

COLLABORATIVE PRACTICE Toronto

Previously Featured Article

LISTENING TO CHILDREN in the COLLABORATIVE PROCESS

This paper was presented by Sandra Demson and Judith Huddart to the World Congress on Family Law and the Rights of the Child, held in Cape Town, South Africa in March 2005.

A. INTRODUCTION:

It is time to re-examine traditional attitudes toward the participation of children in a family's transition following separation and divorce. Historically the focus of lawyers and judges has been to keep children away from an adversarial process in an attempt to protect them from parental disputes and above all, from having to take sides. In 1992 Canada ratified the United Nations Convention on the Rights of the Child (UNCROC). This document outlines basic human rights for children and speaks not just to the protection of children, but also to their right to have their views heard.

Article 12 states:

1. Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of the national law.

Recent studies on children of divorce appear to support the principles expressed in Article 12 of UNCROC. These studies have made it clear that the status quo of attempting to exclude children from the separation process does not protect them from its impact or from adversarial attitudes; instead, it may ignore their views and interests and harm children. For example, in U.S. studies by Dr. Marsha Kline Pruett and Dr. Kyle Pruett, detailed in the *Journal of the American Academy of Child and Adolescent Psychiatry* 1999; 38: 1544-1550: "Only God Decides": *Young Children's Perceptions of*

Divorce and the Legal System, interviews with children from 2 ½ to 6 ½ years of age children prompted the following comments about our current process:

About Divorce:

“Divorce is when Mom and Dad hate each other and your family is dead” (3.4 year-old)

“Divorce is when you pay lawyers a lot of money to wreck your family” (6 year-old)

It means you won’t get married again, ever, ever, ever” (4.4 year-old)

“It’s when someone signs a paper, someone leaves home, and then kids cry”
(5 year-old)

“It’s when your Mom and Dad can’t stop pushing each other around and they kill your family” (6 year-old)

About Lawyers:

“Lawyers can be good and bad. They help people and give them tips, but they take a lot of money” (4.6 year-old)

“They lie a little bit to help you win; it’s someone you can buy” (4.1 year-old)

“The big problem with lawyers is that they don’t help Mom and Dad stay friends, but they take your money. I’ll never like them” (4.1 year-old)

“I talked to one once and I thought she listened, but she took care of the money, not me” (5.2 year-old)

Suggestions for Lawyers and Judges:

“I would tell them to make Mommy and Daddy get along. I’m too little, I can’t. If they can’t, then don’t stretch it out please” (4.8 year-old)

“Don’t take all the money from Mom and Dad – I want a paint-ball gun. Don’t scare people about money” (5.2 year-old)

“...Keep that grey tape for people’s mouths in court hall so they don’t say stuff that hurts people’s feelings” (2.4 year-old)

“Judges should listen to kids. Adults are smarter, but kids know the truth” (5.9 year-old)

“Don’t scare people about not seeing each other any more. IT’S TOO SCARY to think you can’t see your Mom or Dad any more. God decides that, not people!” (6.4 year-old)

“Be careful and listen. Just because a person makes sense, or is more polite, doesn’t mean they’re telling the truth, or they are a good parent. Mom and Dad both tell some lies, but it’s cause they want us more. Lawyers should tell the truth all the time and not try to fool people. The kids know what’s happening” (6.6 year-old)

The family law bar needs to be aware of the UN Convention on the Rights of the Child and of recent developments in family law that are consistent with children’s participation.

For many years in Ontario the Children’s Lawyer’s Office has represented the interests of children in higher conflict custody/access cases. A social worker or lawyer from the Office will speak for the children, as the assumption has been that this protects children from involvement in their parents’ separation. However, given Article 12 of the UNCROC, is the Children’s Lawyer’s Office doing enough to facilitate the participation of children?

