Changing the Experience of Family Dispute Resolution:

Collaborative Principles in the Courtroom

By Laura Fryer*

The subject of this article arose from a discussion panel held at the Ontario Collaborative Law Federation Conference, September 2010. Madam Justices Ann Nelson, June Maresca and Heather McGee graciously offered their time to participate in what was originally to be a discussion of the court's position on aspects of collaborative practice.

What emerged from each of the three judicial panellists was something much broader and, frankly, more exciting than the "assigned" topic. Justices Nelson, Maresca and McGee were all enthusiastic practitioners of collaborative law prior to their respective appointments. From their vantage point on the bench, they now posit that collaborative principles *must* have a place in matrimonial litigation.

Justice McGee opened the panel discussion with the proposition that to truly change our system of family law, we must change how people experience it. We must change the culture of the family law community. Justice McGee had three broad proposals to change the public's experience of family law dispute resolution:

1. **That litigation skills incorporate collaborative practice skills.**

The ideals of collaborative practice and those of the professional advocate are never in conflict. We must always remember that we share the same goals: to effectively managing conflict, and in the end, to achieve a fair and just outcome. Accurate and timely exchange of information, decisions through reason, courtesy and graciousness to all involved are but a few of the many skills which should be common to both collaborative practice and litigation.

2. **That whenever possible, those with collaborative practice skills should not withdraw from the litigation arena.**

Justice McGee put out a call to collaborative practitioners who have chosen to opt out of litigation work. There will always be matters that must for one reason or another need to be determined within a court process. That process is diminished when those with collaborative practise skills withdraw. Litigants benefit when their counsel employ collaborative practise skills in the court room. The family law bar benefits from the mentoring and modelling of collaborative practise skills in every arena.

3. **That family law practitioners have an opportunity to see themselves as one community committed to excellence, service and, while perhaps diverse in their skill sets, bound by a common set of goals.**

We all share the same life's work: proving service to individuals in family conflict. On a personal basis the challenges can be immense and the rewards fleeting. Best practises and the choice of arena for each individual conflict will vary. But within the broader perspective of a family law community we can widely effect the positive changes that come from consistent best practises and good process choices – creating certainty, security and fairness for families and individuals in transition.

How Can the Experience be Changed from the Grassroots?

Justices Nelson and Maresca discussed the practical elements of grassroots change. They propose that such change can be applied to the various relationships:

- To a family lawyer's relationship with his/her client;
- To a lawyer's relationship with other counsel;
- To a lawyer's relationship with the court; and
- To the court's relationship with both the parties and counsel.

Justice Nelson refers to the lawyer who successfully merges litigation and collaboration skills as the Enlightened Litigator. Justices Nelson and Maresca both spoke at length about the various ways in which collaborative principles can be applied in the litigation context to bring about basic, grassroots change.

1. Developing Interests:

Collaborative lawyers seek to develop and identify the needs and interests of the client both short and long term. Justice Nelson fears that in the litigation context, clients' needs and interests may be forced into the legal model and that counsel may ignore things that a client *really* wants which may be outside of the typical legal relief. This may occur because counsel him or herself feels that the legal model is the only option or worse because counsel may feel that what the client really wants is irrelevant. If counsel is informed about a client's interests this will expand the opportunities for successful resolution regardless of whether it is negotiated or litigated.

The development of interests also requires consideration of the other spouse's goals and interests. Justice Nelson feels that if traditional litigators paid more attention to the needs and interests of 'the other side' it would result in earlier and better resolutions for the parties.

2. Importance of Language

Collaborative practitioners are ever mindful of the impact of language on the dynamic between the spouses in the conflict and they coach their clients on ways to express their interests in ways that their spouse can hear them. Collaborative lawyers model measured, respectful communication for their clients. Instead of blaming and judging, the focus remains on the client's interests and needs. These same principles should, in Justice Nelson's view, be readily applied in the litigation context.

The Enlightened Litigator would use the powerful tool of reframing in their communications with all of the players in the family law dispute to refocus destructive messages into more constructive ones. Similarly, the Enlightened Litigator would see the power of acknowledgment and positive reinforcement; he/she would prepare in advance for difficult conversations to ensure constructive problem solving.

Justice Maresca suggests that lawyers need to ask themselves when drafting pleadings and other court documents whether it is helpful to recount every slight, nasty argument, piece of irresponsible behaviour and bad conduct of the other spouse. How are the issues being raised relevant to the client's ultimate long term goals? Counsel should look for ways to point out the commonalities between the parties even if the only commonality appears to be the conflict itself. Litigators should identify concerns as problems to be solved, rather than accusations.

