

**CONFLICT RESOLUTION:
PEACE, PRACTICE, PERSPECTIVES –
CELEBRATING WOMEN AS ADR LEADERS**

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EMPOWERING COUPLES TO RESOLVE THEIR OWN FAMILY DISPUTES

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Introduction

If I were you, I wouldn't start from here.....

At a conference recently I heard a story about a shipwreck in the Pacific Ocean. Over a thousand people were stranded on a desert island. The Captain took charge and immediately organised people into various workgroups, carpenters to build shelter, farmers to gather food, cooks to cook meals, nurses and doctors to help the sick and injured, teachers to teach the children, etc etc. At the end there were a few stragglers and they were the lawyers. The Captain reckoned that they all might be on the island for quite a time and sent the lawyers off to the far end of the island to think up a good system of dispute resolution as inevitably there would be problems and disputes. After a while the lawyers group came back and announced their system. They said if someone had a dispute with another person, they should not talk to that person about their problem. They should go to another person and tell him/her all about it (ie solicitor). That person would then go and talk to another person (ie junior counsel) and possibly even a third person (ie senior counsel). The other person would do the same and then everyone would meet with yet another person (ie the judge) and he/she would decide having heard what facts were thought be relevant.. This would all take a very long time and a lot of money. Needless to say the Captain was not impressed and sent the lawyers off to find another system. This time they came back and said that if people had a dispute they should firstly try to resolve it themselves and failing that they should both go to another person (ie mediator) who would help them to try to resolve the problem.

This is of course very simplistic but I do think that those of us who work in the judicial system should, from time to time, step back and try to see how the system looks from the outside and from the perspective of those who, perhaps only once in a lifetime, have to use the Courts to resolve a problem. The law has become increasingly complicated, as has commercial life, with international dimensions and EU regulations, but every case does not need a court determination and this is particularly so in the family law cases.

This Report commented on the current system's negative ethos:

“Instead of concentrating on the empowerment of individuals to resolve their own family disputes, by encouraging negotiation and agreement, the emphasis of our system, with its concentration on adjudication, is on solutions which take control away from the participants. A humane system of family law, it is argued, is one which encourages the responsible resolution and management of disputes wherever possible by members of the family themselves. Judicial intervention is of course necessary to prevent exploitation or abuse between family members. The ideal of empowerment should not blind us to problems of inequality which may arise in a system of private ordering. This apart, it is perhaps time to consider how reforms in our legal processes may help in the process of personal and family empowerment.”

We know that a high proportion of cases settle so people do have to ultimately make decisions even if it is on the steps of the court. Can we help to make them earlier and avoid the courts altogether.

HOW CAN WE HELP CLIENTS MAKE THE BEST DECISIONS FOR THEMSELVES AND THEIR FAMILIES?

The definition of empowerment is to give somebody the strength and confidence to act on their own initiative. So here are some tips which may help:

Understanding the emotional backdrop to the case

Lawyers underestimate the emotional impact on their clients at their peril. Separation and divorce are painful and difficult processes. They are life changing. In many cases they are unexpected and unwelcome. Whether you are the person who has made the decision to leave the relationship or the person who is being left (abandoned) there is an emotional impact. Even clients who appear to be coping will go through difficult phases during the case. Encourage clients to get professional help. Lawyers can be sympathetic but we are not therapists. Also understanding where the other party is on the emotional time line is important. Often one party wants to move on and get matters sorted quickly as perhaps he/she has been out of the marriage emotionally for quite some time. They need to give the other spouse time to catch up and come to terms with a new reality. This issue cannot be overstressed. Many court applications are made because one spouse wants to hurry along and the other spouse is hell

bent on preventing the process from progressing.

Information gathering and education

It is usual for one spouse to have greater knowledge about the family finances and the cost associated with running the home. This person is often/usually the husband but not always. A husband client can often puff themselves up with pride as they tell you the efficiency with which the house is run, bills paid, best deals organised, savings made and somewhat scornfully add that his wife knows nothing of his hard work and takes very little interest. If that was the way they did things during the marriage that will have to change. The husband will have to share all his knowledge of the detail of financing the home with the wife in addition to providing all of the documentary information. The answer often is “she trusts me with the finances”. That will simply not hack it or get around the need to share all the information and documentation. It is really quite simple, until all involved in the case are as familiar with the finances as the main player and everyone, clients and advisers, are all “singing from the same hymn sheet” you cannot get to the negotiation phase of the case. On the other hand, there is a duty on a wife to work hard to understand the finances if that is necessary. A wife who sits back and says “she knows nothing about bills” needs to start learning. And it does take time and it can be scary so the sooner that the learning starts the better.

The children

Although this topic can only get a brief mention, parents must be told of their responsibility to their children no matter how angry and upset they may be themselves. There is now a wealth of material available for parents to help them, books, DVDs, pamphlets and information on the Internet. Barnardos and the Family Support Agency have published a series of booklets on Parenting Positively and one is for separating parents. John Sharry and others have written a book called “When parents separate: helping your children cope”. Fiona McAuslan (of FMS) and Peter Nicholson have published a book called “Living with Separation & Divorce. Resolution, the English Solicitors Family Lawyers association has a publication “parenting after parting” which is very good. There are excellent websites attached to the Rainbows Ireland and Accord and Relationship Ireland. Also www.divorceandchildren.com and also the Resolution website.

