a fundamental shift away from the litigation model for resolving family law disputes. The results of the present study, however, suggest that most of the collaborative family lawyers interviewed offer collaborative family law as one of many of the available options for resolving disputes without recourse to the courts. The collaborative family lawyers interviewed in the present study perceived collaboration, litigation and mediation all to be appropriate for some clients, depending on the circumstances.

**COST**

Participant responses indicated that the cost of collaborative family law can vary greatly. This variation is reflected largely in the number of four-way meetings needed to resolve issues in dispute, which in turn is related to the length of time it takes to complete the collaborative process. The involvement of other professionals such as divorce coaches, child specialists and financial specialists, also adds to the cost of the collaborative process. Participants perceived collaborative family law as more cost effective than litigation processes, including court and lawyer-assisted negotiation, but more expensive than cases that could be resolved using mediation.

\textsuperscript{286} N.J. Cameron (2004), supra note 30.

\textsuperscript{287} P.H. Tesler (2001), supra note 77.
SUMMARY

In summary, collaborative family law is evolving at a time when family lawyers are not only increasingly aware of the legal consequences of separation but also more willing to develop a negotiation style that tries to better acknowledge the mental, emotional, psychological and social consequences of separation. The use of collaborative negotiation to arrive at an agreement is a central feature of resolving a family law dispute collaboratively. As noted by Professor Macfarlane, collaborative family law groups are “investing heavily in the development of a cooperative reputation, and any adversarial negotiation behavior by their members threatens to taint that”.

The results of the lawyer interviews suggest a broad range of family law matters may be settled using the collaborative process. This includes children matters involving custody and access, child support, spousal support, and property division. It also includes matters that involve conflict, power imbalances and possibly where there is a history of spousal abuse. It was noted widely by participants in this study however that in any situations where the parties do not feel they could come to the negotiating table or that they could not trust the other party to participate in a respectful and honest way then the collaborative process would not be desirable in those circumstances. It may also be difficult for lawyers to assess the specific context of a complex case if they do not have special training and skills to do so. In this regard, whilst some participants suggested that cases involving a background of spousal abuse, for instance, may be able to be negotiated collaboratively, in some such instances lawyers indicated that they

288 J. Macfarlane (2005), supra note 6 at 77.
would avoid doing so because of the difficulty in assessing the nature of the abuse or because they questioned their own skills in doing so.

Collaborative practice is not immune from some of the criticisms that have been leveled at mediation, for instance when it comes to mediating spousal abuse. It is important for collaborative practitioners to be trained to recognize and assess spousal abuse, and where necessary direct clients to other forms of dispute resolution. Collaborative family law faces many of the same problems as mediation when it comes to attempting to resolve family disputes in which there is a history of spousal abuse. Like mediation, collaborative family law is ostensibly a means of privately dealing with family law disputes. The feminist critiques of mediation suggest we should exercise caution in jumping to conclusions that collaborative practice is a safe process for women who have been victims of spousal abuse. As was discussed in Chapter 3 it is important also to note that in each case the context in which abuse and power occur should be taken into consideration. Whilst both clients are represented by legal practitioners in collaborative practice, and sometimes by divorce coaches, it remains a private dispute resolution processes. As such it is not open to the same levels of public scrutiny and protection as in the case of litigation.

As with any negotiated settlement, the outcomes of the collaborative process do not necessarily reflect legal precedent and may result in injustice to a party that is

vulnerable, for instance a party who is intimidated as a result of past abuse. For collaborative practice to be a safe process for an abused person, practitioners should be trained in recognizing and assessing spousal abuse, and screening out clients who have been abused. As a means of private dispute resolution it is important that clients have full freedom of choice and are fully empowered when they enter the collaborative process.

To achieve the goal of participating fully and with respect and trust, clients who have been the victims of spousal abuse should be screened out unless the clients themselves feel empowered to participate equally with their ex-partner in the collaborative process. While the context of collaborative family law involves both parties retaining legal advice, and lawyers present during negotiations, this may not be enough to protect the victim from further abuse, and process dangers, if the lawyer is not skilled in recognising and dealing with clients who are the victims of abuse.

