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Title	Resolution of conflict in family law matters: An alternative and child-inclusive approach
Author(s)	Healy, Mary (Connie)
Publication Date	2014-05-01
Item record	http://hdl.handle.net/10379/4415

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**RESOLUTION OF CONFLICT IN FAMILY LAW MATTERS: AN
ALTERNATIVE AND CHILD-INCLUSIVE APPROACH**

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This Thesis is submitted to the National University of Ireland Galway for
the Degree of Phd in the School of Law.

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2014.

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Abstract

This thesis examines the emerging area of alternative dispute resolution in a family law context in Ireland. Specifically, it explores mediation and collaborative practice. Family law mediation is well established in Ireland. Collaborative practice, however, is a relatively new process. This thesis considers the theoretical framework of dispute resolution, and against the backdrop of the family courts' system, examines the nature and role of mediation and the origins and development of collaborative practice in the United States. It assesses their effectiveness in a family law context, as ascertained through international research and extensive empirical research undertaken specifically for this thesis, the first known empirical research into the collaborative process in such a context in Ireland. It also addresses issues such as the impact of lawyers as agents in the dispute resolution process and what supports should be available for families going through a period of transition.

This thesis also addresses the potential, if any, of mediation and collaborative law to provide an avenue for children to participate and have their voices heard in accordance with Article 12 of the UN Convention on the Rights of the Child. Underpinned by a theoretical framework examining the development of children and the impact of societal and other factors on their ability to participate, this thesis explores the law and policy on the principle of the "best interests" of the child and the importance of hearing the "voice of the child" in determining such "best interests". The thesis examines these issues in the context of parental separation and the changes that may occur due to the recent referendum on children's rights (November 2012). It also examines the extent to which children's rights may, despite the referendum, continue to be difficult to enforce with parents, mediators, lawyers and judges acting as gatekeepers.

Acknowledgements

I would like to thank my supervisor, Marie McGonagle for her unfailing support and encouragement throughout the Ph.D. Not alone was she a wonderful supervisor but also a great friend, instinctively picking up on when I needed that extra chat over coffee or a late night e-mail. It has been a true honour to work with Marie and to benefit from her expertise.

I would also thank the members of my GRC, Fergal Landy and Anne Egan for their advice and direction.

One of the best parts of the process was the many friends I met along the way. In particular, I would like to thank Anne Egan for her friendship, listening ear and continued patience. Meeting Matti, Annabel, Sharon, Charles, Aisling, Ingrid, Karen, Ciara Hackett, Ciara Staunton and Maeve was a very welcome bonus. I would also like to thank Ciara Smyth for her help and guidance. Old friends also played a large part in this thesis, namely Liz, Anne Mc D, Michael O'Neill and Joan. Thank you all for putting up with me. And to my Mum, my brother Declan and his wife Caroline, thank you for the support.

Completing the empirical research for this thesis would not have been possible without the kind assistance of all those who gave their time to contribute through interviews or replying to questionnaires/surveys, thank you to all participants.

A special thanks to my husband Jim for his kindness, incredible thoughtfulness and support which enabled me to complete this thesis and my two wonderful children, David and Anna.

I would also like to thank the Irish Research Council for funding this research and to dedicate the thesis to the memory of my father, Joe Healy.

INTRODUCTION: A Dynamic Time in the Development of Family Law in Ireland

The thesis addresses the resolution of conflict in family law matters, with reference to alternative dispute resolution methods, namely mediation and collaborative practice, and their effectiveness as dispute resolution processes in a family law context. It also assesses the extent to which these processes provide an avenue to hear the voice of the child as per their rights under Article 12 of the United Nations Convention on the Rights of the Child.

Research into the role of alternative dispute resolution at a time of relationship breakdown, particularly the mediation process in Ireland and the extent to which the views of children are considered within the process, is not new.¹ However, this thesis contributes to the body of literature on the mediation process by examining recent developments at EU level and the transposition in Ireland of the European Mediation Directive. It also assesses the impact of the Draft Heads of the Mediation Bill 2012 for family law litigants and for the legal profession and the influence of lawyers, as agents, in the dispute resolution process.

Collaborative practice is an American concept which seeks to provide an interdisciplinary and holistic approach to the resolution of family conflict and is a relatively new addition to the dispute resolution landscape in Ireland. Separating parties are represented and supported by their lawyers who focus on reaching settlement outside of the adversarial courts' system. However, the process has not been without its share of critics both in the legal profession and academia.² This thesis reviews and assesses the body of literature on collaborative practice, analysing the constituent elements of the

¹ Majella Foley-Friel, 'Unseen but Are they Heard? An exploration of the mediator's perspective on the role of children in Irish mediation' in Delma Sweeney and Mary Lloyd (eds) *Mediation in Focus: A Celebration of the Family Mediation Service in Ireland* (Family Mediation Service 2011) 58; Elaine O'Callaghan, 'The Role of Mediation in Resolving Disputed Contact Cases: An Empirical View' (2010) 2 *Irish Journal of Family Law* 2 50; Sinead Conneely, *Family Mediation in Ireland* (Ashgate 2002).

² Alexandria Zylstra, 'A Call to Action: A Client-Centered Evaluation of Collaborative Law', (2011) *Pepperdine Dispute Resolution Law Journal* 11 547; Eugene Davy, 'Problems Associated with Collaborative Practice' *Judicial Studies Institute Journal* (2009)

process, the various models used and synthesising the results of international research. An additional factor that sets the present work apart is that it presents the results of the first known empirical research into the development of collaborative practice in a family law context in Ireland. This research provides a valuable insight into the process from the perspectives of Irish separating parties who have used the process, collaborative lawyers, lawyers who practise within the courts' system and the judiciary. It also presents an overview of the attitude of the Irish legal profession to the issue of alternative dispute resolution in general.

Family law in Ireland is changing. There is now an increased focus on reform, on the use of alternative methods of dispute resolution and on the child. In the last year alone, Ireland has seen the passing of an historic referendum to amend the Constitution such that the State has now recognised and affirmed 'the rights of all children'³ and has made a commitment, though somewhat limited, to hear the voice of the child.⁴ There have also been significant changes to the *in camera* rule⁵, a specific project has been undertaken examining the plight of children within the public care system;⁶ the integration of the Legal Aid Board and the Family Mediation Service⁷ has proceeded, as has the creation of a new Child and Family Agency.⁸ Discussions have begun with a view to the establishment of specialist family law courts and most recently, the Minister for Justice⁹ has published the General Scheme of a Children and Family Relationships Bill 2014, which will address issues such as reform of the law on guardianship, custody

(1) 14; John Lande, 'The Promise and Perils of Collaborative Law' (2005-2006) 12 *Dispute Resolution Magazine*, 29.

³ Thirty-First Amendment of the Constitution (Children) Bill 2012

⁴ *ibid*

⁵ Section 5 of the Courts and Civil Law (Miscellaneous) Provisions Act 2013 amending s.40 of the Civil Liability and Courts Act 2004.

⁶ Carol Coulter, Child Care Law Reporting Project. Available at <http://www.childlawproject.ie/author/carol/>

⁷ Civil Law (Miscellaneous Provisions) Act 2011 Part 16

<http://www.irishstatutebook.ie/2011/en/act/pub/0023/> Commenced November 1, 2011.

⁸ Child and Family Agency Act 2013 available at

<http://www.oireachtas.ie/documents/bills28/acts/2013/a4013.pdf>

⁹ Mr. Alan Shatter, Minister for Justice.

and surrogacy.¹⁰

The briefing note on the proposed Children and Family Relationships Bill 2014 also acknowledges the ‘need to provide better support to the courts in family law and childcare cases, to provide improved access to welfare reports, and new mechanisms to ensure parental compliance with child maintenance and access.’¹¹

This thesis therefore in examining concepts such as the “best interests” and “voice of the child”, using the courts process as a benchmark and addressing both the effectiveness of mediation and collaborative practice as dispute resolution processes and their potential, if any, to facilitate the hearing of the voice of the child, is therefore both timely and pertinent as the judiciary, the legal profession and mediators alike discuss and debate the changes that are now required under the Constitution and under the anticipated legislation.¹²

Coming from a historical perspective, the family, as recognised in Irish law and under the Constitution, was and continues to be ‘the family based on marriage’¹³ with the assumption that married parents decide what is in their children’s best interests.¹⁴ The State has now pledged to protect children ‘regardless of their (parents’) marital status’, where the parents fail to such an extent that ‘the safety or welfare’ of their children is ‘likely to be prejudicially affected.’¹⁵ This offers protection to children born within the

¹⁰Briefing Note on the Children and Families Relationship Bill 2013
<http://www.justice.ie/en/JELR/Children%20and%20Family%20Relationships%20Bill%202013%20141113.pdf/Files/Children%20and%20Family%20Relationships%20Bill%202013%20141113.pdf> General Scheme of a Children and Families Relationship Bill 2014
<http://www.justice.ie/en/JELR/General%20Scheme%20of%20a%20Children%20and%20Family%20Relationships%20Bill.pdf/Files/General%20Scheme%20of%20a%20Children%20and%20Family%20Relationships%20Bill.pdf>

¹¹ *ibid* 1.

¹² Thirty-First Amendment of the Constitution (Children) Bill 2012; Child and Family Agency Bill 2013; Children and Families Relationship Bill 2014

¹³ *State (Nicolaou) v An Bord Uachtala* [1966] IR 567; *G v An Bord Uchtala* [1980] IR 32.

¹⁴ *North Western Health Board v H.W* [2001] 3 IR 622.

¹⁵ (n 3).

‘moral institution’¹⁶ of the Constitutional family, and arguably, should also protect them on its dissolution.

Despite the protracted religious and political debate surrounding the holding of two referenda prior to the introduction of divorce in Ireland, there is little mention of children under the Family Law (Divorce) Act 1996 (other than in financial terms).¹⁷ Neither is there any protection for them. Earlier legislation, which provides for a court ordered or judicial separation, namely the Judicial Separation and Family Law Reform Act 1989, defines welfare as ‘the religious and moral, intellectual, physical and social welfare of the children concerned.’¹⁸ However, there is no provision which, in effect, recognises the impact of such family transition on the children of the marriage, nor, despite the Courts recognising the special ‘status’ of marriage¹⁹, is there any automatic counselling or emotional support available for ‘a family falling apart.’²⁰

Marriage or relationship breakdown is universal. It does not only affect the most vulnerable in society; it can, depending on how it is managed, lead to financial and emotional hardship across all strands of society. Though the issue of family breakdown has been viewed traditionally as a private matter, it is argued that support at this time should be universal in order to enable families to develop their own inherent ‘strengths’ and the resiliency to move on.

This thesis adds to the existing body of research in examining the voice of the child in the light of the passing of the 31st amendment to the Irish Constitution, the referendum on children’s rights, in November 2012. Though the results of this referendum are the subject of a challenge which has been appealed to the Supreme Court (addressed in chapter 2), it

¹⁶ Article 41 of the Constitution.

¹⁷ S. 5 (c) ‘such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent members of the family.’

¹⁸ S. 3 (2) (b).

¹⁹ *T v T* [2002] IESC 68 ‘The moment a man and woman marry their bond acquires a legal status. The relationship once formed, the law steps in and holds the parties to certain obligations and liabilities’ (Murray J)

²⁰ Interview with YA 3, March 2012.

examines the extent to which the wording of the referendum complies with Article 12 of the Convention.

Finally, the thesis, though information gleaned from interviews with young adults whose parents separated when they were children, outlines what they considered of importance to them during their parents separation. Building on their views, it explores what needs to be done, in practical terms, to ensure that the courts' service and alternative dispute resolution processes provide a mechanism through which children's voices can be ascertained. In essence it proposes that, regardless of the process used to resolve the conflict, there are potential benefits of taking a multidisciplinary approach with experts working together rather than against each other to provide a more holistic solution.

Research Questions

The research question addressed in this thesis is:

Are mediation and collaborative practice effective in resolving conflict in family law matters, and what is the potential, if any, of these processes as a means of enabling the voice of the child to be heard in accordance with Ireland's obligations under Article 12 of the UN Convention on the Rights of the Child?

In addressing this question, a number of related questions are also addressed. Firstly, in providing a benchmark from which to address this issue, the thesis examines the voice of the child within the court process. It poses questions such as: What role, if any, do children play in court proceedings? Are they consulted? What is their right to representation, and how, if at all, can they assert this right? How effective is the guardian ad litem service? What is the scope and effectiveness of reports prepared under section 47 of the Family Law Act 1995 and how often, and in what circumstances, will a judge speak directly to children in family law matters?

Next, the thesis will address the effectiveness of mediation, as the most established alternative dispute resolution process in this jurisdiction. It addresses questions such as, has mediation been an effective method of dispute resolution in family law matters, what are the results achieved and are there benefits of court imposed/mandatory mediation? Specifically in addressing the research question, does the mediation process give children an opportunity to express their views, could it/should it be adapted to be more child friendly, while ensuring that children's rights are protected? What safeguards or regulatory controls are in place?

In addressing the research question as to the effectiveness of collaborative practice as a method of dispute resolution, the thesis outlines the origins and development of collaborative practice in the US. It addresses questions such as, what can be learnt from its development in the US, and Canada? It will address questions as to people's awareness of collaborative practice when they attend their first consultation with their solicitors, their reactions to the process once explained to them, and what concerns, if any, they may have. What has the reaction of lawyers/the judiciary been to the process in Ireland? Are there regulations in place? An important element of the research will be examining the safeguards that are built into this process to ensure that all parties' rights are protected.

Specifically, in addressing this aspect of the research question on the extent to which the collaborative process is a viable method of ensuring that the voice of the child is heard in an appropriate manner, questions posed include: What is the role of the child specialist? What methodology is used by these specialists to elicit children's views? How inclusive is the process and what feedback is given to children? To what extent have therapists and child specialists been used in cases in Ireland? How has using this process, as a means of dealing with family conflict/divorce, helped children and will these methods provide a non intrusive means of enabling us to speak to children in an age appropriate manner?

In answering these questions, the thesis, through empirical research, also provides an insight from the perspective of Irish separating couples who used the process to resolve their marital issues, triangulating the results with research carried out internationally. This research also addresses the extent to which the process has been accepted within the Irish legal profession and whether the concerns raised by its critics were evident in the examination of collaborative practice in an Irish context.

Previous studies have sought to elicit the impact of parental separation on children on the island of Ireland by interviewing children under the age of 18.²¹ The research undertaken for this thesis adds to this body of work by providing a new perspective, the views of young adults whose parents separated when they were children, and who have had an opportunity to reflect on how the transition impacted on them, both at the time and subsequently. It addresses questions such as whether they felt that their parents had their “best interests” in mind, to what extent they wished to participate in the decisions being made and whether they felt that their parents were aware of how they were feeling throughout this time.

In anticipation of the proposed legislation providing for the voice of the child, this thesis also presents the views of a sample of Irish judges as to their preferred method of hearing the child’s voice within the courts’ system at present. It ascertains the concerns that are raised by members of the judiciary and considers how these should be addressed.

I. Thesis outline

As a foundation for assessing the potential or capacity of alternative dispute resolution mechanisms to be child-inclusive and to facilitate hearing the voice of the child, Chapter 1 examines the theoretical issues relevant to children and the broader concept and theory of dispute resolution. It

²¹ Diane Hogan, Sheila Greene, Anne Marie Halpenny, *Children's Experiences of Parental Separation in Ireland* (The Children's Research Centre Trinity College Dublin 2002); Margaret Fawcett, ‘What hurts? What Helps? Study of Needs and Services for Young People whose Parents Separate and Divorce’ (Relate Northern Ireland and Queens University Belfast 1999).

addresses the issue of childhood and examines the writings of Piaget²², Vygotsky²³ and Wood Brenner and Ross²⁴ on how children develop competence. It examines the views of those who take a welfare approach and those who advocate from a children's rights perspective. Chapter 1 also examines the sociology of childhood and the importance of children's immediate environment in framing the context of the arguments made. Importantly, it examines the issue of "participation" and the importance of "scaffolding" in assisting persons of all ages to participate in decisions that affect them.

In providing a framework from which to examine the issues surrounding dispute resolution, this chapter also explores the transformative nature of disputes²⁵ and the impact of lawyers as agents in the dispute resolution process in guiding their clients towards adversarial or alternative methods of resolution. The theoretical issues underpinning mediation and collaborative practice are assessed in chapters dealing with each process (chapters 3 and 4 respectively).

Chapter 2 addresses the voice of the child within the courts' system at a time of parental separation and divorce. This analysis is undertaken first and provides a benchmark from which to assess the extent to which the voice of the child is heard through mediation and collaborative practice in chapters 3 and 4. It examines the position prior to the amendment to the Constitution and the changes that may occur following the enactment of the accompanying legislation. In doing so it examines Articles 3 (Best Interests) and 12 (Voice of the Child) of the United Nations Convention on the Rights of the Child and the guidance provided by the Committee on the Rights of the Child, with specific reference to General Comments No.12 and 14. In

²² Jean Piaget, *The Child's Conception of Number* (Routledge Kegan and Paul Ltd.(trs) 1952); Jean Piaget, *The Child's Conception of Movement and Speed* (Routledge Kegan and Paul Ltd.(trs) 1970); Jean Piaget and B. Inhelder, *The Child's Conception of Space* (Routledge Kegan and Paul Ltd.(trs) 1956).

²³ Lev S. Vygotsky, 'Mastery of memory and thinking' in Martin Cole, Vera John-Steiner, Sylvia Scribner & Ellen Souberman (eds), *Mind in society: The development of higher psychological processes* (Harvard University Press 1978).

²⁴ David Wood, Jerome S. Brenner and Gail Ross, 'The role of tutoring in problem solving' (1976) 17 (2) *Journal of Child Psychology and Psychiatry and Allied Disciplines* 89.

²⁵ William Felstiner, Richard Abel and Austin Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...' (1980-1981) 15 (3-4) *Law and Society* 631

the light of these, it outlines the ways in which the voice of the child is currently heard in the Irish courts. The chapter provides a practical insight into the views of those charged with ascertaining the views of children. It does so through semi-structured interviews with section 47 reporters who work within the courts' system and also through the results of a survey completed by a sample of members of the judiciary on their preferred methods to hear the voice of the child and the judicial interview.

