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Changing times – Collaborative Law

Economic change impacts heavily on human relationships both in the workplace and at home and while for many couples, testing times will forge an even stronger bond, unfortunately, others will find it even harder to keep going. According to Jennifer O'Brien, specialist family lawyer and partner in Mason Hayes+Curran, it is evident from cases coming before the Circuit Family Court that many families with young children are paying the price, in human terms, of this post-Celtic tiger era. The strain of both parents working, long commutes, increasing mortgage repayments, tax individualisation and child care costs are taking their toll. Relationship counselling is an imperative in the first instance, and indeed, every family law solicitor is obliged to furnish their client with information and addresses on counselling and mediation before embarking on a family law matter.

Where separation is inevitable, in these uncertain times, many clients are opting to resolve matters through Collaborative Law. This alternative dispute resolution ("ADR") model has its origins in the United States and many Irish lawyers have undertaken training in Collaborative Law within the past five years. Practice Groups known as "pods" have gathered a certain momentum in Bray/Wicklow, in Cork (which hosted Meitheal, the 2nd European Collaborative Law Conference in May 2008) and in Dublin - more or less in that order!

The process facilitates couples who wish to resolve matters arising as a consequence of separation on an amicable basis by agreement and without resorting to contentious applications in the Courts. The process involves exchange of financial information, including Affidavits of Means, in a neutral and cost-effective manner. For instance, Ms O'Brien reports, both parties will often instruct the same forensic accountant. The parties and their lawyers enter into a Participation Agreement in which they each pledge to work towards an amicable resolution of all matters. In the event that any party wishes to proceed to Court for the purpose of contentious litigation, that Agreement provides that the Collaborative process immediately comes to an end and the clients must then instruct new lawyers to act on their behalf. This *'non-retainer'* clause is intended to operate as an incentive to both lawyers and clients for engagement in positive dialogue towards resolution of the issues arising as a consequence of separation.

A series of four-way meetings are held in which there is a protocol surrounding setting of agenda, note-taking and the manner of communication for both lawyers and clients. The clients essentially control the negotiations and are guided by their respective lawyers on legal and other issues as they arise.

There is no inter-party correspondence or contentious communication and matters are dealt with outside the four-way meeting through a series of telephone calls with one's client and the lawyer acting for the other partner. In this way, acrimony is minimised and both individuals are encouraged in relating to each other in a respectful and dignified manner. Minutes are kept of each meeting which are shared with lawyers and clients in advance of the next meeting. All financial information is shared and discussed openly with or without a forensic accountant, depending on the circumstances of the case. The idea is to create a new dynamic in the relationship, new rules lets say, for communicating during the separation and post-separation process. While this can create an emotionally charged atmosphere at meetings, it can result in a powerful exchange of thoughts, ideas and feelings, with extremely positive results for families going through this difficult time. There is no doubt that this type of dispute resolution has found its time. Civil disputes are also likely to benefit from this form of ADR. There is an obvious application in family law matters as clients are often anxious to ensure good relations with former spouses and partners particularly where there are children. Many clients are also anxious to avoid the risks, costs and stress associated with going to Court, not to mention the delays. Ms O'Brien says that while there will always be a place for litigation

in family law, Collaborative Law has the distinct advantage of avoiding acrimony from the outset. Currently many cases are settled on the steps of the Court, at a point when maximum emotional damage has already been inflicted on the individual family members. Exchanging the adversarial model with a Collaborative approach, in suitable cases, may prove of particular importance to families and is more likely, to assist both parents in parenting their children positively in a post-separation context.

X v Y, was a Collaborative Law case in respect of which the parties signed a Participation Agreement in August 2007. At the first four-way meeting the parties had already exchanged Affidavits of Means and a financial report was prepared by a firm of forensic accountants on a neutral basis. The parties and their lawyers held a series of eleven four-way meetings between August 2007 and April 2008 during which they resolved all issues arising on separation, by agreement. In the course of those discussions particular regard was given to the special needs of the dependant children. Briefly, the case involved net assets in the sum of approximately €4.7 million together with pension assets in the sum of €1.4 million. The net assets comprised real estate and a family business, which was the main source of income. The husband was a businessman with a net disposable income after mortgage repayments and tax in the sum of approximately €45,000 per annum. The wife provided primary care for the dependant children and was attending a part-time course of study. Consent terms were ruled on foot of a Decree of Divorce which involved transfer of the family home (with a value of €1.4 million) and a second property (with a value of €475,000) into the wife's sole name together with a further payment of €25,000 in her favour. In addition the pension assets were divided between the parties. Maintenance for the wife and children was also agreed. Detailed discussions were entered into regarding the care and welfare of the children and the parties were able to reach a resolution on these issues. As the parties were living apart for a period of four years, the settlement was ruled in conjunction with obtaining a decree of divorce in April 2008, a mere eight months after commencement of negotiations.

The speed, depth and thoroughness of such an approach, is, undoubtedly of interest to clients. More importantly, the client retains control over their personal lives and emotional damage to each spouse and their children is greatly reduced.

Legal costs are also minimised although they are unlikely to be insignificant given the time involved in managing a Collaborative file. Certainly, the usual risks, in terms of costs and delays often associated with hard fought litigation are avoided. On the negative side, the non-retainer clause, while a cornerstone of this area of practice has a consequence, where the process fails, of bringing about the necessity of instructing new lawyers. Careful selection of suitable cases prior to commencement of the Collaborative process will greatly reduce such a possibility. In the writer's opinion, with appropriate training on the part of family law practitioners including participation in active practice groups, this is an area of family law that will develop in the coming years, primarily due to client demand. The writer believes Collaborative Law will be the preferred option of the "thinking" client and for those anxious to ensure harmonious relations with the other spouse/partner, in relation to parenting and other matters. For further information on Collaborative Law see www.acp.ie. and www.mhc.ie

Attribute to Jennifer O'Brien, Partner, Mason Hayes+Curran

Jennifer is a partner in the family law unit at MH+C Private. For more information, please contact Jennifer at jobrien@mhc.ie or + 353 1 614 5000. The content of this article is provided for information purposes only and does not constitute legal or other advice. Mason Hayes+Curran (www.mhc.ie) is a leading business law firm with offices in Dublin, London and New York.