Collaborative law should be seen on the continuum of tools available to clients for resolving their family law disputes. The various forms of appropriate dispute resolution should be explained to clients when they first attend lawyers. The appropriate dispute resolution methods include informal negotiations, mediation, lawyer-facilitated negotiation, collaboration, arbitration and litigation. Practitioners who practice in a non-litigious environment must be vigilant to the needs of some clients for litigation. Therefore continued education of the collaborative family law community is essential to ensure that clients are being offered the most appropriate
service for their needs. It is important that clients make their choice of dispute resolution method on the basis of complete information about the available mechanisms. Collaborative lawyers' enthusiasm for the process should not lead to pressure from practitioners to “sell” one particular method over another.

FUTURE RESEARCH
The set of structured, open-ended questions used in this study elicited a rich and detailed set of responses from participant lawyers which enabled them to discuss their perception of the process of collaborative family law in detail. Future research will benefit by extending the findings of the present study to compare the perspectives of other collaborative lawyers from outside Vancouver where different models and approaches to collaborative family law are used. A number of the participants came from practices in which other lawyers in the practice did not practice collaborative law. A further interesting group who will undoubtedly have individual perspectives on the strengths and weaknesses of collaborative law will be those family lawyers who chose not to practice collaborative law. Whilst the results of the present interviews provide the perspectives of one group, lawyers, involved in the collaborative process, future research and investigations would also usefully extend the present interviews to include the perceptions and experiences of clients and other professionals in the collaborative process. In particular, do clients feel the process is fair, useful and safe? Whilst this was not part of the present research, it is an essential focus for future research in a process that purports to be “client-centered”.

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APPENDIX A

Sample Lawyers' Collaborative Law Participation Agreement used in Vancouver.

The parties have chosen to enter into this agreement to use the principles of the collaborative law process to settle the issues arising from the dissolution of their relationship.

1. PURPOSE

The primary goal of the collaborative law process is to settle the outstanding issues in a non-adversarial manner. The Parties aim to minimize, if not eliminate, the negative economic, social, and emotional consequences of protracted litigation on themselves and their family. The Parties have retained collaborative lawyers to assist them in reaching this goal.

2. COMMUNICATION

The Parties intend to communicate effectively with each other to efficiently and economically settle the dissolution of their relationship. Written and verbal communications will be respectful and constructive and will make no accusations or claims not based in fact.

It is agreed that communication during settlement meetings will focus on the economic and parenting issues arising from dissolution and the constructive resolution of those issues.

The Parties are encouraged to discuss and explore the interests they have in achieving a mutually agreeable settlement, and each is encouraged to speak freely and express his or her needs, desires, and options without criticism or judgment by the other. Although the Parties should be informed by their lawyers about, and may discuss with each other, the litigation alternatives and the outcomes they might attain, neither Party nor their Lawyers will use threats to withdraw from the process or to go to court as a means of achieving a desired outcome or forcing a settlement.

3. CHILDREN'S ISSUES

In resolving issues about sharing the enjoyment of and responsibility for any children, the Parties agree to make every effort to reach amicable solutions that promote the children's best interests.

The Parties agree to act quickly to mediate and resolve differences related to the children to promote a caring, loving, and involved relationship between the children and both parents.

The Parties acknowledge that inappropriate communications regarding the dissolution can be harmful to their children. They agree that settlement issues will not be discussed in the presence of their children, or that communication with the children regarding these issues will occur only if it is appropriate and done by mutual agreement, or on the advice of a child specialist.

The Parties agree not to make any changes to the residence of the children without first obtaining the written agreement of the other Party.

4. PARTICIPATION WITH INTEGRITY
Each participant will uphold a high standard of integrity, and will not take advantage of inconsistencies or miscalculations of the other, but will disclose them and seek to have them corrected.

5. **NEGOTIATION IN GOOD FAITH**

The Parties and their Lawyers agree to deal with each other in good faith and to provide promptly all necessary and reasonable information requested. No formal discovery procedures will be used unless specifically agreed to in advance by the Parties.