Chapter 3 examines the role of mediation in an Irish family law context. It addresses the research question as to whether mediation has been an effective method of dispute resolution and whether the process gives children an opportunity to express their views. This chapter also synthesises research carried out into the voice of the child within the mediation process in Ireland and internationally. It notes that while efforts are being made to train Irish mediators working with the State-run Family Mediation Service to ensure that they have the skills necessary to hear children in an appropriate way that, in addition, changes are needed in attitude and governance within the service in order to provide the impetus for such change.

Chapter 4 outlines the origins and development of collaborative practice in the US. In addressing the research question, it examines the effectiveness of collaborative as a method of dispute resolution. It also examines the interdisciplinary nature of the process and its efforts to provide a more holistic family friendly approach. The enactment of the Uniform Collaborative Law Act in the US is examined, as is the research which has been carried out internationally into the effectiveness of the process. This chapter also addresses the development of collaborative practice in an Irish context and examines some of the criticism it has received from the legal profession, in particular those who argue that they take a settlement focused approach to family law matters and that there is no need for such a structured process. In addressing the research question, it also examines the role of the child specialist within the process and the extent to which such expert is effective at providing an avenue for children and indeed, young adults, to express their views.

Chapter 5, in accordance with the specific focus placed on collaborative practice, addresses the efficacy of collaborative practice and presents the results of the empirical research carried out for this thesis. This is the first known empirical research into the process in Ireland. Using a combination of quantitative and qualitative socio-legal research methods it presents an over-view of the development of collaborative practice in Ireland as evidenced through a nationwide questionnaire. It also presents the views of parties who have used the process in the resolution of their family law issues, elicited through the medium of semi-structured interviews. This chapter also presents the views of collaborative lawyers, as well as solicitors and barristers who practise within the adversarial court system and thus see a limited role for alternative approaches. Questions addressed include whether outcomes achieved through the collaborative process are different from those determined within the court process and if so, in what way? Is there a need for such a process or can cases be settled as effectively by solicitors/barristers negotiating for clients within the adversarial process? This empirical research also sought to address issues raised by critics of the collaborative process as detailed in earlier chapters, namely, that it denies clients the right of access to justice, that it is effectively only suitable for wealthy clients and that the disqualification clause (a key element of the process) places too much pressure on clients to settle their cases.

In presenting these results, the limitations of the study have to be acknowledged. The sample size was small and therefore it reflects the views of those interviewed rather than representing the wider population. The separating parties interviewed were recruited through collaborative lawyers and one has to be cognisant as to whether there was any element of selection bias with respect to those that the lawyers chose to contact. However, 8 out of 10 participants who volunteered had settled their cases within the process and this is in line with the results of quantitative research also carried out as part of the study and in line with research internationally.

Chapter 6 focuses on the issues surrounding “participation” and the voice of the child as set out under Article 12 of the UN Convention on the Rights of the Child (discussed in Chapter 2), in presenting the results of semi-

structured interviews carried out with 15 young adults. It addresses questions such as how, and to what extent, they would have liked to have participated in the decisions being made at the time of their parents' separation or divorce and what, in their view, is the most effective way for parents to handle such family transition. It presents their views on the voice of the child within the court process, what "participation" meant to them and also the extent to which they recognised the view often expressed by parents that the "children were fine." Did the young adults interviewed feel that they were supported by extended family or to what extent did they receive, or wish to receive, support from outside the family? Chapter 6 compares the results of the Irish study to research carried out internationally and submits that providing children with support in the form of a child specialist may be a necessary precursor and the missing link in terms of ensuring that children understand what it means to participate, such that they can then make an informed decision as to whether they wish to avail of their rights under Article 12 of the United Nations Convention on the Rights of the Child.

Chapter 7 will outline the key findings of the research and will make recommendations, where appropriate both in terms of future research and implications for policy or practice.

CHAPTER 1: Theory Informing Practice or Practice Informing Theory?

I. Introduction

As a foundation for assessing the potential or capacity of alternative dispute resolution mechanisms to be child-inclusive and to facilitate hearing the voice of the child, Chapter 1 examines the theoretical issues relevant to children and the broader concept and theory of dispute resolution. In addressing the research question as to the effectiveness of mediation and collaborative practice as dispute resolution processes and the extent to which children participate through these methods or through the more recognised and established courts' system, it is necessary to examine the theoretical perspectives on the issue of childhood, how children develop and the extent to which they are considered competent to participate. This chapter will examine the arguments raised for and against the participation of children and to what extent they have been viewed as being rights holders or persons in need of protection.

Drawing on socio-cultural and ecological theories, the chapter will examine 'the child' as perceived within the legal system (referred to as the 'child of legal discourse'¹) through the lens of the sociology of childhood and the emergence of children's rights. In particular, it will focus on the child's right to participate under Article 12 of the United Nations Convention on the Rights of the Child and the corresponding responsibilities placed on parents, guardians and the State under Articles 5, 9 and 18 of the Convention to ensure that children's rights are afforded to them in accordance with their evolving capacity.

Neale and Smart describe the 'child of legal discourse' in the following terms:

¹ Bren Neale and Carol Smart, *Agents or dependants? Struggling to listen to children in family law and family research* (Working paper three) (University of Leeds Centre for Research on Family, Kinship and Childhood, Leeds 1998) 3. Available at http://www.sociology.leeds.ac.uk/assets/files/FLaGWorkingPapers/WP3_Neale_Smart.pdf

‘The child of legal discourse is primarily a dependent, who is defined within a developmental, welfarist and protectionist framework. Biologically, children are perceived in developmental terms as in the process of becoming and hence, their incompetence, irrationality and structural powerlessness are taken for granted. Legally they are minors ... in need of protection and, therefore, justifiably subordinate to adults. ... The child of legal discourse is a somewhat generalised, theoretical child rather than a real, embodied, biographically unique and socially differentiated child.’²

In examining the work of Piaget³, Vygotsky⁴, Bronfenbrenner⁵ and Rogoff⁶ on child development, this chapter will explore the theory that, rather than being viewed as a ‘generalised, theoretical’ and incompetent child, it should be recognised that each child develops competence in a unique way. Social factors and the extent to which children are supported and assisted to develop, to learn and to participate in their own right, are important determinants in this development. It will be argued that if children are adequately supported by a ‘competent other’ as proposed by Vygotsky, if there is some element of ‘scaffolding’⁷ in the support given to them to assist them to develop this competency, that such competency will enable them to participate effectively and to make informed decisions.

The importance of this issue of capacity to participate and the language of ‘participation’ in addressing the voice of the child in accordance with

² *ibid.*

³ Jean Piaget, Swiss Psychologist (1896-1980).

⁴ Leo Vygotsky, ‘Mastery of memory and thinking’ in Michael Cole, Vera John-Steiner, Sylvia Scribner and Ellen Souberman (eds), *Mind in society: The development of higher psychological processes* (Harvard University Press 1978).

⁵ Urie Bronfenbrenner, ‘Ecological systems theory’ in Ross Vasta (ed), *Six theories of child development: Revised formulations and current issues* (Jessica Kingsley Publishers Ltd 1992) 187-249; Urie Bronfenbrenner, *The ecology of human development: Experiments by nature and design* (Harvard University Press 1979); Urie Bronfenbrenner and Pamela Morris, ‘The ecology of developmental process’ in William Damon & Richard. Lerner (eds), *Handbook of child psychology: Vol. 1 Theoretical models of human development* (5th edn, John Wiley & Sons Inc.1998) 993-1028.

⁶ Barbara Rogoff, *Apprenticeship in thinking: Cognitive development in social context* (Oxford University Press 1990).

⁷ David Wood, Jerome S. Brenner and Gail Ross, ‘The Role of Tutoring in Problem Solving’ (1976) 17 (2) *Journal of Child Psychology and Psychiatry and Allied Disciplines* 89, 90.

Article 12 of the United Nations Convention on the Rights of the Child, will be a recurring theme throughout this thesis and will be examined from a life course perspective beginning with the evolving capacity of the child, into adulthood. This chapter will also lay the foundation for assessing the impact of such capacity on adults' ability to engage effectively in more client centred means of dispute resolution – namely mediation and collaborative practice, at a time of family breakdown or transition (Chapters 3, 4 and 5).

In also providing a theoretical framework for the exploration of alternative methods of dispute resolution in an Irish context, and addressing the research question as to the effectiveness of such processes, chapter 1 will explore the theoretical underpinnings of disputes, the transformation of disputes and the methods which people choose to resolve conflict. Is it the process or the outcome that is important to the disputing party? What is the importance of such theory in informing practice for lawyers, the judiciary, social workers and other professionals who operate within the legal system? And could it, or should it, change how professionals approach and assist separating parties and their children to overcome this period of transition and move on? The theoretical issues underpinning mediation and collaborative practice specifically will be assessed in chapters dealing with each method (chapters 3 and 4 respectively).

Previous research in Ireland indicates that 90% of all family law cases taken on by lawyers settle prior to going to full hearing.⁸ As this thesis will discuss methods used to facilitate settlement, chapter 1 will also explore the theory of negotiation and will address issues such as: what is negotiation, why may parties choose to negotiate rather than litigate and what type of negotiation typically takes place in the cases that settle prior to hearing? Are such negotiations undertaken in a 'competitive' or 'collaborative' environment and to what extent do the lawyers briefed determine the way in which such negotiations take place? Is it possible for one lawyer to take a

⁸ Carol Coulter, 'Family Law Matters' No.1 (1) (Brunswick Press Spring 2007) 24 Available at [http://www.courts.ie/Courts.ie/library3.nsf/\(WebFiles\)/593A30194F32754C802572870041333C/\\$FILE/Family%20Law%20Matters%20-%20Vol.%201%20No.1%202007%20-%20web%20version.pdf](http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/593A30194F32754C802572870041333C/$FILE/Family%20Law%20Matters%20-%20Vol.%201%20No.1%202007%20-%20web%20version.pdf) accessed 4 April 2013.

collaborative approach if his or her opposite number is operating on a competitive basis and what, if anything, is to be gained by clients from the various approaches taken, be it ‘positional’ or ‘interest’ based negotiation?

The chapter will assess the importance of context in terms of the personality traits of clients and their lawyers and the impact of the ‘human factor’ on the process chosen and the results obtained; the need for both the clients and the lawyers involved to maintain an ongoing relationship and how this impacts on the type of negotiations undertaken, and the role, if any, that children play in these negotiations. In addition, the need for such professionals to adopt a reflective practice approach will also be addressed throughout this thesis. Finally, the chapter will examine negotiation in the context of mediation and collaborative practice and will assess what the perceived advantages or disadvantages may be in these alternative, “interest-based”, methods of dispute resolution.

II. What is childhood?

The place of the child within the family, and indeed their role within society has always been an emotive issue. Stone⁹ and Aries¹⁰ for example, propose the theory that childhood did not exist in mediaeval times. Though not asserting that parents did not love and care for their children, in early law children were viewed more as a benefit to families, ‘primarily as agents for the devolution of property within an organized family setting... as furthering the interests of the family group as a whole and over time by maintaining and perhaps extending the family’s land holding.’¹¹

Educating children, therefore, was useful as a means of possibly increasing their father’s role within society but was not undertaken for the benefit of the particular child itself. The welfare of the child was inextricably linked

⁹ Lawrence Stone, *The Family, Sex and Marriage in England 1500-1800* (Abridged edn, Penguin 1990).

¹⁰ Philippe Aries, *Centuries of Childhood* (Jonathan Cape Ltd. 1962).

¹¹ John Eekelaar, ‘The Emergence of Children’s Rights’ (1986) 6 (2) *Oxford Journal of Legal Studies* 161,163.

with the welfare of the father. The father's right as guardian of his child would only be questioned if his actions were likely to have an adverse affect on the society in which he lived. 'The earliest measures for dealing with child neglect were activated solely by concerns about social cohesion rather than the implementation of the children's interests in their own right.'¹² There was some transition throughout the fifteenth and sixteenth centuries when children came to be recognised as a 'significant family member, to be nurtured and protected.'¹³ These changes were first felt amongst the wealthier classes who began to acknowledge the child's place within the family and their need for education but such recognition was limited and not applicable across all class structures. It is perhaps then no wonder that De Mause commented that '[t]he history of childhood is a nightmare from which we have only recently begun to awaken.'¹⁴

Archard¹⁵, in his writings on childhood, argued that there needs to be a distinction between the 'concept' of childhood and the 'conception of childhood'. He describes the concept of childhood as a vision of 'childhood' as being distinct or different from 'adulthood'. Most cultures, he believes will have a concept of what childhood means to them. In examining one's 'conception of childhood' Archard notes that each society will have what he terms 'boundaries', 'dimensions' and 'divisions'. 'Boundaries', Archard proposes, refer to the markers that indicate when childhood typically ends in a particular society. For example, some cultures may determine the end of childhood with perhaps some ceremonial coming of age or an acknowledgment of the person's newly assumed freedoms. The 'dimensions' of childhood, he asserts, reflect a particular society's beliefs. Each society will value certain traits as an indication of maturity. For one society it may be the ability to begin to work, perhaps for another, to start a family, depending on that society's norms. The third element referred to by Archard is that of 'divisions', the divisions, for example, between infancy,

¹² ibid 168.

¹³ Trevor Buck, *International Child Law* (2nd edn, Routledge 2010) 2.

¹⁴ Llyod De Mause, (ed), *The History of Childhood* (Souvenir Press 1976)1-2.

¹⁵ David Archard, *Children: Rights and Childhood* (Routledge 1993).

requiring care and protection, and childhood, and the divisions between children of various ages and stages of development.

Archard was therefore of the belief that all that was necessary was to question what matters most to a society. ‘Is what matters to society that a human can speak, be able to distinguish good from evil, exercise reason, learn and acquire knowledge, fend for oneself, procreate, participate in running society or work alongside its other members?’¹⁶ The answers to these questions, will, he submits, assist us to establish the value that a particular society places on childhood. These difficulties, arguably, continue today in trying to establish how we define boundaries for childhood, who determines the dimensions and where the divisions lie. This can be seen in the distinctions between, for example, the age at which children are deemed capable of being prosecuted for committing crimes,¹⁷ that at which they are deemed eligible to consent to medical treatment¹⁸ and the age at which they are entitled to vote.¹⁹

Under common law, children were largely seen as incompetent and deserving of protection rather than as autonomous human beings. In this vein Verhellen,²⁰ for example, refers to the child as ‘not-yet-being’.²¹ Matthews and Limb similarly described children as ‘adults in waiting’²² and Zinnecker regarded childhood as a ‘moratorium’²³ on adulthood, a period where children prepared for adulthood, where they were protected and, as such, waited out their time until they reached the illusive maturity and wisdom of adulthood.

¹⁶ *ibid* 27.

¹⁷ Section 52 of the Children Act 2001 as amended by Section 129 of the Criminal Justice Act 2006. In October 2006, the age of criminal responsibility was raised from 7 to 12 years of age with the exception that children aged 10 or 11 can be charged with murder, manslaughter, rape or aggravated sexual assault.

¹⁸ Section 23 of the Non Fatal Offences Against the Person Act, 1987 provides that young people of 16 and over may give valid consent to medical, surgical and dental treatment.

¹⁹ In Ireland, 18 years of age.

²⁰ Eugene Verhellen, *Convention on the Rights of the Child. Background, Motivation and Strategies, Main Themes* (Garant Publishers 2000).

²¹ *ibid* 16.

²² Hugh Matthews and Melanie Limb, ‘The Right to Say: The Development of Youth Councils/Forums within the UK’ (1998) 30(1) *Area* 66, 67.

²³ Jurgen Zinnecker, ‘Childhood and Adolescence as Pedagogic Moratoria’, (2000) 46(2) *Zeitschrift Fur. Padagogik* 36–68.

Writers such as Goldstein saw childhood as a period of incompetence, a time when parents should have full authority,²⁴ whereas Rawls, taking a more protectionist rather than an authoritarian approach, felt that children should be protected from ‘the weakness and infirmities of their reason and will in society’.²⁵

Liberationists like Holt and Farson,²⁶ on the other hand, believed that ‘childhood’ was in itself an invention, a means of suppressing children. Children, they believed, should have the same rights as adults and that they should be able to exercise these rights, when and if they wanted in the same way as adults. In many ways these somewhat extreme views did nothing to further children’s rights because of the obvious dangers of ignoring the natural progression of children’s growth in terms of their mental and physical capacities and the implications for, and possible damage to, children’s relationships with their parents and to the family as a whole. However, the views of the liberationists were instrumental in beginning the debate into a children’s right perspective.

The children’s rights movement therefore began as a group opposing the idea of a child as being incompetent and in need of protection. They, assisted by the developments in thinking about the sociology of childhood as espoused by writers such as Freeman²⁷, James et al²⁸ and Mayall²⁹, led to, as Mayall notes, greater respect for children and childhood, but also to a fuller understanding of the wrongs suffered by children.³⁰ As part of the

²⁴Joseph Goldstein, ‘Medical Care for the Child at Risk: On State Supervention of Parental Autonomy’ Faculty Scholarship Series, Paper 2448 (1977) 86 *Yale Law Journal* 645 Available at

http://digitalcommons.law.yale.edu/fss_papers/2448 accessed 4 April 2013.

²⁵ John Rawls, *A Theory of Justice* (Oxford University Press 1971) 462.

²⁶ John Holt, *Escape from Childhood: The Needs and Rights of Children* (E.P Dutton 1975); Richard Evans Farson, *Birthrights* (Macmillan 1978).

²⁷ Michael Freeman, ‘The sociology of childhood and children’s rights’ (1998) 6 *The International Journal of Children’s Rights* 433.

²⁸Alison James and Alan Prout (eds), *Constructing and reconstructing childhood: Contemporary Issues on the Sociological study of childhood* (2nd edn, Falmer press 1997).

²⁹ Berry Mayall, ‘The sociology of childhood in relation to children’s rights’ (2000) 8 *The International Journal of Children’s Rights* 243.

³⁰ *ibid* 248.