All the studies show that while parental separation does upset and hurt children, the intensity and

length of that impact relates to the level of conflict between the parents. There is a lot of useful material in a study called “Children’s experiences of parental separation” done by the Children’s Research Centre TCD 2002 and some of the findings are printed at the end of this paper. I also read a book called “Caught in the Middle: protecting children from high-conflict divorce” by Carla B Garrity and Mitchell A Baris and in particular it looked at the developmental impact conflict (even mild conflict) can have on children.

Because the children’s issues are so emotive, if not worked out well at the beginning of a case they will completely swamp any possibility of reaching agreement on the other aspects which may not be that difficult but the parties are polarised.

4. Focus on solutions

Clients need to know that the court only sets out broad principles and they are interpreted to the facts of each case. Asking a client at the outset, what they need is useful. At the same time ask them what the other spouse needs. So if a wife says she needs to stay living in the family home, for the husband to pay the mortgage and all the household bills, school fees for the children, the VHI and for her monthly allowance to continue as is and this all represents 90% of what is available, you must ask her what she thinks her husband needs and how that need will be met. You must sow the seed that difficult decisions need to be made and give her time to adjust her thinking. Likewise if a husband thinks that making bare provision for his wife and children is likely, he needs to be told that the process will impact on business assets, cash reserves, investments etc.

Rightly or wrongly, lawyers have become the “go to” people when separation happens. In the past it might have been the priest or a counsellor also the Court has become the default setting for resolution of family disputes. It is now nearly 24 years since the 1989 Judicial Separation and Family Law Reform Act which requires all solicitors to discuss counselling, mediation and reaching agreement with clients and giving the names and addresses of suitably qualified people and still the take up on mediation is low. I often challenge my colleagues on whether clients really know what is involved in a court application and are they making an informed choice to go there. This is not the day to discuss the court and its procedures, but they are pretty archaic. The paperwork obscure, the language complicated and old fashioned. Do the courts actively manage cases and intervene (at all or enough) to encourage litigants to address their family’s needs through alternative models? In the Northern Circuit in England

the judges have prepared an information sheet entitled “what the Courts expect of you” and it is given to all litigants in family law case. It has an interesting point at the top which says “Please do not think your case is an exception”

While the Court system and individual judges are diligent and conscientious it is surely not the best place to deal with family issues. A court must still adhere to formal procedures and the system is adversarial in nature. You may recall the witness scenes in *Kramer v Kramer*.

At a Seminar on Saturday last, Minister Shatter announced that he is looking into a specialised family court system with support services and will be canvassing views on this exciting departure.

APPROPRIATE DISPUTE RESOLUTION

I now see a variety of ways to try to resolve family law cases.

MEDIATION

There are a number of variations of mediation available. The most experienced are probably those attached to the FMS which is operating for over 25 years. There are also a number of experienced private family mediators including some family law solicitors who have trained as mediators. Different ones will suit different people. FMS has the huge benefit of being an entirely free service. Private mediators are countrywide and will often be able to see people after normal working hours. Solicitor mediators bring an added strength of being able to give information (not advice) with their experience of the law and the courts and this can be reassuring to people that they are not making a bargain which is very far short or more than what might be considered the norm.

LAWYER ASSISTED MEDIATION

Although this model is usually used in commercial disputes it has its role in family law cases too. Sometimes clients want the security of knowing their lawyer is with them in the process, or with them at certain times e.g. when discussing the finances. If the solicitors representing the parties are trained mediators it helps.

COLLABORTIVE PRACTICE

Collaborative practice has taken root in Ireland, particularly in the family law area. Couples, with the help of

their lawyers, coaches, financial and child neutrals, control the process and outcome in a climate of co-operation. This reduces the stress inherent in many family law disputes. Trained practitioners assist the couple at every stage of the process and the team can focus on achieving a resolution free from the threat of court litigation. Coaches can be very effective as part of the collaborative process to help couples and their children deal with many emotional conflicts of marital and family breakdown. The process focuses on the interests of the parties and their children. Collaborative Practice allows the parties to maintain their dignity, lessens hostility, reduces the negative impact on the children and sets the stage for getting on with life in a constructive manner. The process allows the parties to make their own decisions and to have full control over the final outcome rather than handing it over to third parties for decision. The parties negotiate directly with each other rather than through professionals and retain ownership of the process and the final agreement.

The ACP (Association of Collaborative Practitioners) is an active organisation. There are ten practice groups in Ireland and one in Belfast and collaborative practitioners in nearly every county in the country.

LAWYER NEGOTIATION

It is sometimes forgotten that the 1989 Act specifically requires solicitors to advise their clients of the benefits of negotiating a settlement and reaching agreement.

At a recent Legal Aid Board Conference Judge Petria McDonnell had a “wish list” as a Judge for solicitors/ barristers as follows:

Be honest and courageous in your work;

Be challenging to clients of their “bad” behaviour;

Focus on solutions;

Talk to colleagues on the other side and avoid writing (acrimonious) letters.

Muriel Walls

March 2013

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