Justice Maresca also encourages counsel to carefully consider the language that they use in the court room as this affects the tenor of the process. Framing issues in a blaming and

accusatory way simply triggers a defensive and hostile reaction from the other party. Framing issues in a problem solving way does not detract from the lawyer's ability to advocate on behalf of the client.

Justice Maresca suggests that she has more time for the litigant who is focused on the needs of the child, his/her own needs and can acknowledge the needs of the other side.

3. Strategic Advocacy

According to Justice Nelson, the Enlightened Litigator would have the client's goals in mind when communicating at any step in the case; this may include assessing how to respond to the insulting letter from opposing counsel or the motion on short notice seeking numerous grounds of relief. The Enlightened Litigator would always consider how to assist the client in reaching the best possible resolution as early as possible in the litigation process.

The Enlightened Litigator would work together with the other lawyer in presentations to the court. He/she would use Agreed Statements of Fact whenever possible and would work on drafting agreements together rather than exchanging drafts. The Enlightened Litigator would work with the other lawyer to utilize case and settlement conferences effectively; this may entail advance communication with respect to option generation for settlement.

Justice Maresca echoed the comments of Justices McGee and Nelson in stressing that counsel should take each attendance in court as an opportunity to identify and meet the needs and interests of the parties and their children and an opportunity to solve problems and create a plan to move forward to an ultimate resolution.

4. Value of Partnering with Other Professionals:

Collaborative lawyers have embraced the involvement of mental health and financial professionals as integral team players right from the beginning of a matter. This is particularly important when the parties have children whose interests need to be prioritized. The litigation lawyer on the other hand may go it alone and focus only on the legal issues. The Enlightened Litigator, suggests Justice Nelson, would ensure that his/her client understands the values that other professionals have to offer and why it is in the client's enlightened self interest to take advantage of their services.

Justice Maresca also emphasized the importance of utilizing professionals such as mental health professionals, child development experts and financial experts in the court process. She suggests that these experts could be brought into the court at various stages in the litigation prior to trial to provide assistance with problem solving.

5. Parking the Ego:

Justice Nelson advises that family lawyers need to let go of outcome and not take ownership of the client's problems. Many litigation lawyers allow the client's problems to become their problems – "*we* won or lost the motion or trial." Too often a litigator's success is defined not by client satisfaction but by how much or how little *the lawyer* perceives he/she obtained for the client. Success in litigation, as in collaborative law, should be measured by satisfied clients.

Parking your ego also means letting go of "being right". In both the collaborative and litigation contexts being right at the end of the day matters very little to the real issues at stake for the client.

What Change Might Look Like

Justice Maresca feels that except in the most serious and unusual circumstances, once the dust settles, the results will be as follows:

- The children will be parented by the parties in some fashion;
- There will be child support;
- There will be some form of equalization of net family property;
- Both parents are going to have to survive economically.

In Justice Maresca's words, 'the rest is details'. She urges counsel to use a collaborative approach to problem solving in all of their litigated cases now. Her vision is that one day collaborative principles will be fundamentally integrated into all aspects of the litigation process and the process might look something like this:

1. The pleadings would be a useful summary of each party's needs and interests and their perception of the needs and interests of the children.
1. All court hearings (other than trials) would be held around a table, with the parties, their counsel and the judge.
2. At the table would also be a professional who provides information to everyone about the issue being discussed. If the issue relates to parenting it might be a children's mental health professional and if finances are in issue, a financial planner or tax consultant might be at the table.
3. Rather than a conference brief, a jointly prepared summary of the issues to be discussed and the party's needs and interests in that area would be served and filed – this would form the agenda for the conference.
4. The judge's endorsement would summarize the results either in narrative form or in the form of an order, temporary or final.

Conclusion

The author had a conversation in court a couple of days after Justices McGee, Maresca and Nelson gave us their comments. Both the author and another litigation lawyer (on a different case) discussed how they had returned to the office following the OCLF conference and made modifications to affidavit material and to the position they were recommending that their client take on the motion - this in light of the discussion the preceding weekend.

Malcolm Gladwell, in his book, *The Tipping Point* refers to "positive epidemics." Gladwell states that 'the virtue of an epidemic, after all, is that just a little input is enough to get it started, and it can spread very, very quickly." Justices McGee, Nelson and Maresca encourage all participants in family law dispute resolution to take steps, however small, to reach a tipping point – a tipping point where collaborative principles become an integral element of the litigation sphere to the benefit of litigants and their children, lawyers, the judiciary and the system as a whole.

**Laura Fryer has been practising family law in the Markham area for 15 years originally in partnership with Madam Justice McGee before her appointment to the bench and now with her own her firm, Fryer & Associates. Laura is a collaborative lawyer who continues to litigate family law disputes; she looks forward to continuing to amalgamate the two spheres.*