‘Negotiating Childhoods’³¹ study carried out in the UK between 1997 and 1999, Mayall interviewed 57 children from multi-ethnic, mixed social class backgrounds and discussed with them their understanding of childhood. He found that children viewed their parents as having ‘ultimate’ responsibility for meeting their needs and had clearly held views that their mothers provided the childcare and their fathers provided the resources.³² They emphasised the importance of relationships with their parents, friends and extended families and viewed ‘interdependence and reciprocity, rather than lonely autonomy, as central values.’³³ Children, he found, do not want to be burdened with adults’ responsibility and:

‘think that they have rights to protection and to provision (and on the whole that their parents meet their rights). They also emphasise their participation rights, but find that these are not always respected. Parents only sometimes, and school staff hardly ever respect their participation rights.’³⁴

Research carried out into the nature of childhood, with particular emphasis on assessing the impact of separation and divorce on children’s development ‘has challenged the idea that children are the passive victims of harmful experiences’,³⁵ and indicates that they are, in fact, ‘social actors with their own views and strategies for active coping within their family and community.’³⁶ Taylor notes that ‘[c]hildhood has now come to be regarded as a part of the human life course that is significant in its own right, not merely as a precursor to adulthood.’³⁷ Such development in the sociology of

³¹ Berry Mayall, ‘Negotiating Childhoods’ (Economic and Social Research Council, 2005) Programme (ref. No. L129 25 1032) Available at <http://www.esrc.ac.uk/my-esrc/grants/L129251032/read>.

³² Mayall, (n 29) 253.

³³ *ibid* 254.

³⁴ *ibid* 255.

³⁵ Nicola Taylor, ‘What do we know about involving children and young people in family law decision making? A research update’ (2006) 20 *Australian Journal of Family Law* 156.

³⁶ *ibid*.

³⁷ *ibid* 157.

childhood has radically altered the conception of childhood where children are now recognised ‘as human beings rather than as human becomings.’³⁸

III. The Competence of the Child

The psychologist Piaget³⁹ was the first to examine the issue of the cognitive or psychological development of the child. His work is important in that it formed the basis for much of the developmental psychology that has influenced legal thinking as to children’s competence. He was the first to recognise and to acknowledge the differences between children’s brains and adult brains and to examine the thought process for children and how it developed and matured. Piaget set out what he believed were the stages of cognitive development as follows:

1. The ‘sensorimotor stage’: Up until the age of two, a baby’s intelligence is mediated by their sensory and motor systems; thus the child understands the world through senses and actions.
2. The ‘preoperational stage’: Between the ages of 2-7 the child begins to develop language and mental images.
3. The ‘concrete operational’ stage: Between 7 and 12 children begin to understand concrete situations. The present and actual is understood, the possible can be imagined and children can engage in logical thinking.
4. The ‘formal operational’ stage: From the age of 12 upwards children can engage in hypothetical and abstract thinking and scientific reasoning.⁴⁰

He believed that all children had to go through these four stages of development and that children could only progress from one stage to

³⁸ Jens Qvortrup, ‘An introduction’ in Jens Qvortrup, Marjatta Bardy, Giovanni Sgritta and Helmut Wintersberger (eds), *Childhood matters: Social theory, practice and politics* (Avebury Press 1994) 4.

³⁹ Swiss Psychologist, Jean Piaget (1896-1980). Jean Piaget, *The Child’s Conception of Number* (Routledge Kegan and Paul Ltd.(trs) 1952); Jean Piaget, *The Child’s Conception of Movement and Speed* (Routledge Kegan and Paul Ltd.(trs) 1970); Jean Piaget and B. Inhelder, *The Child’s Conception of Space* (Routledge Kegan and Paul Ltd.(trs) 1956).

⁴⁰ For Piaget there were several steps within each stage. For example, in the sensorimotor stage he believed that babies go through 6 phases of development alone. For a full analysis of Piaget’s theories see Margaret A. Boden, *Piaget* (2nd edn, Fontana 1994).

another when they had reached the required levels of maturity. Children therefore, according to Piaget, begin the process as irrational, immature and egocentric and through their own personal internal development they gradually begin to progress through these stages until they are capable of rational thought. He proposed the theory that children “assimilate” information by absorbing new encounters. Through the thought process they then “accommodate” this information in how they make sense of what they have assimilated to reach what, he defined, as “equilibrium”.

Piaget therefore believed that the individual child needs to develop his or her own cognitive skills before they can interact with society. He viewed such development as an intensely personal experience and he saw no role for teaching. However, Piaget’s theory and empirical studies have been questioned,⁴¹ as he provides no indication or explanation as to why children develop in these pre-determined stages; nor does his theory take account of the fact that some individuals may proceed faster through these stages than others.

Vygotsky⁴², as a socioculturalist, had quite a different view. He saw children’s development as being deeply influenced by the social context in which the children are reared. Rather than societal influences being secondary to the child’s individual development as suggested by Piaget, Vygotsky believed that children’s development is interwoven through the ‘elementary processes, which are of biological origin ... and the higher psychological functions of sociocultural origin.’⁴³ He believed that ‘[e]very function in the child’s cultural development appears twice: first, on the social level, and later, on the individual level: first, between people (interpsychological) and then inside the child (intrapsychological).’⁴⁴ Vygotsky placed an importance on language and communication with others

⁴¹Margaret Donaldson, *Children’s Minds* (Fontana 1978); John Morss, ‘After Piaget: Rethinking “cognitive development”’ in John Morss and T. Linzey (eds) *Growing up: The Politics of Human Learning* (Longman 1991).

⁴² Lev S. Vygotsky, ‘Mastery of memory and thinking’ in Martin Cole, Vera John-Steiner, Sylvia Scribner & Ellen Souberman (eds), *Mind in society: The development of higher psychological processes* (Harvard University Press 1978).

⁴³ibid 46.

⁴⁴ibid 57.

as a means of assisting children's understanding and development. As noted by Tharp and Gallimore '[w]hat is spoken to the child is later said by the child to the self, and later is abbreviated and transformed into the silent speech of the child's thought.'⁴⁵

Additionally, Vygotsky believed that it was wrong to determine a child's intelligence merely by examining the child as it was at a particular point in time, that it was also necessary to look at the potential that that child had to develop. He referred to this as the 'zone of proximate development'⁴⁶ and pointed to the difference between what a child could achieve on its own as compared to what it could achieve with assistance from a more capable peer or adult. Unlike Piaget, he believed that learning was essential for development.⁴⁷

This theory of the assistance that can be given to a child by a 'more competent other' was developed further by Wood, Bruner and Ross⁴⁸. They referred to the importance of 'a "scaffolding" process that enables a child or novice to solve a problem, carry out a task or achieve a goal which would be beyond his unassisted efforts'⁴⁹. This scaffolding allows that child to do as much as possible by him or herself and then to receive assistance for what they are unable to do from someone with the expertise that they require. As the child develops competence in the area, the scaffolding is gradually removed.

Rogoff has described this connection between the teacher and the student as 'the mutual understanding that is achieved between people in communication.'⁵⁰ She sees this development as occurring between the teacher and the student rather than to either the teacher or to the student, and also occurring in many different directions, influenced by a society's

⁴⁵ Roland G. Tharp and Ronald Gallimore, *Rousing minds to life: Teaching, learning and schooling in social context* (Cambridge University Press 1988) 44.

⁴⁶ Vygotsky, (n 42) 86.

⁴⁷ *ibid.*

⁴⁸ David Wood, Jerome S. Brenner and Gail Ross, 'The role of tutoring in problem solving' (1976) 17 (2) *Journal of Child Psychology and Psychiatry and Allied Disciplines* 89.

⁴⁹ *ibid.* 90.

⁵⁰ Barbara Rogoff, *Apprenticeship in thinking: Cognitive development in social context* (Oxford University Press 1990) 67.

cultural and other beliefs at any particular point in time. Rogoff goes on to describe the benefits therefore of periods of apprenticeship to a teacher or expert in the area, observing and learning. She refers to ‘guided participation’, helping to show children how to participate and ‘participatory participation’ where children’s participation in activities with others enhances their ability to begin to participate fully themselves.⁵¹

With colleagues Matusov and White, Rogoff ⁵² referred to the models of participation as being adult run, where children are given instruction and advice from adults; child run where students, in Piagean style, acquire the knowledge for themselves without the assistance of an adult; and the community of learners approach where:

‘Children and adults collaborate in learning endeavors (sic); adults are often responsible for guiding the process and children also learn to participate in the management of their own learning.’⁵³

Finally, Bronfenbrenner, in examining the role of childhood, has referred to our need to take the child’s ecology into account.⁵⁴ Again this follows on from the sociocultural influence of looking at your immediate environment. Children are naturally influenced by the environment in which they live and their relationship with their families. Additionally, he examines the impact of time on the macro-system in which children live. Time results in

⁵¹ *ibid.*

⁵² Barbara Rogoff, Eugene Matusov and Cynthia White, ‘Models of teaching and learning: Participation in a community of learners’ in David Olson and Nancy Torrance (eds), *The handbook of education and human development* (Blackwell Publishers 1996).

⁵³ *ibid* 396.

⁵⁴ Urie Bronfenbrenner, ‘Ecological systems theory’ in Ross Vasta (ed), *Six theories of child development: Revised formulations and current issues* (Jessica Kingsley Publishers Ltd 1992) 201. Bronfenbrenner describes the microsystem as the child’s immediate environment, relationship with family, his or her relationship with school; the mecosystem taking account of the relationships between the elements of child’s environment, e.g. home and school combined; the child’s exosystem he describes as incorporating the child’s relationship with another aspect that they may not be directly involved in but that influences his or her life, e.g. their parents’ relationship with their work environment. A parent, having difficulties at work or losing a job will impact on the child’s environment. In the context of this thesis, a parent’s interaction with the family law courts may impact on a child though they may not be directly involved. Bronfenbrenner refers to these various systems together as the macrosystem, or society’s plan.

‘developmental changes triggered by life events or experiences’⁵⁵ which may be either normative changes like taking up employment or a marriage, or non-normative in the case perhaps of an untimely death or a divorce.⁵⁶ Babb describes this approach as ‘a life course perspective on the study of families and children.’⁵⁷ These changes that occur over time will have obvious effects on the child and their development. A child’s views therefore need to be ascertained based on the particular circumstances in which they find themselves and the experiences they have lived through.

In his more recent work, Bronfenbrenner acknowledged the need for Piagetian style recognition of the individual person and Vygotskian appreciation of the child’s societal experiences as he attempted to come full circle to join both of these views in a complete understanding of the person and their interaction with their environment.⁵⁸ Bronfenbrenner believed that:

‘... the capacity of a dyad⁵⁹ to serve as an effective context for human development is crucially dependent on the presence and participation of third parties, such as spouses, relatives, friends, and neighbours. If such third parties are absent, or if they play a disruptive rather than a supportive role, the developmental process, considered as a system, breaks down; like a three-legged stool, it is more easily upset if one leg is broken, or shorter than the others.’⁶⁰

“Disruptive” roles or events therefore, in the context of the issues being examined in this thesis – conflict in family law matters and how these issues are addressed by the significant “third parties” in children’s lives, namely their parents, and perhaps extended family - may have long term effects on a

⁵⁵ *ibid* 201.

⁵⁶ Urie Bronfenbrenner, ‘Ecological Methods of human development’ in Torsten Husen and T.N Postlethwaite (eds), *The International Encyclopaedia of Education* (2nd edn, Pergamon 1994) 1646.

⁵⁷ Barbara A. Babb, ‘An Interdisciplinary Approach to Family Law Jurisprudence: Application of an ecological and therapeutic perspective’ (1997) 72 (3) *Indiana Law Journal* 775,792.

⁵⁸ Urie Bronfenbrenner and P.A Morris, ‘The ecology of developmental process’ in William Damon and Richard M. Lerner (eds), *Handbook of child psychology: Vol. 1: Theoretical models of human development* (5th edn, John Wiley & Sons Inc.1998) 993-1028.

⁵⁹ The mother-child or father-child relationship.

⁶⁰ Urie Bronfenbrenner, *The ecology of human development: Experiments by nature and design* (Harvard University Press 1979) 5.

child's development if a child is not supported and assisted through inclusion and participation.

Crucial to this maturation and development is an acknowledgement of the importance of the psychological welfare of the child at a time of such disruption. Howe notes that '[t]here is ...no hard boundary between the mental condition of individuals and the social environments in which they find themselves'.⁶¹ Bowlby was one of the first to note the importance of the attachment of a child to his or her main caregiver.⁶² An interruption of this care or attachment can cause children much upset and distress. This was not just a physical sense of being close but also feeling that they were close psychologically. Bowlby noted that immediately after such interruption children suffer anxiety, then a period of grief and finally a sense of detachment as a defensive mechanism to protect themselves from the psychological pain of such loss. Children who do not form secure attachments or who have these attachments severed may, he believed, suffer long term difficulties throughout their lives in their ability to form relationships with others and in how they cope with the issues they face in their own lives. 'Attachment theory, then, is a theory of personality development' and is a 'powerful perspective on socio-emotional development across the lifespan.'⁶³ While it is beyond the remit of this thesis to explore this area of attachment theory in detail⁶⁴, it is important to recognise and appreciate the impact of such theory and to recognise its significance when ascertaining the views of the young adults presented in chapter 6.

Socioculturalists have shown that, with guidance, children can participate and '[t]he onus is now on the adult to understand, support, have positive

⁶¹ David Howe, Marian Brandon, Diane Hinings and Gillian Schofield, *Attachment Theory, Child Maltreatment and Family Support: A Practice and Assessment Model* (Palgrave Macmillan 1999) 9.

⁶² Jonathan Bowlby, *Maternal Care and Mental Health*, World Health Organization Monograph (Serial No.2) (World Health Organization 1951).

⁶³ *ibid* 14.

⁶⁴ For more on Attachment Theory see Howe (n 61).

expectations, and, when appropriate, guide and assist the child...⁶⁵. It is now up to parents and the legal system to adapt to facilitate participation.

IV. Participation – Welfare v Rights

If it is accepted that children have the capacity to participate in decision-making either with assistance from a “competent other” or in their own right, nonetheless ‘[t]he extent to which children are involved in any real sense, however, depends on a number of factors; not least the extent to which the adults involved, and particularly the parents, allow this to happen.’⁶⁶ Social policy in relation to children has therefore been either welfarist – thereby seeking to protect vulnerable members of society, who are considered in need of guidance and control, or rights based, seeking to support children’s own participation in decision making based on children having rights that can be asserted morally and legally. This debate as to whether children should operate from a rights basis, and if so, what rights they should have and who should assist them in enforcing those rights has had equally strong opposition from the supporters of the welfarist approach, that children should be protected from adult concerns.

Those taking a welfarist⁶⁷ approach, not accepting the need for, or benefit of, children’s participation, refer to the dangers of children being manipulated by adults. Thus, it is alleged, children, by participating, are only promoting the agenda of whatever parent has sought to influence them and that such pressure can cause children to feel anxious and have a conflicted sense of loyalty to their parents⁶⁸. In addition, the fear that the other parent’s due process rights may be adversely affected is something

⁶⁵ Taylor, ‘What do we know about involving children and young people in family law decision making ? A research update’ (n 35) 160.

⁶⁶ Judy Cashmore and Patrick Parkinson, ‘Children’s participation in family law disputes. The Views of Children, Parents and Counsellors’ (2009) 82 *Family Matters* 16.

⁶⁷ Martin Guggenheim, ‘*What’s wrong with children’s rights*’ (Harvard University Press 2007).

⁶⁸ Fiona Garwood, ‘Children in Conciliation: The Experiment of Involving Children in Conciliation (1990) 28 *Family and Conciliation Court Review* 43,49. See also Robert Emery, ‘Children’s Voices: Listening – and Deciding – is an Adult Responsibility’ (2003) 45 (3) *Arizona Law Review* 621.

that must be considered where there is a danger that such manipulation may occur.⁶⁹ Warshak cautions that children's wishes must be accompanied by an understanding of the context in which those wishes are expressed.⁷⁰ Some children will have a much greater insight into life coming perhaps from a background where there has been a sense of inclusion whereas other children, having lived a more sheltered life may, express quite different views. Another factor often referred to in the debate regarding participation is the ability of the parents to accept or understand the input from the children; are they too entrenched in their own battle to make effective use of what they are being told and will some parents despite this, continue to act as before? If, through such inability to understand or to act upon the feedback given from their children, parents continue on a path that the children view as contrary to their wishes or that fails to take their views into account, can this have a deleterious effect on the child's welfare or do children understand the difference between being consulted for their opinions and ultimately making the final decision? This is of relevance to the position of children in family disputes and breakdown situations, which is at the heart of this thesis.

Those taking a rights-based approach, such as Freeman, note that:

'Rights ... offer a fora[sic]. Without rights the excluded can make requests, they can beg or implore, they can be troublesome; they can rely on, what has been called, noblesse oblige, or on others being charitable, generous, kind, cooperative or even intelligently foresighted. But they cannot demand, for there is no entitlement.'⁷¹

Federle⁷² similarly places value on rights as a means of gaining power and with that power, she asserts, comes respect and the opportunity to be taken seriously, to make one's views known thereby reducing the chances of

⁶⁹ Martin Guggenheim, 'Maximising Strategies for Pressurizing Adults to do Right by Children' (2003) 45 (3) *Arizona Law Review* 765.

⁷⁰ Richard A. Warshak, 'Payoffs and Pitfalls of Listening to Children' (2003) 52 (4) *Family Relations* 373.

⁷¹ Michael Freeman, 'Why it remains important to take children's rights seriously' (2007) 15 *International Journal of Children's Rights* 5, 9.

⁷² Katherine Federle, 'Rights Flow Downhill' (1994) 2 (4) *International Journal of Children's Rights* 343.

being victimised. However, the idea that children have rights is not something that has been accepted with uniformity. Rights such as the right to life, care and protection are easily accepted but issues arise when we look at children's rights to participate or engage in any actions which may be seen as a threat to the rights of their parents. Questions arise as to whether children can be rights holders at all if they are, perhaps, too young or immature to exercise these rights. Does having a right mean that you have to have 'the capacity to obligate others'⁷³? Raz has defined a right by noting that a 'law creates a right if it is based on and expresses the view that someone has an interest which is sufficient ground for holding another to be subject to a duty.'⁷⁴

Eekelaar's approach to this issue was that if a child has an interest that is in need of protection, they have a moral right and therefore a legal right. He believes that children's interests fall in to three main categories: **basic**, their basic needs for physical and emotional care and general well being; **developmental**, the ability to develop within the community, to be educated and to be supported by society; and **autonomy**, their need to be able to determine matters for themselves, to have freedom to chose their own lifestyles uncontrolled by the adult world. If there is a conflict between these three interests, the basic interests should prevail. Eekelaar also proposed the theory of 'dynamic self-determinism',⁷⁵ that children should be given flexibility and to allow them to explore various choices giving them an increased role in making decisions as they grow up.⁷⁶ Complementing this he also examined the idea of the modified 'least detrimental alternative'⁷⁷, a theory which involves finding a solution that causes the least damage to the

⁷³ Immanuel Kant, *The Philosophy of Law* (William Hastie tr. 1887) 114.

