

# THE USE OF COLLABORATIVE LAW PROCESS AND ALTERNATIVE DISPUTE RESOLUTION IN FAMILY MATTERS

## Reflections from the Bench: Making Court the Last Resort

Family law, at its heart, is an area of profound human consequence. The decisions rendered in matters of divorce, child custody, spousal and child maintenance, and related disputes echo far beyond the courtroom, shaping the lives and futures of families in ways both subtle and profound. As Assistant Justice of the Family Division of the Supreme Court, I am privileged and entrusted to witness the complexities and emotions entwined in these proceedings.

From my perspective, the increased use of the Collaborative Law Process and other forms of alternative dispute resolution (ADR) should be strongly encouraged in divorce and family matters. Whenever possible, parties should consider turning to the courts only as a last resort.

## The Challenges of Traditional Litigation in Family Matters

Traditional litigation carries with it a distinctive set of burdens. The adversarial system, by its nature, positions parties against one another, often escalating conflict rather than diffusing it. In family law, where the parties are not mere business interests but former partners, parents, and children, the adversarial paradigm can deepen wounds and amplify acrimony.

Moreover, the process is time-consuming and expensive. Litigation may involve lengthy discovery periods, multiple hearings, and sometimes protracted trials. The financial costs—attorney fees, court fees, expert witnesses, and other expenses—can be daunting, draining resources that might otherwise support the parties' transition to new lives.

Beyond cost and time, litigation can also perpetuate a loss of control. Decisions are ultimately rendered by a judge—however wise and well-intentioned—rather than crafted and consented to by the parties themselves. The result, though legally sound, may not reflect the nuanced priorities or interests of those most affected.

## The Promise of Collaborative Law and Alternative Dispute Resolution

Against this backdrop, the Collaborative Law Process and ADR present a compelling alternative. Collaborative law is a voluntary, non-adversarial approach in which the parties, supported by trained professionals, work together to resolve disputes respectfully and

creatively. ADR includes mediation, arbitration, early neutral evaluation, and other methodologies designed to facilitate settlement outside the courtroom.

Having been trained in the Collaborative Law Process, and drawing upon my experience as both a private practitioner and now a jurist, I have observed the varied advantages of these processes:

- Preservation of Relationships: Collaborative law and ADR are premised on mutual respect and constructive communication. This is especially crucial in family matters, where ongoing relationships—particularly co-parenting—are often necessary for years to come. All too often parties who appear before me are already divided and damaged by the breakdown of the relationship. The chances that the parties become embroiled in high-conflict litigation is significantly exasperated when court is seen as the only option as the parties' mindset becomes narrowed to "win or lose".
- Tailored Solutions: Parties retain greater agency to shape their agreements, crafting solutions that address unique needs, interests, and circumstances. This flexibility is lessened within court-imposed orders.
- Confidentiality: ADR proceedings are generally confidential. This protects the privacy of sensitive family matters and shields children and other vulnerable parties from public scrutiny.
- Efficiency: These processes are typically faster and less costly than litigation, reducing the emotional and financial toll on families.
- Empowerment and Satisfaction: Research repeatedly demonstrates that parties who participate in collaborative processes are more satisfied with outcomes having been directly involved in the resolution.

## The Collaborative Law Process in Practice

The collaborative law model is distinguished by its commitment to voluntary, good-faith negotiation. Each party is represented by a lawyer trained in collaborative practice, and may be supported by neutral experts such as financial advisors, mental health professionals, and/or child specialists. All participants sign a participation agreement, committing to resolve issues without resort to litigation. If the process breaks down and litigation ensues, the collaborative lawyers withdraw—a structural safeguard ensuring everyone is invested in the success of the process.

Meetings are convened in a dignified, neutral setting. The focus is on open disclosure, transparency, and the identification of common interests. This stands in marked contrast to the strategic posturing often necessitated by litigation. Parties work together to generate options, assess outcomes, and arrive at mutually agreeable solutions.

## Mediation and Other Forms of ADR

Mediation, another widely embraced ADR process, involves an impartial mediator who facilitates dialogue and negotiation between parties. The mediator does not impose solutions, but guides parties toward consensus. Arbitration and early neutral evaluation offer additional pathways, each carrying unique structures and benefits. The common thread is the prioritization of settlement, autonomy, and respect.

## The Role of the Court: A Guardian and Arbiter of Last Resort

The court's involvement must, in my respectful view, be reserved for circumstances where collaborative or ADR processes have been exhausted or are clearly inappropriate—such as in cases involving domestic violence, power imbalances, or entrenched non-cooperation. Judicial determination remains necessary and vital in safeguarding rights, protecting children, and ensuring justice when parties cannot, despite earnest effort, resolve their differences.

Yet, the court should be the guardian and arbiter of last resort, not the default mechanism for family dispute resolution. The courtroom ought not to be the first stop for families in distress, but the final station after all other avenues have been earnestly pursued.

## Conclusion: A Vision for Family Justice

As a jurist, I believe it is imperative that the judiciary actively supports and encourages the use of collaborative law and ADR. To envision a family justice system that prioritizes human dignity, well-being, and autonomy is not an idealistic concept, but a practical necessity. Collaborative law and ADR offer tools to realize this vision—reducing conflict, empowering families, and preserving resources for the transitions that inevitably follow separation or divorce.

The court is, and must always remain, a pillar of justice and protection; however, its role is best reserved for those exceptional instances when parties are unable to craft their own future. In all other cases, families should be supported and encouraged to resolve disputes through collaborative and alternative means.

As an Assistant Justice assigned to the Family Division of the Supreme Court, I am steadfast in my support for these processes. Let us work together—judges, lawyers, professionals, and families—to make the courtroom the last resort, and to build a system that places families, not conflict, at its center.

Alexandra Wheatley

**ASSISTANT JUSTICE OF THE SUPREME COURT OF BERMUDA**