The Parties acknowledge that by using informal discovery, they are giving up certain rights for the duration of the collaborative law process, including the right to formal discovery, formal court hearings, restraining orders, and other procedures provided by the adversarial legal system. They give up these measures with the specific understanding that both Parties make full and fair disclosure of all assets, income, debts, and other information. The Parties acknowledge that participation in the collaborative law process, and the settlement reached, is based upon the assumption that both Parties have acted in good faith and have provided complete and accurate information to the best of their ability. The Parties agree to provide sworn statements making full and fair disclosure of their income, assets and debts, if requested.

6. **CAUTIONS AND LIMITATIONS**

In electing the collaborative law process, the Parties understand that there is no guarantee that the process will be successful in resolving their case. They understand that the process cannot eliminate concerns about any disharmony, distrust, or irreconcilable differences which have led to the current conflict. While intent on striving to reach a cooperative solution, success will ultimately depend on their commitment to making the process work. The Parties understand that they are still expected to assert their respective needs and interests and that their respective Lawyers will help each of them do so.

The Parties further understand that while the collaborative Lawyers share a commitment to the process described in this document, each of them has a professional duty to represent his or her own client, and is not the lawyer for the other party.

7. **EXPERTS AND CONSULTANTS**

When appropriate and as needed, the Parties will use neutral experts (the “Collaborative Neutral Expert”). The Parties will agree in advance of retaining the Collaborative Neutral Expert as to how the costs of the Collaborative Neutral Expert will be paid. Unless the parties otherwise agree in writing, any report prepared by the Collaborative Neutral Expert will be covered by the confidentiality provisions set out in paragraph 14 of this agreement. In the event that the collaborative law process comes to an end, the confidentiality provisions as set out in paragraph 14 of this agreement apply to the Collaborative Neutral Experts.

8. **DIVORCE COACHES, CHILD SPECIALIST, AND FINANCIAL SPECIALIST**

When appropriate, and as needed, the Parties will use the services of one or more of the following professionals: divorce coach, child specialist, or financial specialist (collectively referred to as the “Collaborative Professional”). When a Collaborative Professional is engaged, the parties agree that the Collaborative Professional and the Lawyers may engage in whatever discussions are necessary for resolution of the case. In the event that the collaborative law process comes to an
end, the confidentiality provisions as set out in paragraph 14 of this agreement apply to the Collaborative Professional.

9. **NO COURT INTERVENTION**

Unless otherwise agreed, prior to reaching final agreement on all issues no writ and statement of claim will be filed or served, nor will any other motion or document be prepared or filed which would initiate court intervention.

10. **DISQUALIFICATION BY COURT INTERVENTION**

The Parties understand that their collaborative Lawyers’ representation is limited to providing services within the collaborative law process. Thus, while each Lawyer is the advisor of his or her client and serves as the client’s representative and negotiator, the Parties mutually acknowledge that both Lawyers, and anyone in each Lawyer’s office, will be disqualified from representing them in a contested court proceeding against the other Party.

11. **WITHDRAWAL OF PARTY FROM COLLABORATIVE LAW PROCESS**

If a Party decides to withdraw from the collaborative law process, prompt written notice will be given to the other Party through his or her Lawyer. Upon termination of the collaborative law process by a Party or a Lawyer, there will be a thirty (30) day waiting period (unless there is an emergency) before any court hearing, to permit the Parties to retain new lawyers and make an orderly transition. All temporary agreements will remain in full force and effect during this period. The intent of this provision is to avoid surprise and prejudice to the rights of the other Party. It is therefore mutually agreed that either Party may bring this provision to the attention of the court to request a postponement of a hearing.

If a Party wishes to withdraw from the collaborative law process with their current Lawyer, but retain a new lawyer to continue with the collaborative law process, the Party will give prompt written notice to the other Party through his or her Lawyer, of their intention to withdraw and obtain a new lawyer. The new lawyer shall execute a new collaborative law participation agreement within 30 days of the Party giving notice. If a new agreement is not executed within 30 days, then the other Party will be entitled to proceed as if the collaborative law process were terminated as of the date written notice was given.