⁷⁴ Joseph Raz, 'Multiculturalism: A liberal perspective' (1994) *Dissent* 67.

⁷⁵ John Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' (1994) 8 *International Journal of Law and the Family* 42.

⁷⁶ Herring notes that the best way to test this theory of 'dynamic self determinism' is to ask adults to look back on their childhood and to advise as to how they would like to have been raised. This will be addressed further in the views of the young adults interviewed as part of the research undertaken for this thesis (Chapter 6) Jonathan Herring, *Family Law* (5th edn, Pearson Education Limited 2011) 437.

⁷⁷ Joseph Goldstein, Anna Freud and Albert .J Solnit, *Beyond the Best Interests of the Child* (The Free Press 1973).

well-being of the parents or the children.⁷⁸ Solutions, Eekelaar believes, should be chosen that try to balance the interests of the parties. However, he added the proviso that ‘no solution should be adopted where the detriments outweigh the benefits for the child, unless that would be the result of *any* available option, so that it is unavoidable’.⁷⁹

Bainham⁸⁰ is of the view that both parents’ and children’s interests should be categorised in to what is considered their primary and secondary interests. When a conflict arises therefore, a child’s secondary interests would be less important than a parent’s primary interest and likewise a parent’s secondary interest would be less important than a child’s primary interest. Additionally, the court when assessing a case should look at the ‘collective family interest’. All of these interests therefore would have to be weighed against each other and any one individual’s interests would have to be assessed against what may be considered as the entire family interests. Meanwhile, Bevan⁸¹ categorised rights simply into two elements, protective and self assertive. However, as noted earlier, society is more willing to acknowledge children’s protective rights rather than their self assertive rights.

‘From a legal perspective, it is undeniable that the rights approach is one that is advocated and supported by international law - particularly the Convention on the Rights of the Child...’⁸². The United Nations Convention on the Rights of the Child (UNCRC), described by Jupp as a ‘landmark in a century long struggle for social reform’⁸³, promotes the idea of the competent child and under article 12, provides children with a specific right to participate. Article 12 of the UNCRC provides that:

⁷⁸ John Eekelaar, ‘Beyond the Welfare Principle’ (2002) 14 *Child and Family Law Quarterly* 237, 244.

⁷⁹ *ibid.*

⁸⁰ Andrew Bainham, ‘Honour Thy Father and Thy Mother: Children’s Rights and Children’s Duties’ in Gillian Douglas and Leslie Sebba (eds) *Children’s Rights and Traditional Values* (Aldershot 1998c).

⁸¹ Hugh Bevan, *The Law Relating to Children* (Butterworths 1989).

⁸² Ursula Kilkelly, *Children’s Rights in Ireland Law, Policy and Practice* (Tottel publishing 2008)11.

⁸³ Michael Jupp, ‘The UN Convention on the Rights of the Child: An Opportunity for Advocates’ (1990) 12 (1) *Human Rights Quarterly* 130, 131.

‘1. States 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 national law.’

It is clear under Article 5 of the Convention that:

‘parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention.’⁸⁴

The Convention under Articles 5 and 9⁸⁵ obligates States to support parents in their duties and responsibilities towards their children and acknowledges

⁸⁴ Article 5 <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

⁸⁵ Article 9(1). States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

the importance of parents in the child's life, such that a child should not be separated from the parents unless it is in the child's best interests.

In addition, Article 18 (1) specifies:

‘States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.’

Parents are therefore afforded a position of responsibility under the UNCRC, and such responsibility extends to protecting the rights of their children.

V. Feminist Perspective

Feminists, however, argue that a purely rights-based model ignores the relational nature of the parties. The rights approach or the ‘ethic of rights’, they believe, is based on an ‘ethic of justice’⁸⁶, framed by rules and arguably a somewhat impersonal approach. Kiss, for example, sees the rights perspective as ‘overly abstract and impersonal and for reflecting and endorsing a selfish and atomistic vision of human nature and an excessively conflictual view of social life.’⁸⁷ Smart and Neale, examining some of the guiding principles in law, refer, for example, to the fact that contact is championed as the right of the child to see both of his or her parents. However, a court, by imposing:

‘a contact order on an unwilling child in the *long run*, seems to want to have its cake and eat it. If contact is the right of the child, so is no contact. If the child chooses to exercise his/her rights, it is an abuse

⁸⁶ Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press 1982).

⁸⁷ Elizabeth Kiss, ‘Alchemy of Fool's Gold? Assessing Feminist Doubts About Rights’ in Mary Lyndon Shanley and Uma Narayan (eds) *Reconstructing Political Theory: Feminist Perspective* (University of Pennsylvania State University Press 1997) 2.

of the court's power to insist that they can only be exercised in one direction because the court actually knows what is best already. Treated this way, the notion that contact is the right of the child does not empower the child but only the court in the pursuit of an ideal about the benefits of contact.'⁸⁸

Minow similarly see the rights perspective as lacking, again favouring a more relational model and the need for adults to be able to assist children to develop through their relationships with adults.⁸⁹ Nedelsky agrees that some of peoples' most essential characteristics, such as their capacity for language and the conceptual framework through which they see the world, are developed through their interactions with others.⁹⁰ By promoting a rights agenda, many feminists believe that society runs the risk of children being controlled by adults who are only concerned with their own agendas. Kelly believes that '[t]his is particularly pertinent in family law, where the language of children's rights is common but the voices of children are largely absent, and where most of the "rights of the child" are necessarily exercised by adults'⁹¹. She goes on to say that '[t]he goal of autonomy need not be abandoned, but it must be joined with the goal of affiliation.'⁹²

Carol Gilligan points to the problem of presuming that there is only one path to moral development through the ethic of justice. Instead, she promotes an 'ethic of care'⁹³. Gilligan notes that there are three main criteria to the ethic of care. This first element is that of relationships; the second is the principle of actuality, examining the actual circumstances of that child's life; and the third element is the activity of care and who actually provides the care on a day to day basis. She notes that:

⁸⁸ Carol Smart and Bren Neale, *Family Fragments?* (Cambridge Polity Press 1999) 189-190.

⁸⁹ Martha Minow, 'Interpreting Rights: An Essay for Robert Cover' (1987) 96 *Yale Law Journal* 1860, 1910

⁹⁰ Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) *Yale Journal of Law and Feminism* 1,7.

⁹¹ Fiona Kelly, 'Conceptualising the child through an 'ethic of care': lessons for family law' (2005) 1 (4) *International Journal of Law in Context*, 375, 384.

⁹² *ibid* 385.

⁹³ Gilligan, (n 86).

‘[in] a care ethics perspective, government should see as its primary task enabling men to build intimate and caring relationships with women and children, by making it possible in terms of time, space and material resources. This would imply that a more satisfactory distribution of labour and care between men and women would be a political priority. When care is re-evaluated and freed from its gender-load and its associations with sexual difference, it also becomes a less daunting more attractive proposition for men to identify with care and to adopt a caring identity.’⁹⁴

Interestingly, in a study carried out by Smart and her colleagues on children and divorce, she found that children of ‘both sexes spoke the language of care’.⁹⁵ Smart, Neale and Wade concluded that ‘children conceptualize (sic) family very much in terms of their relationships rather than structures, and that relations of care and respect assume rather more significance for them than the particular shape and size of their family.’⁹⁶

Kelly, in supporting Gilligan’s view, notes that:

‘[t]he principle of actuality also necessarily provides that children have a voice in decision-making about their lives. If our conceptualisation of the child is grounded in the practical realities of a child’s life then we must talk and listen to children. This does not mean that the perspectives of adults are irrelevant; they are just no longer the exclusive source of information about the children in their care. This de-centering of adults in an ethic of care’s conceptualisation of the child also makes it more difficult for adults to appropriate the rhetoric surrounding children’s rights and children’s vulnerability for their own political goals.’⁹⁷

⁹⁴ Selma Sevenhuijsen, *Citizenship and The Ethics of Care: Feminist Considerations on Justice, Morality and Politics* (Routledge 1998) 111.

⁹⁵ Kelly, (n 91) 386 citing the work of Carol Smart, Bren Neale and Allison Wade, *The Changing Experience of Childhood: Families and Divorce* (Cambridge Polity Press 2001).

⁹⁶ Carol Smart, Bren Neale and Allison Wade, *The Changing Experience of Childhood: Families and Divorce* (Cambridge Polity Press 2001) 65.

⁹⁷ Kelly, (n 91) 391.

How do these two ethical principles of care and rights work together? Can it be a situation where you either take one approach or the other, or is it - as proposed by Joy Kroeger-Mappes - a case that these 'two ethics are part of one system, the ethic of care functioning as a necessary base for the ethic of rights'?'⁹⁸ For instance, court orders (rights ethic), though arguably a blunt instrument in seeking to regulate contact, may help parents and their children to develop and maintain their relationship (care ethic). This was evident from the interviews carried out for this thesis with young adults, who indicated that while they were annoyed at the time with the judge's decision to order contact, it did in fact help to maintain their relationship with their non-resident parent and that it is something for which they are now grateful.⁹⁹

VI. Participation in the Context of their Parents' Separation and Divorce

Studies carried out by Cashmore and Parkinson indicate that children wish to be 'active participants' post separation or divorce and that children understand the difference between providing input into decision making and making the final decision.¹⁰⁰ Children, by participating, are thereby helped or empowered to adapt to their new family configuration. Kaganas and Diduck¹⁰¹ refer to the "good" post-separation child not simply as a victim but as one who has a responsibility and a role to play in shaping the post separation family. This, they believe, can enhance children's self esteem, give them a sense of control over their fate, and ultimately enhance their resiliency.¹⁰² Writers such as Kaltenborn¹⁰³ and Taylor¹⁰⁴ also challenge the earlier assertions in relation to children's competence and embrace the

⁹⁸Joy Kroeger-Mappes, 'The Ethics of Care – *vis a vis* the Ethic of Rights: A Problem for Contemporary Moral Theory' 9 (3) *Hypatia* 108.

⁹⁹ See chapter 6.

¹⁰⁰Judy Cashmore and Patrick Parkinson, 'Children's participation in family law disputes: The views of children, parents, lawyers and counsellors' (2009) 82 *Family Matters* 15.

¹⁰¹ Felicity Kaganas and Alison Diduck, 'Incomplete citizens: Changing Images of Post-Separation Children' (2004) 67 (6) *Modern Law Review* 959.

¹⁰² *ibid* 980-981.

¹⁰³ Karl-Franz Kaltenborn, 'Individualization, family transitions and children's agency' (2001) 8 (4) *Childhood* 463-498. See also Nicola Taylor, 'What do we know about involving children and young people in family law decision making? A research update' (2006) 20 *Australian Journal of Family Law* 154.

¹⁰⁴ Taylor, (n 35).

Vygotskian approach that much depends on the support they receive and the way legal and administrative systems are structured to enable them to participate effectively. For those who believe that children should participate, the most commonly referred to rationales for this belief are those of enlightenment and empowerment.¹⁰⁵ Warshak, for example, notes that it is this enlightenment and empowerment that children value more than actual decision-making.¹⁰⁶

The enlightenment rationale points out that children can, when consulted, provide important information to adults that the adults may need in order to make informed decisions about how the conflict is impacting on the children and how to restructure the family. All too often, parents will think that children are coping well and that they are blissfully unaware of what is happening within their now fragmented family unit. This failure by parents to appreciate the impact of the separation on the children may, as Goldson asserts, ‘inadvertently add to their children’s stress.’¹⁰⁷ This is evident in the interviews carried out for this thesis, which will be detailed in future chapters.¹⁰⁸ Information that parents receive from their children can also have a transformative effect on reducing the conflict between the parents with the realisation of the wider implications of their actions for the family as whole.

In addition, participation can help children to feel empowered. By having some input, children may be better able to accept the decisions that the adults ultimately make once they are aware that their views were considered and they are given feedback as to how the final decision was reached. Hart¹⁰⁹ in discussing the issue of participation refers to the various levels of

¹⁰⁵ Warshak, (n 70).

¹⁰⁶ *ibid.*

¹⁰⁷ Jill Goldson, ‘Hello I’m A Voice, Let me Talk; Child Inclusive Mediation in Family Separation’ (2006) *Centre for Child and Family Policy Research* 6.

¹⁰⁸ See chapters 5 and 6.

¹⁰⁹ R.A. Hart, ‘Children’s participation; From tokenism to citizenship’, Innocenti. Essay no.4 1992 (UNICEF Innocenti Research Centre, Florence) 5. Other models of participation have been developed: Treseder focused mainly on advising organisations on how to include child participation, Shier’s ‘Pathways to Participation’ acknowledged the importance of not making it compulsory for a child to participate and in developing a five level model which moved from just listening to the child at level one to taking the child’s views into account

participation as rungs on a ladder. The lower levels, manipulation, decoration and tokenism are merely platitudes of participation and ultimately serve no purpose other than perhaps to frustrate children more, purporting to give children a voice but giving them little or no opportunity to express their views. For participation to be effective, it must be facilitated properly. On the upper rungs of Hart's ladder, children are consulted and informed, leading ultimately to the highest level, child initiated shared decision with adults. He points out that children 'need to be involved in meaningful projects with adults. It is unrealistic to expect them suddenly to become responsible, participatory adult citizens at the age of 16, 18 or 21 without prior exposure to the skills and responsibilities involved.'¹¹⁰

It also has to be acknowledged that many children may not want to actually participate or contribute their views and this decision must also be respected. Even where this is so, Raitt refers to the importance of inclusion, noting that:

'A sense of inclusion provides a child with more choices than just using his or her voice. It permits the child who is unwilling or unable to express a view to be kept informed, always able to observe the decisions being taken about their life even if they elect or feel forced in to silence. Provided inclusion is conducted in a way that respects a child's individuality and accords a child dignity, it is purposive and has a value.'¹¹¹

Taylor refers to the importance of parents realising that '[c]hildren are not a homogenous group.'¹¹² Every child deserves to be respected.

at level 3, to adults sharing power with the children at level 5. Most recently, Lundy developed a model of participation which involves four elements 1. Space – an opportunity to express a view, 2. Voice – must be facilitated to express a view, 3. Audience – children must be listened to and 4. Influence – the view must be acted upon as appropriate. For more see Aisling Parkes, *Children and International Human Rights Law: The Right of the Child to be Heard* (Routledge 2013) 16-26.

¹¹⁰ *ibid* Hart.

¹¹¹ Fiona Raitt, 'Hearing Children in family law proceedings, can Judges make a difference?' (2007) *Child and Family Law Quarterly* 204, 218.

¹¹² Taylor, (n 35) 170.

But what are the long-term consequences of such capacity to participate? How will this skill to participate, if developed, assist children in later life? Buck argues that ‘...the airing of a child’s views is good practice for more central participation in decision-making to be undertaken later on in adulthood’.¹¹³ The capacity to participate is an essential trait to be fostered. Children who perhaps may have been over protected or discouraged from making decisions or expressing opinions of their own may find it difficult, as adults, to engage in debate and to see issues from another point of view. Hart notes that ‘[a]n understanding of democratic participation and the confidence and competence to participate can only be acquired gradually through practice; it cannot be taught as an abstraction.’¹¹⁴ This ability to engage is essential if parties, who subsequently find themselves in situations of conflict in their own lives, are to develop the capacity to work through problems together rather than, perhaps, continue the cycle of conflict by taking a positional stance. Taylor notes that:

‘Participatory processes and the role of professionals in scaffolding children’s understanding through collaborative partnerships, characterised by reciprocity and warmth, offer new opportunities to improve child and family functioning and the quality of the decisions made.’¹¹⁵

VII. Disputes

Examining this issue of participation from a life course perspective therefore it is evident that increased involvement in understanding and contributing to issues being discussed while a child, with the assistance of adults, if necessary, should increase one’s level of competence in resolving issues that may occur in later life. Felsteiner, Abel and Sarat (when commenting on disputes generally) note that the way individuals deal with disputes may be ‘a function of personality as it interacts with prior

¹¹³ Buck, (n 13) 32.

¹¹⁴ R.A. Hart, ‘Children’s participation; From tokenism to citizenship’ (n 109) 5.

¹¹⁵ Taylor, (n 35) 178.

experience and current pressures'.¹¹⁶ The extent to which individuals perceive conflict and how they behave during a separation or divorce may depend on the extent to which they have been encouraged to participate, their level of education and social variables with regard to their gender, age, class or ethnicity. Attachment theory, as mentioned earlier¹¹⁷ and other factors including a person's 'risk preference, conscientiousness, and feelings about personal efficacy, privacy, independence, and attachment to justice (rule-mindedness)¹¹⁸ may also determine the way they approach other difficulties that may arise in their lives.

Many people have a certain "grievance apathy"¹¹⁹ in that they choose to perhaps let an issue go rather than transform it into a dispute. Felstiner, Abel and Sarat refer to the process of dispute transformation whereby an "experience", something that causes conflict develops into a "grievance" and how this grievance, if not addressed, in turn becomes a dispute. For a dispute to materialise Felstiner, Abel and Sarat refer to the necessity for the "naming" of the wrong alleged to have been suffered in that the aggrieved person acknowledges the issue by telling someone about it, "blaming" thereby attributing blame to the person or organisation believed to have caused or contributed to the wrong and if this complaint is not dealt with, "claiming" in making a claim for the wrong suffered. However, this dispute transformation process is further complicated by the fact that disputes are subjective, unstable in that they transform over time and reactive in terms of the response of the individual to the rejection of their claim. Crucial in the way a dispute may progress is the impact of third parties with whom the aggrieved person may come in contact. If for, example, the person with whom they choose to discuss the grievance has a calming effect, then the disputant may choose to seek peaceful means of resolving the issue; however, if the disputant speaks to someone who takes an adversarial

¹¹⁶ William Felstiner, Richard Abel and Austin Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...' (1980-1981) 15 (3-4) *Law and Society Review* 631, 640.