Our Family Court in Barrie, Ontario seems to be charting a new course for resolution of conflict, by moving high conflict families out of the courtroom to child-focused support services. The goal is to reduce or eliminate conflict for children and has the potential to lead to children’s participation in the process. Family Law Judges skilled in case management work with clients and their lawyers to reach agreement on a court-appointed parenting co-ordinator. Through this court mandate, parents work with co-ordinators under a 6-month contract to resolve differences regarding their children in a way that serves their best interests, minimizes conflict, and fosters co-operation. Following an initial evaluation, the co-ordinator may work with the parents through coaching, mediation, and referral to other professionals. The co-ordinator has the right to meet with and hear from the children and any other relevant third party. If necessary, the co-ordinator is also authorized to arbitrate certain incidents of custody or access. Barrie’s experience has shown that, once parents begin to learn how to disengage from conflict and use the services of the parenting co-ordinator they are less likely to return to court and more likely to be receptive to hearing their children’s needs and views.

Participation of children in a family’s transition after separation is not only possible but perhaps necessary to optimize the outcome for children as well as their parents. Within the safety of a child-focused *non-adversarial* Collaborative process participation of children could take many forms and could be tailored to the needs of each particular family. This paper will outline the Collaborative process, distinguish it from other alternate dispute resolution processes, and provide examples of how children’s needs and interests may be accommodated in the process. Listening to children in the Collaborative process presents many possibilities but is not without potential pitfalls.

Possibilities and pitfalls highlight the need to proceed with caution in any process, to ensure children's needs and interests remain paramount.

B. COLLABORATIVE PRACTICE:

Resolution options for separating families range from settlement discussions at the kitchen table to contested court proceedings. Collaborative practice falls somewhere between mediation and traditional lawyer negotiations. Lawyers in Collaborative practice each continue to represent their own client, but both lawyers and their clients contract not to go to court during the Collaborative process. This non-adversarial approach requires lawyers to work *with*, not just *for*, their clients. It requires clients to participate in the resolution process themselves, to open lines of communication with each other, and to resolve their differences creatively. Lawyers must be fully trained in "interest-based" negotiation and communication skills, be prepared to let go of their traditional control over the process, and ready to encourage clients to make use of the expertise of other professionals, when necessary. Unlike mediation, lawyers have a role in the negotiations as coaches to assist their clients, but unlike traditional lawyer-driven negotiations, the parties are encouraged to start taking responsibility for the process and the outcome. Lawyers must work ethically and co-operatively with each to ensure their clients are participating fairly in the process, including providing full disclosure. If negotiations fail in Collaborative practice, both lawyers must withdraw and different lawyers must be hired by the parties to take the matter forward to court.

The principles of Collaborative practice extend beyond the legal issues and include listening to and respecting the views of each participant and ensuring they obtain the information they need to generate options and arrive at an acceptable resolution that meets the interests of their family. Parents address both legal and emotional issues in team meetings. With the assistance and coaching of their lawyers and other professionals they may decide to bring in, parents learn how to problem-solve respectfully and maintain responsibility for their family as they move through the transition following separation. All professional members of an inter-disciplinary Collaborative team, not just lawyers, are specially trained in communication and interest-based negotiation techniques.

Collaborative practice is recognized internationally. Hundreds of lawyers in Canada have been trained to offer a Collaborative approach through groups in almost every province and territory of the country. As Collaborative practices have grown and matured, they have been attracting more diverse and more high conflict clients. As a result, more and more Collaborative groups in Canada are starting to include child specialists, coaches, mental health professionals, and financial specialists as members, to work as part of inter-disciplinary Collaborative teams. These teams provide a more comprehensive support system for families, which can continue to assist in their transition long after the legal issues have been resolved.

The inter-disciplinary Collaborative process has the potential to be adapted to listen to children, respect their views and needs, and provide them with age-appropriate information. Depending on the level of conflict in a family, participation of children could range from discussion and recognition by informed parents during the process that their children's needs may differ from their own, to indirect participation of children through a child advocate such as a child specialist or child coach, to face-to-face participation within the collaborative group with the support of a child specialist or coach.