12. **WITHDRAWAL OF LAWYER FROM COLLABORATIVE LAW PROCESS**

If either Lawyer withdraws from the case for any reason except those set out in paragraph 13 herein, they agree to do so promptly by a written notice to the other Party through his or her Lawyer. This may be done without terminating the status of the case as a collaborative law case. The Party whose lawyer has withdrawn may elect to continue in the collaborative law process and will give prompt written notice of this intention to the other Party through his or her lawyer. The new lawyer will execute a new collaborative law participation agreement within 30 days of the Lawyer first giving notice. If a new agreement is not executed within 30 days, then the other Party will be entitled to proceed as if the collaborative law process were terminated as of the date the first written notice was given.
13. **TERMINATION OF COLLABORATIVE LAW PROCESS**

A collaborative Lawyer must withdraw from the collaborative law process in the event they learn that their client has withheld or misrepresented information and continues to withhold and misrepresent such information, or otherwise acted so as to undermine or take unfair advantage of the collaborative law process. The Lawyer withdrawing will advise the other Lawyer that he or she is withdrawing, and that the collaborative law process must end.

14. **CONFIDENTIALITY**

All communication exchanged within the collaborative law process will be confidential and without prejudice. If subsequent litigation occurs, the Parties mutually agree that:

A. neither Party will introduce as evidence in court information disclosed during the collaborative law process for the purpose of reaching a settlement, except:
   1. documents otherwise compellable by law including any sworn statements as to financial status made by the parties, or
   2. a report prepared by a Collaborative Neutral Expert which may be used only in the event that the parties jointly agree in writing as set out in paragraph 7;

B. neither Party will introduce as evidence in court information disclosed during the collaborative law process with respect to either Parties' behaviour or legal position with respect to settlement;

C. neither Party will ask or subpoena either lawyer or any of the Collaborative Professionals or Collaborative Neutral Experts to court to testify in any court proceedings, nor bring on an application to discover either Lawyer or any of the Collaborative Professionals or Collaborative Neutral Experts, with regard to matters disclosed during the collaborative law process;

D. neither Party will require the production at any court proceedings of any notes, records, or documents in the lawyer's possession or in the possession of one of the Collaborative Professionals or of the Collaborative Neutral Experts; and

the Parties agree that these guidelines with respect to confidentiality apply to any subsequent litigation, arbitration, or other process for dispute resolution.

The confidentiality clause does not apply in the event that a Party or Collaborative Professional is obliged by law to report to the Superintendent of Family and Child Services information arising out of the collaborative process which gives the party or Collaborative Professional reasonable grounds to believe that a child may be in need of protection.

15. **RIGHTS AND OBLIGATIONS PENDING SETTLEMENT**

Although the Parties have agreed to work outside the court system, the Parties agree that:

A. neither Party will dispose of any assets except by an agreement in writing; and

B. neither Party may harass the other Party; and
C. all available insurance coverage must be maintained and continued without change in coverage or beneficiary designation.

16. ENFORCEABILITY OF AGREEMENTS

In the event that the Parties require a temporary agreement during the collaborative law process, the agreement will be put in writing and signed by the Parties and their Lawyers. If either Party withdraws from the collaborative law process, the written agreement is enforceable and may be presented to the court as a basis for an order, which the court may make retroactive to the date of the written agreement. Similarly, once a final agreement is signed, if a Party should refuse to honour it, the final agreement may be presented to the court in any subsequent action.

17. ACKNOWLEDGMENT

Both Parties and their Lawyers acknowledge that they have read this agreement, understand its terms and conditions, and agree to abide by them. The Parties have chosen the collaborative law process to reduce emotional and financial costs, and to generate a final agreement that addresses their concerns. They agree to work in good faith to achieve these goals.
(4) You understand that the interview will be tape-recorded and will be transcribed into typewritten form.

(5) You understand that you may request and receive a copy of the typed transcript of your interview.

(6) You understand that you may stop the interview at any time for any reason and/or withdraw from the interview at any time.

(7) You understand that to ensure confidentiality your name and/or personal information will not be recorded or divulged in the audio tapes. Where this occurs inadvertently during the interview, any oral references to your name or personal information in the context of the interview will be deleted from the typed transcript.

(8) You understand that research materials such as audio tapes and transcripts will be held in a secure location and will not be publicly accessible and that when data analysis is completed and project findings presented, the tapes and transcripts will be destroyed after 5 years.

(9) The results of this study will be presented in Brett Degoldi’s Masters of Law thesis which will be available in Koerner’s library and Law library at UBC.