¹¹⁷ The extent to which children form secure attachments with their primary caregiver. See Howe (n 61); Bowlby (n 62).

¹¹⁸ Felstiner et al (n 116) 640.

¹¹⁹ *ibid* 636.

approach, the disputant may become more likely to wish to fight his or her case.

Lawyers, as persons consulted in these types of situations, can therefore have a significant influence on how a dispute will progress. For many disputants, the person upon whom they attribute blame will have a strong case to answer and it is important that lawyers are there to ensure that their demands are met and that their rights are protected. Writers such as Fiss argue that justice can only be done through the courts and that any type of settlement or compromise reached through negotiations or less adversarial methods of dispute resolution are ‘a poor substitute for judgement’.¹²⁰ He is of the view that all such disputes require the ‘thorough presentation promised by the adversary system’¹²¹ and that ‘when a party settles, society gets less than what appears, and for a price it does not know it is paying’.¹²² For Fiss, any form of settlement or private negotiation of a dispute raises questions with regard to the equal bargaining power of the parties whereas the judicial system ‘knowingly struggles against those inequalities’¹²³ and a judge can ‘supplement the parties’ presentations by asking questions, calling his own witnesses, and inviting other persons and institutions to participate as amici’¹²⁴. This, however, is unlikely to happen within an Irish family law system where only ten per cent of cases are actually heard before the court and in many cases judges want the issues to be narrowed by counsel before the hearing rather than engage in a full investigation of the case. In many cases, judges come from backgrounds which are removed from that of the parties over which they adjudicate and therefore may not have an awareness of the ecological perspective within which the dispute is framed.

Legal systems have traditionally regarded their role as one of resolving disputes, viewing them as issues that have happened at perhaps a fixed point of time in the past. However, examining this issue from a transformation perspective one notes that the dispute itself also transforms over time, issues

¹²⁰ Owen Fiss, ‘Against Settlement’ (1986) 93 (6) *Yale Law Journal* 1073.

¹²¹ *ibid* 1082.

¹²² *ibid* 1085.

¹²³ *ibid* 1078.

¹²⁴ *ibid* 1077.

that were of importance to a client at the time the dispute was initiated may be less important at the time the matter is actually heard before the court. Thus the practice of narrowing the issues between the parties often undergone before a trial may be unhelpful if parties choose to try to negotiate settlement.

VIII. Negotiation theory

Life is a series of negotiations. Therefore even though a person may be intimidated at negotiating the bigger issues in their lives, they will have, subconsciously, established a pattern, often from childhood, as to how they deal with issues that they encounter and will therefore have developed a capacity to participate and negotiate, as they proceed through their life course.

Negotiation has been defined as:

‘a process of adjustment of existing differences, with a view to the establishment of a mutually more desirable legal relation by means of barter and compromise of legal rights and duties and of economic, psychological, social and other interests. It is accomplished consensually as contrasted with the force of the law.’¹²⁵

Negotiators have been described as falling within two specific categories – competitive negotiators or collaborative negotiators.¹²⁶ Zartman & Berman¹²⁷, in examining the psychology of the personality types of these two categories of negotiators, refer to them as either **warriors**, individuals of ill will and extended goals seeking their demands at the expense of the other party or **shopkeepers**, individuals of good will and limited aims seeking positive solutions. Lawyers have traditionally taken on the mantle of the warrior, especially in an adversarial court setting. Clients too, if they feel insecure or threatened by the actions of the party from whom they are separating, may want the warrior to fight the battle on their behalf, to protect

¹²⁵ Robert E. Matthews, ‘Negotiation: A pedagogical Challenge’ (1953) 6 *Journal of Legal Education* 93, 94.

¹²⁶ Gary T. Lowenthal, ‘A General Theory of Negotiation Process, Strategy and Behaviour’ (1982-1983) 31 *University of Kansas Law Review* 69.

¹²⁷ William Zartman, and Maureen Berman, *The Practical Negotiator* (Yale University Press 1992).

them from direct contact with the other party and in many cases to win the battle regardless of the costs, financial or emotional. The legal negotiator then, most often witnessed in the adversarial system, is noted by Menkel-Meadow as:

‘a consummate game player who maximises gain for clients by engaging in a series of ploys and countermoves designed to mislead the opponent into “conceding” as much as possible - and to save time and money that might be spent on formal trial.’¹²⁸

IX. Why negotiate?

Adjudication is described by Gulliver as a situation:

‘...where two parties are separated from each other, face an adjudicator who sits in front of, apart from, and often raised above them. They address him, offering information, opinion and arguments. Each seeks to refute the other’s presentation and to persuade the adjudicator to favour his own case.’¹²⁹

This process can be an effective means of resolving the issues in dispute. Many parties like the formal structure that a court hearing provides; they like the idea of the court having ultimate authority over the other party to make orders, for example to disclose information in relation to assets.¹³⁰ In addition, they feel that the courts system provides them with a finite date for the final hearing of the matter, thereby giving them some closure. They appear to like the idea of a lawyer being a “hired gun” to resolve the dispute on their behalf without them having to have much direct input. On the other hand, participants interviewed for this thesis who had actually dealt with their cases through the courts were of the view that ex-partners routinely

¹²⁸ibid at 911 citing the writings of Bellows and Moulton; Edwards and White; Michael Meltsner and Philip G. Schrag, *Public Interest Advocacy: Materials for Clinical Legal Education* Chapter 13, Negotiation (Little, Brown and Co. 1997).

¹²⁹ P.H. Gulliver, *Disputes and negotiations: A Cross Cultural Perspective* (Academic Press 1979) 3.

¹³⁰ For example, Interview with CC 10, August 2011. This participant had a strong sense of rule mindedness and valued the role of the court in determining the issues between them and their ex-spouse.

ignored court orders, that their cases were frequently adjourned with no sense of finality and that, rather than handing matters over to their legal representatives, they had to remain actively involved in pushing matters forward and scrutinising settlement offers proposed by their own and opposing legal teams.¹³¹

By engaging in the court process, Gulliver notes that ‘[c]ompulsorily or voluntarily, the disputants surrender the ability to decide for themselves’¹³². While some judges may be predictable in the way they decide cases, ‘the ball may bounce either way’¹³³ and the outcome achieved may largely depend on which lawyer is stronger on the day. Clients interviewed for the purposes of this thesis typically stated their reasons for not wanting to go to court as being based less on the issue of the costs involved, even though this was understandably a consideration in a number of cases, but their most pressing reason was fear; fear of not getting a fair hearing, of losing their home or their children.

X. “Ordinary Lawyer Negotiation”

The difference between the court process and negotiation for lawyers may not be as clear. Lande, in what he refers to as ‘ordinary lawyer negotiation’, (negotiation within the framework of the adversarial system) believes that ‘lawyers presumably try to get good results for their clients and believe that they are more likely to do so through cooperative conversation than through (either) hard bargaining or systematic analysis of interests and options.’¹³⁴ In family law in particular, previous research has shown that many lawyers favour settlement over trial.¹³⁵ Galanter likewise is of the view that there is no such division between the adversarial system and negotiation, that they should not be perceived as alternatives but that ‘there is a single process of

¹³¹ Interview with CA 1, June 2011; Interview with CA 2 April 2012, Interview with CA 4 June 2011.

¹³² Gulliver, (n 129) 4.

¹³³ Interview with LI 1, May 2011.

¹³⁴ John Lande, ‘Teaching Students to Negotiate Like a Lawyer’ *Washington University Journal of Law and Policy* (2012) 39 109, 118.

¹³⁵ Austin Sarat and William Felstiner, *Divorce Lawyers and their Clients* (Oxford University Press 1995). See also Robert Mnookin and Lewis Kornhauser, ‘Bargaining in the Shadow of the Law: The Case of Divorce’ (1978-1979) 88 *Yale Law Journal* 950.

disputing in the vicinity of official tribunals that we might call *litigotiation*, that is, the strategic pursuit of a settlement through mobilizing the court process.¹³⁶

In Ireland, from the research carried out by Coulter on behalf of the Courts Service¹³⁷ and also by Conneely¹³⁸, the norm in family law matters appears to be to instruct a solicitor and to issue court proceedings, thereby engaging in the process designed to lead up to a court adjudication. Yet the statistics also show that most family law matters are settled out of court through “ordinary lawyer negotiation”.¹³⁹ Research carried out as part of this study is broadly in agreement with Coulter’s, in that the figures indicate that on average 88% of cases do in fact settle. However, what was surprising was that from the information supplied by practitioners who responded to the author’s research, 54% of these cases will not settle until the day the case is actually listed for hearing. In any event, once court proceedings have been issued and served, correspondence will have been entered into between both parties’ respective solicitors and the scene is somewhat set for competitive negotiating. The majority of solicitors and barristers interviewed for this research indicated that they are conscious that family law is different, that they take a more conciliatory approach to negotiation than they would in other matters. However, it appears that many elements of the approach taken are the same. They routinely referred to “cutting to the chase”, expressed a view that “the issues are the same in most family law matters” and their aim is ultimately to reach a “compromise”.¹⁴⁰ Does this model of cases that are routinely settled on the door of the court therefore accord more closely with Rubin’s¹⁴¹ view that negotiation is, in fact, a matter of settling conflict rather than resolving it?

¹³⁶ Marc Galanter, ‘Worlds of Deals: Using Negotiation to Teach about Legal Process’ (1984) 34 *Journal of Legal Education* 268.

¹³⁷ Coulter ‘Family Law Matters’ (n 8) 24.

¹³⁸ Sinead Conneely, *Family Mediation in Ireland* (Ashgate 2002).

¹³⁹ Coulter, ‘Family Law Matters’ (n 8) 24.

¹⁴⁰ Interview with LI 1, May 2011; Interview with LI 5, June 2011; Interview with LI 8 July, 2011.

¹⁴¹ Jeffrey Z. Rubin, ‘The nature of Conflict and Negotiation’ in *Negotiation Theory , & Practice* in William Breslin and Jeffrey Rubin (eds), *The Program on Negotiation* (Harvard Law School 1999).

Once positions have been taken, is it then possible to try to settle a case on amicable terms, to take a conciliatory approach to settlement, particularly when the threat of court, ‘the force of the law,’ remains ever present if settlement cannot be ‘accomplished consensually’? Lowenthal argues that ‘[o]ne cannot be competitive and collaborative at the same time, since concepts like trust and suspiciousness, as well as rigidity and flexibility, are functional opposites.’¹⁴² Is it understandable and expected that the negotiating lawyers will generally hold back during negotiations in case agreement cannot be reached and the matter goes before the Court. ‘The prospect of litigation defines the framework of traditional negotiation and disclosure and shapes the bargaining strategies. Lawyers must engage in a precarious balancing act between litigation and negotiation.’¹⁴³ Therefore, even if settlements are reached that are broadly acceptable to both parties – does the negotiation process in itself instil a sense of distrust and suspicion, leaving one or both of the parties feeling unsure as to whether they got the best settlement?

Negotiation in these situations, frequently at the door of the court, can be perceived by the clients as a ‘formless, informal, hidden, and unstructured process.’¹⁴⁴ Is this perhaps why clients have a poor perception of lawyers and the courts’ system, with many of the clients interviewed during the course of this research having a perception that the outcome they would receive through the courts may not be fair or just?¹⁴⁵ Are lawyers in some way doing a disservice to themselves too, in that, despite, perhaps, in many cases, having negotiated well for their client and obtained the best possible settlement in the circumstances, that perhaps because of the somewhat covert nature of the negotiations clients may be left with a sense of uncertainty?

¹⁴² Lowenthal, (n 126) 92.

¹⁴³ Robert F. Cochran, ‘Legal Ethics and Collaborative Practice Ethics’ (2009) 38 *Hofstra Law Review* 537, 543.

¹⁴⁴ Carrie Menkel-Meadow, ‘Legal Negotiation: A Study of Strategies in Search of A Theory’ (1983) 8 (4) *American Bar Foundation Research Journal* 905, 918.

¹⁴⁵ The issue of fairness was mentioned by many participants- both in term of a fair outcome for themselves and for the other party.

What guidance, if any are lawyers given on the different approaches to negotiation or are they simply taught competitive strategies, how to maximise their position with the aim of winning for their client at all costs? This type of negotiation has been described by Cohen as *Soviet style*¹⁴⁶ negotiation where parties take an extreme initial position, indicate that they have limited authority to settle and make few concessions, their aim being to simply water down the opposition and give as little as possible. Edwards & White, and Peck¹⁴⁷ similarly emphasise the importance of ‘learning the other side’s settling point without revealing your own’,¹⁴⁸ while Bellow & Moulton urge students to ‘reach settlement as near his or her opponent’s minimum disposition as possible.’¹⁴⁹ This competitive form of negotiation is characterised by the “zero-sum” rationale ‘in which each party seems to stand to gain exactly as much as the other party will give up...’¹⁵⁰. This type of negotiation, though often providing very satisfactory results for the winning party many have a detrimental effect both on the party perceived as the loser and on the ongoing relationship between the disputing parties and therefore is arguably more suitable for once off disputes.

It is also interesting to look at two forms of legal negotiation, one being dispute resolution and the other transactional negotiation. Dispute resolution takes the approach of dealing with the resolution of a fixed and ascertainable dispute or some difference of opinion that has occurred between the parties in the past whereas, transactional negotiation, often used in business negotiations, is concerned with setting out the relationship for parties that want to work together in the future. Key themes in transactional negotiation are those of “common concerns”, “shared interests” and “joint decisions about new alternatives.” This type of negotiation ‘enables transactions to be planned so that two or more people can accomplish what

¹⁴⁶ Herb Cohen, *You Can Negotiate Anything: How to Get What you Want* (Lyle Stuart 1980) cited in Menkel- Meadow, (n 144), 913.

¹⁴⁷ Cornelius Peck, *Cases and Materials on Negotiation* (2nd edn, Bureau of National Affairs 1982) 112-113.

¹⁴⁸ *ibid.*

¹⁴⁹ Gary Bellow and Bea Moulton, *The Lawyering Process: Negotiation* (Foundation Press 1981) 58-63.

¹⁵⁰ Menkel-Meadow, (n 144) 911.

neither can do alone'.¹⁵¹ Rather than adopt a dispute resolution model to family law matters, might it be better to use a transactional negotiation approach where, although not a joint business venture per se, couples, particularly those with children will have to maintain some form of "working relationship" in the future, as it was described by one of the participants interviewed for this thesis?

In examining negotiation, it is also necessary to examine the contextual environment in which such negotiation takes place. Earlier, it was noted that the environment in which children grow up can affect their development and capacity to participate. Similarly in assessing the issues that may affect a negotiation process, Lowenthal argues that the subject matter of the dispute, the normative constraints of the negotiator, the ongoing relationship between the parties and the personalities and values of the negotiators must be taken into account.¹⁵² Menkel-Meadow agrees and sets out additional factors to be considered to include: the extent to which the parties are free to choose which resolution method they wish to use or whether this may be court ordered; the visibility of the dispute itself - will the negotiations take place in public or in private; what is at stake for the parties; and both their need to maintain an ongoing relationship with each other and also the need for the negotiators/lawyers to maintain a working relationship. She also noted that issues will also come into play in terms of power, economic power and moral righteousness, the personal characteristics of the negotiator and the medium of negotiation.¹⁵³

Do all negotiators tailor the method they use to each particular case, or do certain negotiators have a reputation for being competitive and adversarial regardless of the facts of the case? How much of an impact do these human issues of personality types have on the outcome of a case? From the interviews carried out for the purposes of this thesis with key professionals in the legal system, solicitors, barristers and experts instructed to prepare reports, there was a general sense of you can tell how the negotiations are

¹⁵¹ *ibid* 909.

¹⁵² Lowenthal, (n 126) 105-111.

¹⁵³ Menkel-Meadow, (n 144) 928.

going to proceed depending on who you are “up against”. Particular negotiators have orientations towards being competitive or co-operative negotiators regardless of the context of the dispute.¹⁵⁴ This signifies the importance of knowing the opponent and the fact that ultimately a party is guided by an opponent’s approach –if they take a competitive stance then the other party may have no choice but to do likewise in representing their client. However, should a lawyer’s approach not be guided by what the client sees as his or her desired outcome? Is there a need for family law clients in particular to have a sense of reparation after a hearing, to enable them to co-parent or is it sufficient for them to settle the conflict on acceptable terms? The outcome desired by the client should determine the most suitable method to use.

XI. The Role of the Client in Conflict Resolution

Menkel-Meadow notes that ‘[s]tudies of legal negotiation must begin with a conception of its purpose. If the lawyer’s role is to solve clients’ problems, assumptions of competitive gain may be inapplicable if not dysfunctional in some situations.’¹⁵⁵ Gulliver also argues that the type of negotiations entered into will be determined largely by the type of outcome that is required by the parties – if their interests are totally incompatible or if they require an authoritative third party ruling, then adjudication is the best route. If on the other hand a more “accommodative” or “multiplex”¹⁵⁶ solution is required then adjudication may not be the most suitable option.¹⁵⁷ The important question therefore has to be what each client hopes to achieve out of these negotiations and what outcome they perceive as being a success.

Why do clients or their lawyers routinely engage in competitive, positional negotiation? Fisher and Ury argue that for parties and their lawyers ‘[p]ositional bargaining is easy.... It requires no preparation, it is universally understood and in some contexts it is entrenched and expected.’¹⁵⁸

¹⁵⁴ Lowenthal, (n 126) 69.

¹⁵⁵ Menkel-Meadow, (n 144) 922.

¹⁵⁶ Gulliver, (n 129) 15.

¹⁵⁷ *ibid.*

¹⁵⁸ Roger Fisher and William Ury, *Getting to Yes* (2nd edn, Random House 1992)157.

Frequently, by their own admission, solicitors and barristers may not address the issues in a case until the case is actually listed for hearing. Similarly, clients may choose to remain steadfast in their entrenched positions until they are about to enter the courtroom, perceiving that any softening on their part may be seen as weakness by the opposing legal team and may be exploited. Therefore, just immediately in advance of the case being heard, barristers are under pressure to comprehend the issues in the case, mindful of the fact that the judge is anxious that they make every effort possible to clear his or her list and the clients are faced with making decisions somewhat against the clock with an emphasis on their bottom line demands.