The following are preliminary suggestions of ways to begin listening to children through their participation within 3 stages of an inter-disciplinary Collaborative process, with consideration of some possibilities and potential pitfalls:

1. First Meeting - Introducing Participation of Children:

Collaborative practice requires a serious commitment to problem-solve rather than litigate. Lawyers and clients sign a participation agreement confirming their commitment to this process. If and when a child specialist and/or financial specialist becomes a member of the Collaborative team they too must sign a participation agreement with the lawyers and clients;

Clients in a Collaborative process may be experiencing different degrees of conflict. As a result, the process requires a diversity of models to accommodate the needs of children. It is important to check in with parents by the first meeting to ensure they have considered how their children are handling the separation. Some children may only need a child-focused parenting plan. However, as the level of conflict within a family increases, children may need to be heard through other means;

The Collaborative team will often invite impartial comments from a child's teacher, guidance counsellor, day care provider, therapist or family doctor, with respect to any special considerations regarding the child's academic, health care, social or emotional status. The focus should be on discussing how to protect the child's well-being. As the level of conflict in the family increases, input may be invited from a trusted neutral adult. It may be possible that the child themselves could choose a trusted person to be a neutral spokesperson to speak on their behalf to the group. In higher conflict cases a neutral child specialist may join the Collaborative team.

The role of neutral child specialist in Collaborative practice is different than the role of a child specialist in a custody access assessment, who assesses the parents as well as the child before making a recommendation to a judge on the child's needs and best interests. In a Collaborative process, a child specialist assumes the role of a neutral advocate for the child to give a voice to their interests. It is important

that this person be someone trained in the Collaborative process who understands that their role is to work with the parents and other members of the team.

The role of a financial specialist may help parents better understand that their commitments to the children must be financially viable.

It is up to the parents to determine how and when any of the above might provide information about the child. In most circumstances the child’s participation in the Collaborative process should not be through the parents’ lawyers.

Possibilities:	Potential Pitfalls:
Both parents should be provided with realistic expectations for the impact on their child of participating in the process and the possible outcome of that participation for their family.	To have realistic expectations at the beginning, parents must start on the same page, getting the same information from each lawyer about their child’s participation in the process.
The involvement of neutral professionals in the collaborative process, whether a child or financial specialist, will defuse any tension and will help the team distinguish the child’s needs from the parents’ needs.	By adding more team members, we add more layers of communication and more chance for miscommunication.
The involvement of a financial professional will help ensure that the commitments of the parents to the child are financially realistic.	If a financial specialist focuses only on the costs of a child’s activity, the parents may not consider the emotional devastation to the child if his social network through this activity is cut out. All team members must be child-focused, keep a balanced perspective, and work together.

2. Information Gathering Stage:

At this second stage members of the team, including any child specialist, need to be briefed on the history of the family to allow them to decide what information on the child may be relevant to collect for a full understanding of the child’s concerns and interests, from whom, and how to collect it. The team will decide on how any specialist will report back to them. A child specialist could advise the team how to address the child’s questions about the process and provide them with information to reduce their anxiety that is age-appropriate, to enable the child to understand the Collaborative process and the roles of all the participants. Finally, the team

could discuss with any financial specialist, the potential implications of the financial information for the children as well as the parents. A lot of skill may be required at this stage.

Possibilities:	Potential Pitfalls:
<p>Someone other than the parents, who is familiar with the child, or a child specialist, may provide different disclosure or concerns than other members of the team. They may highlight specific opinions, preferences, or challenges related to a particular child that the parents may be unaware of or may be over-looking due to their own emotions, etc..</p>	<p>It is challenging to manage parents' expectations. New information about their child may take them by surprise they may have difficulty accepting it, or they may question the neutrality of the person providing the information, or they may try to pressure the child to get her to reflect that parent's views</p>
<p>The process is designed to protect the privacy of children, as necessary, to allow a child to talk more freely about their family to assess any significant issues/needs from the child's perspective. Skill is required, first to get all the necessary information from the child and second to be able to provide "artful reframing" to present that information to the parents.</p>	<p>It is challenging to manage a child's expectations. A child may think their involvement in this process allows them to decide, or a child's expectations about what will happen, or the problem to be resolved may be different than their parent.</p>

3. CHILD'S PARTICIPATION:

The team must decide and clarify the extent of the child's participation in the process. This will depend on the level of conflict in the family – between parents, and between parents and children. The goal is to help participants gain a better understanding of the options available so parents can choose a solution that will work best for their child and meet their needs, and also allow the child to feel important in the process. The purpose is *not* to ask the child to decide between their parents.