(10) You understand that you may register any concerns you might have about the way this research is conducted with the Director of the UBC Office of Research Services and Administration (Tel: 604-822-8598).

(11) You understand that you may obtain copies of the results of this study, upon its completion, by contacting Professor Susan B. Boyd, Faculty of Law, University of British Columbia, V6T 1Z1 (Tel: 604-822-6459).

You agree to participate in this research by granting an interview to the researchers identified above, and to use of the information for the purposes stated above. You also acknowledge receipt of a copy of the consent form.

Name: __________________________

Signature: _________________________  Signature of Researcher

Date: ____________________________
APPENDIX D

Interview No:___________ Date:___________

INTERVIEW SCHEDULE:

FAMILY LAWYERS’ EXPERIENCES OF COLLABORATIVE LAW IN FAMILY DISPUTES

You were selected as a potential interviewee for this study because you are a family lawyer who uses collaborative law practices and principles to help solve family disputes. I would like to begin with some questions about your views on how collaborative law works within your practice.

1. What areas of law does your practice cover? (be specific - e.g., if family law, what areas of family law, such as custody and access, child support, property settlements, etc). What percentage of your practice is family law? Will you take on a custody fight? What percentage of your family law practice is custody and access? Child support? What other areas of law do you practice in?

2. Which of the following methods of dispute resolution do you use in your family law practice?

- collaborative divorce
- mediation
- negotiation
- litigation
- arbitration
- other (specify)

3. In your view, what are the central principals of collaborative law? Define collaborative divorce.

4. How does collaborative process differ from mediation?

5. How does collaborative process differ from [standard] negotiation settlement?

6. How does collaborative process differ from litigation?

7. How does collaborative divorce differ from arbitration?

8. What other professionals do you use on your collaborative files?
9. Overall on a scale of 1 to 5, with 1 being very effective” and 5 being “very ineffective”, how effective are the following methods of dispute resolution in resolving family disputes?

1 = very effective; 2 = somewhat effective; 3 = neither effective nor ineffective; 4 = somewhat ineffective; 5 = very ineffective

(a) collaborative divorce 1 2 3 4 5 DK NR
(b) mediation
(c) negotiation
(d) litigation
(e) arbitration

10. If you are involved in litigation of some family law matters, what types of family law matters do you believe are most suited to litigation?

11. What types of family law matters do you believe are most suited to collaborative law processes?

12. In your experience what is the relationship between client and lawyer in collaborative law? Does this differ from the relationship between client and lawyer in litigation? If so, how? Advocating? Values? Precedent?

13. In your experience what is the relationship between the two lawyers in collaborative law? Does this differ from the relationship between the lawyers in litigation? If so, how?

14. In your experience what is the relationship between the two clients in collaborative law? Does this differ from the relationship between the clients in litigation? If so, how? Values? Goals?

15. In your view, are there differences in the outcomes of disputes successfully settled using collaborative law? If so, how do the outcomes of collaborative divorce processes differ from the outcomes of other dispute resolution mechanisms (such as mediation, negotiation, litigation)?

- lawyer outcomes
- client outcomes

16. In your view, what are the main difficulties or problems with collaborative divorce? In what types of family law matters is collaborative divorce most difficult?

17. How do collaborative divorce processes work with family/couple disputes involving spousal abuse?
18. How do collaborative divorce processes work with family disputes involving highly entrenched conflict?

19. In your view, what effect do power imbalances between the parties have on the collaborative law process? How does this compare to other methods of dispute resolution?

20. How do you view collaborative law interacting with other professions to help resolve family disputes. Other professions could include:

(a) psychology/counseling
(b) financial advisors
(c) social workers
(d) real estate agents

21. Relative costs of collaborative versus other forms of dispute resolution?

A FEW DEMOGRAPHIC QUESTIONS

22. Gender?

23. How long have you been practicing law (admission year)? Family Law? Collaborative Law?

24. How many lawyers in your practice? How many of them are also practicing collaborative law?

25. What education and training do you have beyond your LLB? What do you believe is the most relevant training for practicing collaborative law?

CLOSING STATEMENT

That is all the questions I have. Do you have anything you would like to add?

Do you have any brochures I can take away?

Thank you for taking the time to participate in this interview.