In addressing the research question as to the role of children, questions are posed as to the extent to which they are given an opportunity to express their views, and how, if at all, their views taken into account in cases that are settled under these pressurised conditions. Most solicitors and barristers interviewed for this research were of the view that court is no place for children. This is perhaps a sensible approach but if this is the case, what steps have been taken before parents are at the door of the court to ensure that the children have been considered and their views ascertained? Or are children, as some appear to believe, living in a vacuum totally removed and protected from what is going on in their families? The difficulty for solicitors is, of course, that their duty is to their client, whichever parent they may be acting for and while they will enquire about the children, they have no authority to go beyond such enquiry. Many experienced litigators interviewed for this research said that they explain to clients that the separation or divorce will have an impact on their children but that this impact can be lessened depending on how they, as parents, deal with the conflict and how they explain matters to the children and help them deal with it.¹⁵⁹ Some solicitors give their clients copies of research that has been carried out on this issue or books that have been written to alert them to the matters of which they need to be aware.

¹⁵⁹ This was evident from the interviews carried out for this research where adult children repeatedly stressed the importance of receiving an explanation from their parents.

Occasionally, children are used as pawns in the separation process. They may know perhaps more than is age appropriate about their parents' relationship and conflict. As we shall see in later chapters, one barrister interviewed for this research described the way that children can be drawn into the conflict as tantamount to child abuse.¹⁶⁰ Parents often discuss issues about maintenance, what will happen to the house etc. in front of their children, issues that children should not be burdened with. Child abuse in other forms would lead to a public outcry. However, this group of unrepresented children are routinely ignored by the legal system. Taking this issue a step further, while children under the age of 18 may find assistance through teachers or organisations such as Rainbows¹⁶¹, children who are in early adulthood have no support when their parents separate. Once over 18, all a solicitor or barrister is obliged to consider in terms of negotiating settlement is whether these children are "dependents"¹⁶² for maintenance purposes. Many of these children will cope by leaving home to go to college or work or, for those that remain, take on a consoling alliance with one or other parent where they are subtly encouraged to take sides.¹⁶³ This issue of the role/participation of children/young adults at a time of separation and divorce will be discussed further in chapters 2, 5 and 6.

One lawyer interviewed commented that clients who end up in this position, settling their cases at the door of the court, have in effect, only themselves to blame, that they have been given various opportunities to reach a more amicable settlement along the way and have not availed of the opportunity to negotiate at an earlier stage. But how true is this? Under solicitors' statutory obligations they are obliged to notify the parties of the possibility of reconciliation or mediation at the outset in family law cases¹⁶⁴. The question remains however as to how and with what, if any, conviction these

¹⁶⁰ Interview with LI 6, February 2012.

¹⁶¹ Rainbows is a peer support group for children who have suffered loss. See <http://www.rainbowsireland.com/>

¹⁶² Section 3 of the Family Law (Maintenance of Spouses and Children Act) 1976 as amended. Children are considered dependents up until the age of 18, or 23 if in full time education.

¹⁶³ Interview with CR 1, March 2011.

¹⁶⁴ Section 5/6 of the Judicial Separation and Family Law Reform Act 1989 and Section 6/7 of the Family Law (Divorce) Act 1986.

processes are explained to clients. A barrister interviewed for this research commented that:

‘Clients will be guided but it needs both parties to be guided. There is no point in one particular party [solicitor] encouraging [mediation] if that encouragement doesn’t come from both [solicitors] and I would see that there is an absence of that commitment within our system.’¹⁶⁵

From the client’s point of view, while they may go with the advice given and engage in the court process, as one solicitor said:

‘A lot of people think that is not going to be our case. We are not going to fight it out to the nth degree and only settle on the steps of the court but it is difficult to say to them, here is your chance at mediation or collaborative [practice]. If you can, come to an agreement. If you can’t then this [court] is the route to go and it [your case] is not going to get that [settlement] dynamic until, if not on the steps of the court, on the road to the steps of the court.’¹⁶⁶

So what is the difference for parties in moving away from positional negotiation and what other methods may be more suitable? Both mediation and collaborative practice, discussed in detail in the following chapters are “interest- based” negotiation processes.

XII. Interest Based Negotiations

What are “interest based” negotiations and how if at all do they benefit clients? Do they offer the same structure and authority that clients often seek from the court and do they serve to allay clients’ fears with regard to issues like fairness and justice? Or is there a sense that negotiations taking place in a private forum are less transparent and therefore inherently more open to abuse by a dominant party?¹⁶⁷ Do these views have grounding in practice or are they perceived from misinformation or a lack of education as

¹⁶⁵ Interview with LI 6, July 2011.

¹⁶⁶ Interview with CL 8, February 2012.

¹⁶⁷ Fiss, (n 117).

to what these processes involve and what they have to offer? Do all parties have the capacity to participate in such processes and are the vulnerable protected? These questions will be addressed throughout this thesis as the effectiveness of mediation and collaborative practice is explored.

Fisher and Ury refer to this interest based approach to negotiation as “principled negotiation” or “negotiation on the merits”¹⁶⁸. They explain that there are four basic elements to each negotiation namely the people, their interests, the options and the objective criteria. In dealing with various elements, they propose that negotiators should first “separate the people from the problem” so that rather than fighting each other over issues, the parties to a dispute are actively working together on the issue that has caused the problem between them. The parties are then encouraged to focus on their interests and the interests of their family rather than take a positional stance. In exploring these interests the parties use creativity to accomplish the third element, which are “options”, proposed solutions that may work for the mutual gain of both parties. These “options” are then tested against “objective criteria”, such as, what the likely outcome may be in a court setting, what is the norm in practice and objective standards like, for example, “market value” for property. Parties need this reassurance that the decisions they are making are in line with society’s norms and ‘...an agreement consistent with precedent is less vulnerable to attack’.¹⁶⁹

Therefore though negotiating in an apparently different setting, are negotiators and their clients still ‘bargaining in the shadow of the law’¹⁷⁰? Mnookin argues that ‘[t]he legal system affects *when* a divorce may occur, *how* a divorce must be proceeded with and *what* the consequences of the divorce will be.’¹⁷¹

¹⁶⁸ Fisher and Ury, (n 158)11.

¹⁶⁹ *ibid* 86.

¹⁷⁰ Robert Mnookin and Lewis Kornhauser, ‘Bargaining in the Shadow of the Law: The Case of Divorce’ (1978-1979) 88 *Yale Law Journal* 950.

¹⁷¹ *ibid* 951.

A time of separation or divorce unleashes somewhat primitive emotions for the parties involved.¹⁷² They often feel that their basic human needs are being challenged and they have to adapt to a new sense of self, independent of the other party whom they may have relied on to provide them with financial and/or emotional security.¹⁷³ So in pursuing interest based negotiations, the negotiators, rather than dismiss a demand as being unreasonable, will look behind the demands of the clients and try to ascertain why a particular issue is important to the client. If a non resident parent, for example, is insisting on what appears like unreasonable access to the children, is this perhaps because they are fearful that once they move out of the family home they may lose contact with the children, that time and circumstances as well perhaps as the actions of the resident parent may alienate them? If an assurance can be given that reasonable arrangements will be put in place and this party can see that these arrangements are being adhered to, they may then be less dogmatic in their views.

Fisher and Ury note that '[n]egotiations are not likely to make much progress as long as one side believes that the fulfilment of their basic human needs is being threatened by the other.'¹⁷⁴ The key therefore seems to be to remove some, if not all, of the fear involved in the process by outlining for the parties that through interest-based negotiations the aim is to find shared interests and opportunities for mutual gain, where the parties have more control over the process itself and the outcome.

Is it then that "interest-based" processes provide separating parties with a forum to express their emotions akin to having 'their day in court' rather than just settling their case?

¹⁷²Caoimhe Ni Dhomhnaill, 'Applying Psychodynamic Theory and Practice to Custody and Access Proceedings in the Family Circuit Court' (Irish Forum for Child and Adolescent Psychoanalytic Psychotherapy (IFCAPP) and the Irish Forum for Psychoanalytic Psychotherapy (IFPP) Joint Seminar, Dublin, February 26, 2011).

¹⁷³ Yuval Berger, 'Relationship Transformation, In Search for a "Roadmap" for Separating Couples' (Third European Conference of the International Academy of Collaborative Professionals, Germany 2010).

¹⁷⁴ Fisher and Ury, (n 158) 50.

XIII. Conclusion

This chapter has outlined the theoretical framework which informs my research. It lays the foundation for acknowledging the changing nature of childhood and the factors which impact on a child's development and proposes that rather than viewing childhood as a period of incompetence, parents, adults and the professionals that children come in contact with should reflect on, and seek ways of providing "scaffolding" or assistance to children. Encompassing an examination of sociocultural and ecological theories, it also examines the influence of feminist theory and the ethic of care in questioning whether a purely rights based approach is sufficient.

Hohfeld believed that the word 'right' was *sui generis*, noting that a right may also be a privilege, a power or an immunity.¹⁷⁵ He preferred the word 'claim' and believed that duties are always correlatives to claims. Parents, guardians and the State have these duties under Articles 5, 9 and 18 of the UNCRC but difficulty remains as to the extent to which children's rights are enforceable in a society where parents often remain the gatekeepers in ensuring that they have access to the services they require.

This chapter also sets out the theoretical underpinnings of disputes and how they are settled or resolved through adjudication, negotiation or through interest based methods of resolution. It examines the role that lawyers play as agents in dispute transformation and the influence that they have in guiding potential clients towards one method of resolution or another. Again, the issue of participation comes to the fore in assessing the ability of parties who are in conflict to work through issues themselves rather than have matters adjudicated and the scaffolding that lawyers provide to assist parties in these processes.

The theoretical approaches undertaken will be referred to extensively throughout this thesis in addressing the research questions and will be synthesised and examined in the light of the findings from my empirical

¹⁷⁵ Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 (1) *Yale Law Review* 16.

research detailed in chapters 5 and 6. Prior to that, the theory and implementation of children's rights, best interests and the voice of the child within the court process are examined in chapter 2.

CHAPTER 2: Children's Rights, Best Interests and the Voice of the Child within the Court Process

I. Introduction

This chapter will build on the theoretical underpinnings of the concepts of rights and participation as outlined in Chapter One. As a foundation and benchmark for addressing the research question as to the effectiveness of mediation and collaborative practice in resolving conflict in family law cases and their potential, if any, to enable the voice of the child to be heard, this chapter will examine the development of children's rights in Ireland with specific emphasis on Article 3 (Best Interests) and Article 12 (Voice of the child) of the United Nations Convention on the Rights of the Child 1989. The importance of these two principles has been acknowledged by the Committee on the Rights of the Child which monitors the Convention and which provides guidance through "General Comments" on its application and implementation. General Comment No.12¹ issued in 2009 specifically refers to the:

'...complimentary role of the two general principles: one establishes the objective of achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing either the child or the children. In fact, there can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives.'²

Acknowledging and accepting the obligations imposed on State Parties by Article 12, Article 12 in itself is not questioned in this thesis. It is accepted that the provisions of Article 12 provide a framework and starting point. The

¹UN Committee on the Rights of the Child, General Comment No. 12 (2009) *The Right of the Child to be Heard*. UN Doc UNCRC/C/GC/12, 1 July 2009. <<http://www2.ohchr.org/english/bodies/crc/comments.htm>> .

² *ibid* [74].

substance of General Comment No.12 (Voice of the Child) and General Comment No.14³ (Best Interests) will be examined as they attempt to provide guidance as to the extent to which the views of children should be heard and how their “best interests” should be assessed. This emphasis on children’s voice in accordance with Article 12, using the UNCRC language of ‘participation’, will be addressed throughout the thesis.

In assessing how the concepts of best interests and the voice of the child have been addressed under Irish Law, the chapter will detail the relevant legislation and case law and the over-arching influence of the Irish Constitution pre and post the 31st Amendment (the amendment on the rights of the child)⁴. It will also examine the extent to which European and International instruments have been considered by the courts at sub Constitutional level. While it is beyond the scope of this thesis to examine the provisions of the Hague Convention and the issue of abduction in detail, reference will be made to Article 11(2)⁵ of Brussels II *bis* and the important change in onus under this Regulation which provides that a child **must** now be heard unless is inappropriate to do so because of his or her “age or maturity”.

Finally, the chapter will assess the mechanisms currently available through which children may participate in proceedings and have their voices heard within the Irish family law courts’ system, namely direct evidence, section 47 and section 20 reports, the judicial interview and the Guardian *ad Litem* system.

³ UN Committee on the Rights of the Child, General Comment No. 14 (2013 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) <http://www2.ohchr.org/english/bodies/crc/comments.htm>>.

⁴ Thirty- First Amendment of the Constitution (Children) Dáil Bill (2012) 78 <[http://www.oireachtas.ie/documents/bills28/bills/2012/7812/31stAmendofCon\(Children\).pdf](http://www.oireachtas.ie/documents/bills28/bills/2012/7812/31stAmendofCon(Children).pdf)> .

⁵ Article 11(2) When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity. Council Regulation (EC) No. 2201/2003 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility (Brussels II bis) [2003] OJ L 338/1 repealing Regulation (EC) No 1347/2000.

II. The United Nations Convention on the Rights of the Child 1989

The United Nations Convention on the Rights of the Child (UNCRC)⁶ was adopted by the General Assembly of the UN in 1989. Though now criticised as being in need of updating to meet the needs of a changing world⁷, the Convention has provided the most comprehensive statement of children's rights to date covering civil and political rights, social, economic and cultural rights and protectionist rights. The Convention promotes the idea of the competent child and outlines the basic rights which should be afforded to all children.

Under the Convention a child is defined in Article 1 as:

‘... every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.’

The rights set out in the Convention tend to be grouped into four main areas:

- Survival rights: Basic rights e.g. to food, shelter, standard of living, medical care etc.
- Developmental rights: Education, leisure and play, freedom of thought, conscience and religion.
- Protection rights: Protection from abuse, neglect, and exploitation in employment, the criminal system and assistance for children who are victims of abuse.
- Participation rights: Freedom of expression, opinion, to have a say, to join a discussion and to assemble peacefully.

These are more commonly known as the ‘4 Ps’ – protection, provision, prevention and participation. In setting out these rights, the Convention

⁶ <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

⁷ Michael Freeman, Keynote Address (Campaign for Children, Children's Rights Alliance and PILA Conference, Dublin, July 6 2012) For example, Professor Freeman referred to amongst other issues the fact that children's rights from conception to birth are not specifically provided for, the Convention does not address rights in relation to gender preference and the right for children to vote.

acknowledges the primary role of parents and family in the care and protection of their children's rights and the evolving capacity of the child⁸. It also imposes duties on the State to support parents in this role⁹. As noted in chapter one, there is generally widespread acceptance of the protection, provision and prevention rights of the child but less so of the participation rights enshrined in the Convention because of the potential threat to the authority or autonomy of their parents.

Ireland ratified the Convention on September 21, 1992. However, because of the dualist nature of Irish law, it does not form part of domestic law. Under Article 43 of the CRC, a committee was established namely the Committee on the Rights of the Child, to monitor the implementation of the Convention in member states and to provide guidance through the issuing of "General Comments". These General Comments address specific provisions of the Convention and clarify how they should be interpreted.

In addition, each state has to submit progress reports to the Committee.¹⁰ The Committee makes recommendations based on the reports submitted. Examining the "Concluding Observations" on Ireland's last report in 2006, it is noteworthy that with regard to the specific issues being addressed within this thesis the Committee recommended that the implementation of the "best interests" standard should be a:

'...primary consideration without any distinction and ... (should be) fully integrated into all legislation relevant to children; and (that Ireland should)

⁸ Article 5 of the United Nations Convention on the Rights of the Child 1989.

⁹ Article 18 (2) of the United Nations Convention on the Rights of the Child 1989. This issue of State support for families will be discussed in more detail in chapter 6.

¹⁰ The first report to the Committee is due two years after the entry into force for the State Party concerned and the State Party is then obliged to report every five years thereafter as per the reporting procedure available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G94/195/85/PDF/G9419585.pdf?OpenElement> For Ireland therefore the first report was due in 1994, with subsequent reports due in 1999, 2004 and 2009. To date two reports have been submitted by Ireland, the first in 1997 and the second in 2006. Ireland's third report and fourth were due to be submitted in 2009 but have not been submitted to date.

(b) Ensure that this principle is also applied in all political, judicial and administrative decisions, as well as projects, programmes and services that have an impact on children.¹¹

Also noteworthy is recommendation 25 that Ireland should make provision in the Constitution to ensure that the child has a right to express their views in all matters affecting them. The Committee refers to the need for children to be able to express their views ‘in particular in families, schools and other educational institutions, the health sector and in communities’ and in ‘judicial and administrative proceedings’ as per Article 12. It notes that Ireland should ensure that there is independent representation available through the GAL system especially when children have been separated from their parents under the Child Care Act 1991. This is particularly relevant in the context of Article 9 of the Convention which provides that:

‘1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct

¹¹Committee on the Rights of the Child Forty-Third session, Consideration of Reports Submitted by State Parties under Article 44 of the Convention on the Rights of the Child, Concluding observations: Ireland [2006] Recommendation 23. <http://www.childrensrights.ie/sites/default/files/submissions_reports/files/IRLCONCOBS_0.pdf>.

contact with both parents on a regular basis, except if it is contrary to the child's best interests.’

While the Irish Government have held a referendum to amend the Constitution with regard to this issue of the voice of the child¹², as will be discussed in more detail later in this chapter, it is clear that the amendment does not go far enough in complying with Article 12 and the recommendations made by the Committee.

There are also three optional protocols to the CRC¹³. The most important in the context of this thesis is the third protocol, the Optional Protocol to the Convention on the Rights of the Child on a communications procedure.¹⁴ If ratified, this protocol would provide individual children with a mechanism through which to submit complaints directly to the Committee regarding specific violations of their rights under the Convention and the first two optional protocols and it would serve to highlight the difficulties they continue to face under Irish legislation. It recognises the ‘special and dependent’ nature of children and that this ‘may create difficulties for them in pursuing remedies for violations of their rights’. The third protocol also notes that the best interests of the child are to remain a primary

¹² Proceedings were issued by means of Referendum Petition seeking to set aside the result of the referendum due to the decision of the Supreme Court in the *McCrystal* case, which held that the Government had unlawfully used public monies to produce a booklet which, the Court held, was biased in favour of the Yes campaign. See *McCrystal v The Minister for Children and Youth Affairs, the Government of Ireland and the Attorney General* [2012] IESC 53. The petition was dismissed by the High Court on October, 18 2013 and is now under appeal to the Supreme Court.