A child's participation may remain indirect by accessing information from professionals in the child's life to learn about their physical and emotional welfare as well as their academic development. A trusted neutral spokesperson or child specialist could also report back to the team. In some cases a child's participation may be more direct, perhaps even having a child themselves participate (always with the child specialist or a trusted neutral adult) at a team meeting.

<p>Possibilities:</p>	<p>Potential Pitfalls:</p>
<p>By asking for the child’s input, parents are not only taking steps to address their issues, but are also likely to achieve a better buy-in from their child to the agreement reached and avoid the situation where a child “votes with their feet” and refuses to follow a plan set up by their parents.</p>	<p>Getting a child’s input may be best left to a child specialist, or coach, or neutral advocate. Without this specialist a child may feel he is being drawn into taking sides with one parent against the other.</p> <p>A child involved in decisions with financial implications may become manipulative and use their parents’ conflict and guilt to their advantage in pressing for "stuff".... some children learn at an early age that “love can be bought”.</p>
<p>Children will not experience the alienation articulated by the young children in the Pruett’s examples, but may instead come to some appreciation of the adjustments made by their parents during this period of transition.</p>	<p>Both parents and children’s emotions make them vulnerable. The more directly a child participates, the more need there is to maintain a safe environment.</p>
<p>Parents can better communicate about their children once they are aware of and understand their needs and interests; they can then plan and work on short and long-term goals that serve the best interests of their children.</p>	<p>We have to recognize that we may be assuming a lot of parents in this process. They may need help from a coach or counsellor to be able to communicate with each other about their child.</p>
<p>Whereas traditionally the separation agreement has been viewed as the goal to end the dispute, collaborative practice views this as the beginning, not the end. Skills are developed and the parents learn how to adjust and make the changes to any parenting plan necessary in future to recognize the child’s needs as they evolve.</p>	<p>It is important to do a reality check. The short-term pain of therapy or coaching for parents or children may be necessary to achieve long-term gains for the family.</p>

C. CONCLUSION:

Clearly there are challenges if we begin truly listening to children and expanding the ways they can participate in a separation process that not only protects them, but also pays attention to them.

Our Justice Minister in Canada, Irwin Cotler, regularly expresses his concern for the protection of children in any atrocity and for the protection of their rights. He tells a story of the insight he received from his daughter, who told him that when it comes to human rights, always ask the question, "Is it good for children?" This is the question we are now asking as Collaborative practitioners. Is the Collaborative process going to be good for children?

We believe the basic model for Collaborative practice can work for children in a radical new way, by requiring parents and their lawyers to eschew adversarial practices and agree to work together as part of a team that also includes other professionals skilled in advising families in transition. It is important for those of us engaged in Collaborative practice to be vigilant about the impact of children's involvement in the process on the children themselves, and to share our experiences as we move forward. This is a work in progress and everyone has much to contribute. We welcome your insights and comments.

The authors wish to thank and recognize the input of our many collaborative colleagues and friends in the development of the ideas in this paper. In particular, we would like to acknowledge the following:

Judith Johnson, Jan Schloss, Helen Goudge, Jane Tremblay, and Barbara Landau.

More information about the Congress can be found at www.lawrights.asn.au

Sandra Demson and Judith Huddart both practice Family Law in Toronto, Ontario. Judith was the Chair of the Canadian Bar Association's National Family Law Section for 2004-2005 and past Chair of the Ontario Bar Association's Family Law Section. Sandra has for seven years served as Editor of "Matrimonial Affairs", the Newsletter for the Ontario Bar Association's Family Law Section. Sandra and Judith are also founding members of Collaborative Practice Toronto and enthusiastic proponents of collaborative practice.

www.collaborativepracticetoronto.com