¹³ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000 entered into force on 18 January 2002.

<<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx>> ; Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000 entry into force 12 February 2002 <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPACCRC.aspx>> and the third Optional Protocol to the Convention on the Rights of the Child on a communications procedure.

¹⁴ *ibid.* The third protocol opened for signature on 28 February 2012 in Geneva. To date it has been signed by 36 State Parties and ratified by 4. Ireland has not signed this protocol to date. It will enter into force 3 months after the deposit of the tenth ratification or accession. <http://treaties.un.org/doc/source/signature/2012/CTC_4-11d.pdf> 10.

consideration and highlights the need ‘for child sensitive procedures at all levels’¹⁵.

A. Article 3 - Best Interests of the Child

Article 3 (1) of the Convention on the Rights of the Child provides that:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The “best interests” standard was seen as a gender neutral, child focused approach with the aim of promoting equality for all. Emily Logan, Ombudsman for Children in Ireland, has commented that ‘[t]he aim of the rule is not to encroach on the rights of others, but to facilitate an examination of the interests of a vulnerable group’.¹⁶ It was welcomed by those who felt that mothers had been favoured too much under the “tender years” principle which had operated on the assumption that young children were better cared for by their mothers.

Opponents of the “best interests” standard have criticised the vagueness of the standard, arguing that it allows too much judicial discretion, thus leading to increased litigation, with writers such as Fuller commenting that the “best interests” standard is more aspirational in nature than a legal rule to guide custody decision-making¹⁷. Mnookin, too, points out that the “best interests” are vastly indeterminate¹⁸. Parents, often uncertain as to how a judge will decide a case, tend to litigate in the hopes of convincing a judge of their

¹⁵ *ibid.*

¹⁶ Emily Logan, ‘How to protect the child’s best interests?’ (Building a Europe for and with Children, toward a strategy for 2009-2011 Conference, Stockholm, 9 September 2008).

¹⁷ Lon Fuller, ‘Human Interaction and the Law’(1969) 14 *American Journal of Jurisprudence* 1.

¹⁸ Robert Mnookin, ‘Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy’ (1975) 39 *Law and Contemporary Problems* 226.

point of view. It has been argued that the “best interests” standard has led to situations ‘in which parents are motivated to produce hurtful evidence of each other’s deficiencies that may have a lasting, deleterious impact on their ability to act cooperatively in the interests of their children.’¹⁹

Allegations of domestic violence or parental alienation²⁰ are often made. In some cases, these allegations are difficult to assess.

In trying to ascertain the relevance of these issues to their ultimate decisions, judges tend to rely on the opinions of independent mental health experts, appointed by the courts, whose role is to meet with the families and give the court an insight into the private workings of the particular family. While the assistance given to the courts is invaluable, it has been questioned as to whether these mental health experts are being given too much credibility and whether, in fact, they have become the ultimate decision-makers in these cases and not the judges themselves.²¹ This issue will be examined in the Irish context below.

B. General Comment No. 14

On 29th May 2013, the Committee on the Rights of the Child published General Comment No.14²² which focuses specifically on the “best interests” principle. The Committee describe they describe the “best interests” concept as being threefold concept encompassing:

- (a) a **substantive right** to have their best interests taken into account;
- (b) an **interpretative** principle outlining the importance of legal provisions being interpreted in a way which most effectively serves the “best interests” of a child and,

¹⁹ Elizabeth Scott and Robert Emery, ‘Gender Politics and Child Custody: The Puzzling Persistence of the Best Interest Standard’ (2011) Columbia Public Law & Legal Theory Working Papers Paper 9200 3 <http://lsr.nellco.org/columbia_pllt/9200>

²⁰This concept of parental alienation was developed by Richard Gardner in the 1980s. Parental alienation is alleged to take place where one parent is accused of turning a child against the other parent, of perhaps discouraging the child from attending for access visits and making it difficult for the non-resident parent to build a relationship with the child.

²¹ Interview with LI 4, October 2011.

²² General comment No. 14 (n 3).

- (c) a **rule of procedure** to ensure that there is a framework in place to facilitate the assessment and determination of what is in the child’s “best interests”. This includes justification of the decision made and the extent to which the best interests of the child were taken into account.²³

The Committee stipulate that the “best interests” must be determined based on the needs of the individual child. As noted above, it places a particular emphasis on this issue of justifying the decision made. It must be clearly identified as to firstly ‘what has been considered to be in the child’s best interests; what criteria this decision is based on and how the child’s interests have been weighed against other considerations, be they broad issues of policy or individual cases.’²⁴ Where the decision made is different from the views expressed by the child, reasons should be given as to why this decision was reached.²⁵

The Committee have indicated that a two step process should be followed. Firstly, as **assessment** should be carried out ‘evaluating and balancing all the elements necessary to make a decision in a specific situation for a specific individual child or group of children. In this regard, the Committee have provided a ‘non-exhaustive and non-hierarchical list of elements that could be included in a best-interests assessment.’²⁶ This includes:

1. Listening to the child’s views, assisting younger children where necessary;
2. Identity - examining the impact of issues like gender of the child, sexual orientation, origin, religion and cultural identity;
3. Being cognisant of the importance of keeping families together, where possible and for State support in this regard;
4. Protection from harm and the need to foster well-being and development (physical, educational and

²³ *ibid* [6].(Emphasis added)

²⁴ *ibid* [6 (c)]

²⁵ *ibid*.

²⁶ *ibid* [50].

- emotional needs and to the need to form secure attachments);
5. Protection for children from abuse/vulnerability and to assist in situations of disability;
 6. Right to health - to provide information and to facilitate decisions in health care matters,
 7. Right to education- access to quality education.²⁷

The Committee proposes that there should be a general assessment of these and any other relevant elements of the child's best interests and any decision should reflect the weight given to each element depending on the others. In addition, the Committee notes that the 'age and maturity of the child should guide the balancing of the elements'. In assessing 'age and maturity' '[t]he physical, emotional, cognitive and social development of the child' should be taken into account...²⁸

However, General Comment No. 14 also acknowledges that the "best interests" standard requires an element of "flexibility" and that this may lead to situations where parties may seek to manipulate this flexibility for their own purposes.²⁹ Also it recognises that "best interests" is 'a' primary consideration as opposed to 'the' primary consideration:

'[t]here might be situations where "protection" factors affecting a child (e.g. which may imply limitation or restriction of rights) need to be assessed in relation to measures of "empowerment" (which implies full exercise of rights without restriction). In such situations, the age and maturity of the child should guide the balancing of the elements.'³⁰

²⁷ *ibid* [55-79].

²⁸ *ibid* [83].

²⁹ *ibid* [34].

³⁰ *ibid* [83].

Interestingly, also, the Committee notes that ‘they should not only assess the physical, emotional, educational and other needs at the specific moment of the decision, but should also consider the possible scenarios of the child’s development, and analyse them in the short and long term.’³¹ This is reflective of the views of Vygotsky noted in Chapter one where he refers to the ‘zone of proximate development’³² and the need to see the child not only as they are now but also as to how they want to develop.

The second stage is the **determination** which ‘describes the formal process with strict procedural safeguards designed to determine the child's best interests on the basis of the best-interests assessment.’³³

These procedural steps include ensuring firstly that the child is provided with an opportunity to express their views, based on an individual assessment of the child. These investigations and assessments must be done without delay because of the impact of time in decisions affecting children. It is envisaged that assessments would be carried out by an interdisciplinary team of qualified experts in a ‘safe and friendly atmosphere.’³⁴ It is also envisaged that children will have both a guardian and legal representation, and that there should be a mechanism in place to review decisions made. The Comment provides that all professionals should be educated in this regard and that education should also be provided for the children and their parents. In addition, a Children’s Rights Impact Assessment should be applied to all policy and legislation

Specifically, with regard to the issues being examined in this thesis, General Comment No.14 states that these standards when assessing the “best interests” of the child will also apply in ‘conciliation, mediation and arbitration processes.’³⁵

³¹ *ibid* [84].

³² See chapter 1.

³³ General Comment No.14 (n 3) [47].

³⁴ *ibid* [94]

³⁵ *ibid* [27].

C. Alternatives to the “Best Interests” principle?

Acknowledging, as did the Committee on the Rights of the Child, the potential for ‘manipulation’³⁶ in determining the “best interests” is there, perhaps, an alternative to the “best interests” principle? What has been examined in other jurisdictions in an effort to remove this uncertainty for the parties engaging in court actions and indeed the lawyers and judges who strive to administer justice? One alternative which was explored was the “primary caretaker” standard which was established by the Minnesota Supreme Court case of *Pikula v Pikula*³⁷. From the facts of the case, both Dana Pikula and his wife Kelly were described as “imperfect parents”. The judge commented on the difficulties of deciding what was in the child’s best interest. He referred to the *Garska*³⁸ case where Judge Neely had commented that the “best interests” standard required a ‘precision of measurement which is not possible given the tools available to the judges.’³⁹ Wahl J, in *Pikula*, stated:

‘For these reasons — the recognized need for stability in children's lives, the uncertainty of other indicia of a child's best interests in custody decisions, and the pressing need for coherent decisionmaking on the trial court level and for effective appellate review — we hold the factors ... require that when both parents seek custody of a child too young to express a preference for a particular parent and one parent has been the primary caretaker, custody be awarded to the primary parent absent a showing that that parent is unfit to be the custodian.’⁴⁰

Justice Wahl described the primary care taker as ‘... the person who provides the child with daily nurturance, care and support’ and noted that as

³⁶ General Comment No.14 (n 3) [34].

³⁷ *Pikula v Pikula*, 374 N.W.2d 705, 711(Minn. 1985).

³⁸ *Garscha v. Mc Coy*.278 S.E.2d 357 (W. Va. 1981).

³⁹ *ibid* 361.

⁴⁰ *Pikula* (n 34) 713.

had been held in the *Berndt*⁴¹ case ‘a court order separating a child from the primary parent could thus rarely be deemed in the child's best interests’⁴².

‘The primary caretaker’ is therefore more accurately defined as ‘the person who, before the divorce, managed, monitored the day-to-day activities of the child, and met the child's basic needs including: feeding, clothing, bathing, and protecting the child's health’⁴³ and the assumption was that the primary caretaker should continue to be the main carer for the child post divorce. However, in many cases this caused the standard to revert back to what was, in effect, a revival of the “tenders years” principle which favoured mothers. Supporters of the process, like Neely CJ, believed that having such a presumption in place reduced the risk of parents using the issue of custody as a bargaining tool and thus lessened the chances of one party exploiting the other party financially because of fears over custody.⁴⁴ Others, like Katz, note that:

‘Law reformers are constantly seeking magical solutions or formulas for determining who should be awarded custody in divorce cases. While mathematical formulas might work in determining child support payments, there are no such mechanical tests for child placement. The focus in child custody today should not be placed on searching for such tests, but rather on humanizing the process by which custody disputes are resolved. This requires the judge to approach each case with an open mind, apply the appropriate standards, and support the decision with specific reasons.’⁴⁵

⁴¹ *Berndt v Berndt* 292 N.W.2d 2 (Supreme Court of Minnesota 11 April 1980).

⁴² *Pikula* (n 34) 711.

⁴³ Sanford Katz, ‘That They May Thrive’ Goal of Child Custody: Reflections on the Apparent Erosion of the Tender Years Presumption and the Emergence of the Primary Caretaker Presumption’ (1992) 8 *Journal of Contemporary Health, Law and Policy* 123,133.

⁴⁴ Richard Neely, ‘The Primary Caretaker Parent Rule: Child Custody and The Dynamics of Greed’ (1984) 3 *Yale Law and Policy Review* 168.

⁴⁵ Katz, (n 43)135.

In practice, judges and lawyers in Minnesota found the primary caretaker standard ineffective and rather than reduce the number of cases contested through the courts, as anticipated, it ‘produced a frenzy of litigation.’⁴⁶

Four years later legislation was enacted in Minnesota re-establishing the “best interests” principle. The statute sets out a total of thirteen factors to be taken into account when determining what is in the child’s best interests, one of which remains as assessment of who was the primary caretaker for the child. However, this issue is now but one of the factors to be taken into account and not the sole basis upon which matters of custody and access are to be determined.

Assessing the issue under these thirteen factors⁴⁷ helps to give the court a more holistic view of the child’s relationship with both parents and takes the

⁴⁶Gary L. Crippen and Sheila M. Stuhlman, ‘Minnesota’s Alternatives to Primary Caretaker Placements: Too Much of a Good Thing?’ (2001) 28 *William Mitchell Law Review* 677, 682.

⁴⁷ The Minnesota legislature rejected the primary caretaker preference adopted by the state Supreme Court. The statute specifically proscribes basing the custody decision on caretaking alone. Minn. Stat. § 518.17, subd. 1 (2007) provides ‘The best interests of the child. (a) “The best interests of the child means all relevant factors to be considered and evaluated by the court including: (1) the wishes of the child's parent or parents as to custody;(2) the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference;(3) the child's primary caretaker; (4) the intimacy of the relationship between each parent and the child; (5) the interaction and interrelationship of the child with a parent or parents, siblings, and any other person who may significantly affect the child's best interests; (6) the child's adjustment to home, school, and community; (7) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity; (8) the permanence, as a family unit, of the existing or proposed custodial home; (9) the mental and physical health of all individuals involved; except that a disability, as defined in section 363A.03, of a proposed custodian or the child shall not be determinative of the custody of the child, unless the proposed custodial arrangement is not in the best interest of the child; (10) the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture and religion or creed, if any; (11) the child's cultural background; (12) the effect on the child of the actions of an abuser, if related to domestic abuse, as defined in section 518B.01, that has occurred between the parents or between a parent and another individual, whether or not the individual alleged to have committed domestic abuse is or ever was a family or household member of the parent; and (13) except in cases in which a finding of domestic abuse as defined in section 518B.01 has been made, the disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child. The court may not use one factor to the exclusion of all others. The primary caretaker factor may not be used as a presumption in determining the best interests of the child. The court must make detailed findings on each of the factors and explain how the factors led to its conclusions and to the determination of the best interests

child's ecology into account, as was recommended in the writings of Bronfenbrenner, outlined in chapter one.⁴⁸ However, many of the factors listed take a paternalistic/ welfare approach when compared to those set out under General Comment No.14 which focus more on the needs of the child.

Another concept which was proposed by the American Law Institute is the "Approximation standard"⁴⁹. In applying this standard, custody and access are also decided by looking back at the family structure during the marriage. It examines what had been the norm in the family up until the time of the separation, who provided the main care for the children and how much time each parent spent with the child or children. Custody and access for the future are then based on an approximation of the same allocation of time.

Supporters of the approximation standard like Scott and Emery⁵⁰ note that:

'[u]nlike the primary caretaker preference, approximation does not frame the custody decision as a zero sum game in which one parent wins and the other loses. In most cases, the parents continue to share decisionmaking authority and each parent's allocation of physical custody is determined on the basis of the family's past practices. Current research suggests that fathers perform about one third of child care; thus, a typical custody order would provide that the child reside with the father one third of the time (more than the traditional custody-visitation arrangement). If the parents have shared caretaking responsibility equally before dissolution, their custody arrangement will be much like joint physical custody.'⁵¹

of the child. (b) The court shall not consider conduct of a proposed custodian that does not affect the custodian's relationship to the child.'

⁴⁸ Urie Bronfenbrenner, 'Ecological systems theory' in Ross Vasta (ed), *Six theories of child development: Revised formulations and current issues* (Jessica Kingsley Publishers Ltd 1992) 201.

⁴⁹ American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (Matthew Bender & Co., Inc. 2002). The approximation rule was first proposed by Elizabeth S. Scott, 'Pluralism, Parental Preferences, and Child Custody' (1992) 80 *California Law Review* 615.

⁵⁰ Elizabeth Scott and Robert Emery, 'Gender Politics and Child Custody: The Puzzling Persistence of the Best Interest Standard' (2011) *Columbia Public Law and Legal Theory Working Papers*. <http://lsr.nellco.org/columbia_pllt/9200>

⁵¹ *ibid* 42.

Warshak, on the other hand, argues that the approximation standard is perceived as gender biased and that it provides a poor estimate of each parent's contribution. He notes that it overlooks the 'intangible benefits supplied by some parents and that it miscalculates how a child views its family'⁵². He comments that ranking one parent as primary care taker and the other parent as somewhat secondary in the child's life does nothing to assist and that '[p]eople who struggle to preserve their identities as parents, while facing the loss of their identities as spouses, do not benefit from being rank ordered'⁵³.

The mere fact that parties may order daily life in one way while they are married and in a normal marital relationship does not mean that those same arrangements will suit the couple in the event of separation and divorce. What is best for the child should be based on what is best for the child at the present moment and not what has worked historically. Neither does this standard make allowances for the ordinary development of relationships where, customarily, mothers may be more prevalent in a child's life in the early years but fathers take on an increasing role as the child gets older. These changes occur naturally and without any notice in an intact family but need to be acknowledged too as we examine what is best for a child whose parents no longer reside together. Kelly writes that the approximation standard:

'... ignores the quality of the relationship between the child and the primary caretaker in favour of counting hours and rewarding many repetitive, concrete behaviours. Indeed, the most important emotional and interactive behaviours promoting children's development and psychological, social, and academic adjustment, such as love, acceptance, respect; encouragement of autonomy, learning, and self-esteem; moral guidance . . . are not considered.'⁵⁴

⁵² Richard Warshak, 'Punching the Parenting Time Clock: The Approximation Rule, Social Science, and the Baseball Bat Kids' (2007) 45 (4) *Family Court Review* 600.

⁵³ *ibid* 604.

⁵⁴ Joan B. Kelly, 'The Determination of Child Custody, The Future of Children' *Children and Divorce* (1994) 4 (1) 130.

She goes on to say that:

[i]t assumes that a complex system—a family—can be understood by breaking it down into discrete measurable units, without regard for the transactions and balance among the units. It reduces the intricate rhythms of a family’s life together to only those interactions that can be measured with a stopwatch and calculator. In so doing, it no more captures the essence of the family than the number of words and lines convey the meaning, value, and essence of a poem.’⁵⁵

The approximation standard, therefore, may not prove to be the hoped for answer to the problem. Again, this standard is more focused on the needs of parents rather than considering the impact on the child. As noted by Warshak, the ‘courts will not define children’s best interests, by relying on what is easier to measure merely because it is easier to measure.’⁵⁶

Ultimately, the best interests standard, though not easily measurable or a perfect solution to issues of custody and access, nonetheless allows the court to consider all the circumstances past and present and the possible future needs of the child⁵⁷ and indeed ‘... instructs the court to treat each child, in each family, as an individual.’⁵⁸ The benefits for the child to maintain relationships with both parties needs to be ascertained and crucially, the children need to be consulted about decisions that are purportedly made in their best interests, rather than it becoming a time competition between hurt and naturally, at a time like this, defensive parents. ‘The best parenting plans reassure children that their family is not broken but rearranged.’⁵⁹

In examining the “best interests” principle, it is interesting to note that article 3 of the UNCRC refers to the best interests being ‘a’ primary consideration. This suggests that other factors can also be taken into account. General Comment No.14 addresses this issue. It notes that the ‘strong position’ is justified because of the ‘special situation of the child:

⁵⁵ *ibid* 613.

⁵⁶ Warshak (n 52) 609.

⁵⁷ General Comment No.14 (n 3) [83].

⁵⁸ Warshak (n 52) 612.

⁵⁹ *ibid* 613.

dependency, maturity, legal status and, often, voicelessness’ and that ‘[i]f the interests of children are not highlighted, they tend to be overlooked.’⁶⁰ However, they also acknowledge that their “best interests” ‘might conflict with other interests or rights (e.g. of other children, the public, parents etc.)’ and refer to the importance of balancing such rights, as noted earlier, in situations where the child may require protection. However, in Article 21, which refers to the issue of adoption, this is strengthened in that the “best interests” are noted to be ‘the’ primary consideration.

D. Article 12 – Voice of the Child

The Convention on the Rights of the Child has been a “catalyst for a new focus on the inclusion of children’s views and perspectives when decisions are to be made on issues that matter to them”.⁶¹ Article 12 of the United Nations provides that:

‘1. States 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 national law.’

It does not however set out the procedural steps to be taken in order to seek vindication of rights under the Convention; nor is there a complaints

⁶⁰ General Comment No.14 (n 3) [37].

⁶¹ Judy Cashmore and Patrick Parkinson, ‘Children’s participation in family law disputes. The Views of Children, Parents and Counsellors’ (2009) 82 *Family Matters* 15 citing Ursula Kilkelly, ‘Operationalising children’s rights: Lessons from research’ (2006) 1(4) *Journal of Children’s Services* 35-45.

procedure in place. The European Convention on the Exercise of Children's Rights (CECR) in 1996⁶², which sought to give practical effect to UNCRC Article 12, was to provide a procedural framework for the implementation of Article 12 rights. Article 1(2) of the CECR provides that the object of the Convention is to:

‘promote [children's] rights, to grant them procedural rights and to facilitate the exercise of these rights by ensuring that children are, themselves or through other persons or bodies, informed and allowed to participate in proceedings affecting them before a judicial authority.’

Article 3 provides that a child shall have the right to request information, to be consulted, to express a view and to be informed as to the outcome of any decisions made. Under Article 4, a child who has the required understanding has a right to apply for assistance through a special representative in any judicial proceedings where assistance by parents would present a conflict of interest.⁶³ Ireland signed this treaty but it has not yet ratified it, presumably because there is no framework in place to provide for such representation of children within the Irish legal system.⁶⁴ This remains the position in Ireland despite the passing of the referendum approving an amendment to the Constitution set out in the Constitution (Children) Bill, 2012⁶⁵. The amendment will be discussed in more detail below.

Up until July 2009, States, like Ireland, who have not ratified the Convention on the Exercise of Children's Rights, could argue that there were no clear guidelines as to how the provisions of Article 12 of the UNCRC were to be interpreted or implemented. This changed on July, 1 2009, when the UN Committee on the Rights of the Child, by means of

⁶² European Treaty Series CETS No.160. The European Convention on the Exercise of Children's Rights 1996. This Convention came into force on 1 July 2000 following ratification by Greece, Poland and Slovenia in accordance in Art. 21(3) of the 1996 Convention. It has been ratified by 11 States and signed by a further 17.

⁶³ European Convention on the Exercise of Children's Rights 1996 available at <http://conventions.coe.int/Treaty/en/Treaties/Html/160.htm> .

⁶⁴ Ursula Kilkelly, *Children's Rights in Ireland: Law, Policy and Practice* (Tottel 2008) 222.

⁶⁵ Thirty First Amendment (n 4).

General Comment No. 12⁶⁶ provided States parties with a legal and literal analysis of Article 12 and provided clear guidelines as to what is expected in terms of implementation of the child's right to be heard.

E. General Comment No. 12

The Committee has emphasised that the words “shall ensure” in the text of Article 12 ‘... is a legal term of special strength, which leaves no leeway for States parties’ discretion. Accordingly, States parties are under strict obligation to undertake appropriate measures to fully implement this right for all children.’⁶⁷ States are further required to make sure that there is a mechanism in place to enable the voice of the child to be heard and that due weight be given to their views. At paragraph 48 the Comment outlines that there is an obligation on states parties:

‘To review or amend their legislation in order to introduce mechanisms providing children with access to appropriate information, adequate support, and if necessary feedback on the weight given to their views, and procedures for complaints, remedies or redress.’⁶⁸

The Comment goes on to state clearly that every child “capable” of forming a view shall have a right to be heard and that children should be presumed to have the capacity to form his or her views and to express them. It is not up to the child to prove his or her capacity.⁶⁹ The Convention does not specify a particular age at which children's views should be heard. It refers only to the ‘views of the child being given due weight in accordance with the age and maturity of the child’. Recognition must be given to the role of non-verbal forms of communication used by younger children, their views often being expressed through play, painting, etc. The Committee failed to specify who should ultimately determine when a child has the required capacity and

⁶⁶ General Comment No. 12 (n 1).

⁶⁷ *ibid* [19].

⁶⁸ *ibid* [48].

⁶⁹ *ibid* [20].

have only stated that: ‘Good practice for assessing the capacity of the child has to be developed.’⁷⁰

States are under an obligation to:

‘provide training on article 12, and its application in practice, for all professionals working with, and for, children, including lawyers, judges, police, social workers, community workers, psychologists, caregivers, residential and prison officers, teachers at all levels in the education system, medical doctors, nurses and other health professionals, civil servants and public officials, asylum officers and traditional leaders.’⁷¹

Specific training is long overdue for professionals dealing with issues such as this—in that lawyers dealing with family law matters in Ireland have been treading cautiously in to the area of psychology as they attempt to assist their clients with the emotional issues of the breakdown and judges, for their part, have no training or guidance on the best way of interviewing children to ensure that children’s voices are heard without the rights of any party to the proceedings being compromised. Indeed one lawyer interviewed for this thesis expressed the view that:

‘First of all I think there is a huge problem in this area (the voice of the child) in family law. We are not equipped as solicitors to deal with it and the Judges are not equipped to deal with it.’⁷²

The Comment goes on to set out, in paragraphs 40–47, the steps for implementation of the child’s right to be heard. They set out five steps as follows:

1. Preparation: Children should be given information about their right to express a view, should receive information about the option of communicating directly or through a representative, must be made

⁷⁰ *ibid* [44].

⁷¹ *ibid* [49].

⁷² Interview LI 3, June 2011.

aware of the consequences of his/her choice, the impact that the expressed views will have on the outcome, and the child must be prepared for the hearing.

2. The hearing: The person hearing the views of the child must be enabling and encouraging so that the child is assured that they are listening to her views, in a setting where they are, if possible, assured confidentiality, preferably not in open court.
3. Assessment of capacity: Once the decision-maker is satisfied that the child is capable of expressing his/her views, these views must be a significant factor in settlement of the issue.
4. Information about the weight given to the views of the child (feedback): The child must be informed as to the outcome of the process and how their views were considered. This will assist the child in making any amended proposals or, if necessary, to file an appeal.
5. Complaints, remedies and redress: Legislation is needed to provide children with a complaints procedure and remedies when their rights to be heard and for their views to be given weight is disregarded and violated.

Accordingly, under Article 12, children have the right to participate or to choose not to; to participate through a representative or directly in the court should they choose to do so; are presumed to have the capacity to form a view and once this is established their views are to be given weight; and be informed of the outcome and the effect that their views had on the ultimate decision. In following these steps, children would be provided with the “scaffolding”⁷³ as referred to in Chapter One to assist them to participate effectively in matters that concern them.

⁷³ See Chapter 1.

F. Weight to be given to these views – evolving capacity

In addition, in accordance with Article 5 of the UNCRC, one must also acknowledge the evolving capacity of the child and the shifting balance between parental authority and children's autonomy. This issue was highlighted most notably in the case of *Gillick v West Norfolk and Wisbech Area Health Authority*⁷⁴ where the House of Lords held that a girl under the age of 16 had the legal capacity to consent to the use of contraceptives if she had sufficient maturity and intelligence to understand the nature and implications of the proposed treatment. Importantly the court noted that the parent's right to control a minor only existed as far as it was required for the child's benefit and protection and that such right was not based on a fixed age. Lord Scarman recognised that there is a need for children to develop over time and that a child's level of autonomy increases:

‘to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision.’⁷⁵

The court acknowledged that while, in many cases the parents may be the best judge of the child's welfare, there may be exceptional cases where the doctor was a better judge of the medical advice and treatment required and that it may be in the girl's best interests to receive this advice and treatment, this being done without the consent or knowledge of the parents. The court therefore held that the Department of Health and Social Security's guidance on these issues was not an infringement of her parents' rights.

III. Law in Europe

While a full analysis of all European and International law pertaining to children and the family is beyond the scope of this thesis, this section shall outline some of the key provisions of the European Convention on Human

⁷⁴ *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

⁷⁵ *ibid* (Scarman L) 189.

Rights and Fundamental Freedoms and its incorporation into Irish law at sub Constitutional level in the European Convention on Human Rights Act 2003; Brussels II *bis* which resulted from the repeal of the earlier Council Regulation 1347/2000 and the Charter of Fundamental rights which came into effect in December 2009 as a result of the Treaty of Lisbon.

A. Council of Europe

The European Convention on Human Rights and Fundamental Freedom (ECHR) 1950,⁷⁶ though important in the area of human rights generally, does not specifically address the issue of children's rights; children under the ECHR have the same rights as adults. While all the articles of the ECHR are therefore applicable to children in the same way as to adults, two articles of the ECHR, which are relevant in the context of this thesis, are Article 6, which provides for the right to a fair trial and Article 8, the right to respect for family life. In the cases of *T v UK*⁷⁷ and *V v UK*⁷⁸ the European Court of Human Rights (ECtHR) held that the applicants, who were children being tried for murder in an adult court, had not received a fair trial because they had not been given an opportunity to participate. Under Article 6 the ECtHR has also held that a child has a right to initiate proceedings⁷⁹, though this right could, in certain circumstances, be restricted⁸⁰.

Article 8 provides for the right to respect for private and family life:

‘1. Everyone has the right to respect for his private and family life, his home and his correspondence.

⁷⁶ This is an international treaty the aim of which is to protect human rights across Europe. It was drafted by the Council of Europe in 1950. Ireland was one of the first States to ratify the Convention in February 1953. The Convention is essentially a treaty between Member States of the Council of Europe which enshrines the principle of respect for human rights and the basis of a relationship between Member States on this issue. The rights in the Convention operate between the individual and the State. However, if one person's individual rights were breached by another individual it is possible that the State would be liable if it had failed to take steps to prevent this wrong occurring.

⁷⁷ *T v UK* App. No. 24724/94 Judgment of December 16, 1999.

⁷⁸ *V v UK* App. No. 24724/94 Judgment of December 16, 1999.

⁷⁹ *Golder v UK* App. No. 4451/70 Judgment of February 21, 1975.

⁸⁰ *Ashingdane v UK* App. No. 8225/78 Judgment of May 28, 1985.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

However, it is clear from decisions of the ECtHR that Article 8 is often used by parents who seek to challenge court decisions based on procedural issues, rather than the emphasis being on the importance of hearing the child’s view in accordance with their own best interests. For example, in the case of *Elsholz v Germany*⁸¹ the applicant, who was the child’s natural father, challenged the making of an adoption order without his consent and whether such measure was ‘necessary in a democratic society’. The ECtHR held that the Court’s task is to determine what is in the best interests of the child. While acknowledging the fact that the national authorities were the best to judge the situation having had ‘the benefit of direct contact with all persons concerned’,⁸² the Court held that there had been a violation of the father’s rights under Article 8 and that the Regional Court should have appointed an expert to interpret the child’s evidence. Specifically the court noted that:

‘...taking into account the importance of the subject matter, namely the relations between a father and his child, the Regional Court should not have been satisfied, in the circumstances, by relying on the file and the written appeal submissions without having at its disposal psychological expert evidence in order to evaluate the child’s statements.’⁸³

Similarly, in *Sommerfield v Germany*⁸⁴ the child’s father alleged that there had been a breach of his rights under Article 8 because the national court

⁸¹ *Elsholz v Germany* App No.25735/94 Judgment of July 13, 2000.

⁸² *ibid* para [48].

⁸³ *ibid* para [52].

⁸⁴ *Sommerfield V Germany* App. No 31871/96 Judgment of July 8, 2003.

had relied on the wishes of his daughter and had not deemed it necessary to obtain an expert report. Interestingly in that case, the Grand Chamber refused the applicant's claim and held that the national court could rely on the wishes expressed to the Court by a thirteen year old girl and that it was not necessary to get her assessed by an expert witness. Again, in the case of *Sahin v Germany*⁸⁵ the Grand Chamber held that there had been no breach of a father's rights under Article 8 as a result of the decision of the domestic court to rely on expert reports rather than to hear from the the child directly. The child was 4 years old at the time. The Grand Chamber held that hearing the child in each case depends 'on the specific circumstances of each case, having due regard to the age and maturity of the child concerned.'⁸⁶

It is evident, therefore, that the ECtHR looks at the evidence in each case and endeavours to take a balanced approach. In the case of *C v Finland*⁸⁷ the child's father claimed that the Supreme Court of Finland had relied disproportionately on the views of his children that they remain with their deceased mother's female partner. The father felt that the children had been unduly influenced by their mother's partner and there had been no oral hearing. The ECtHR held that the Supreme Court in Finland had failed to strike a proper balance between the respective interests and that therefore there had been a breach of the father's rights under Article 8.

The ECHR has been incorporated into Irish law by means of statute, the European Convention on Human Rights Act 2003. As a result of the incorporation it is now possible for an individual to take a case in a domestic court alleging a breach of the ECHR, whereas prior to incorporation all domestic remedies would have to be exhausted before bringing a case to the European Court of Human Rights. However, the impact of the Act in terms of improving the rights of the child may be limited because of the dualist nature of Irish law. This view was also expressed by Murray CJ in the case of *J MCD v PL and B.M.*, where he

⁸⁵ *Sahin V Germany* App. No. 30943/96 Judgment of July 8,2003.

⁸⁶ *ibid* [73].

⁸⁷ *C v Finland* App.No.18249/02 Judgment of May 9, 2006.

noted that the ECHR was not part of Irish law and was not directly applicable.⁸⁸ ‘Nevertheless, the Act introduces over 50 years of ECtHR case law into our domestic law’.⁸⁹

1. Guidelines of the Committee of Ministers of the Council of Europe on Child Friendly Justice

As part of the Council of Europe’s strategy on Children’s Rights (2009-2011) various committees, including the European Committee on Legal Co-operation, The European Committee on Crime Problems and the Centre for Developmental Disability and Health, worked together in consultation with experts, lawyers, academics and importantly with children and young people to develop the Child Friendly Justice Guidelines.⁹⁰ The Guidelines were developed to address gaps between law and practice with specific reference to the UNCRC and ECHR. They set out their fundamental principles as being those of participation, best interests, dignity, protection from discrimination and respect for and adherence to the rule of law in terms of access to justice and due process.

The guidelines provide that children and their parents should be furnished with information and advice about rights, that they should have their own legal counsel and that such counsel should be properly trained and should promote an interdisciplinary approach. Children should not be prevented from taking actions because of the cost of proceedings. The guidelines specify that the ‘right to be heard is a right of the child, not a duty on the child’⁹¹ and that Judges should respect that right and ensure that children are provided with means to express their view and that it be given due weight according to the age and maturity of the child. Practical matters like the

⁸⁸ *McD v L and anor* [2007] IESC 81 (Murray CJ).

⁸⁹ Geoffrey Shannon, *Child Law* (2nd edn, Thomson Reuters 2010) 81.

⁹⁰ Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies)
<[https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec\(2010\)1098/10.2abc&Language=lanEnglish&Ver=app6&S>ite=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec(2010)1098/10.2abc&Language=lanEnglish&Ver=app6&S>ite=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383)> .

⁹¹ para [46].

layout of the court room are also addressed in the guidelines and the importance of avoiding delays in justice and explaining the outcomes to clients are stressed. In addition, the guidelines call upon member states to carry out research into all aspects of child friendly justice and to monitor and assess their domestic legislation to ensure the implementation of these guidelines.

In addition, paragraph 35 of the Explanatory Memorandum refers explicitly to family law issues and notes that:

‘... children should be included in the discussions prior to any decision which affects their present and/or future well-being. All measures to ensure that children are included in the judicial proceedings should be the responsibility of the judge, who should verify that children have been effectively included in the process and are absent only when children themselves have declined to participate or are of such maturity and understanding that their involvement is not possible. Voluntary organisations and child ombudspersons should also make all efforts to ensure that children are included in family law proceedings and are not faced with a *fait accompli*.’⁹²

It is clear that the standards set out in the Child Friendly Justice Guidelines, though non-binding, represent somewhat of a gold standard for the participation of children and the consideration of their best interests. Though initial progress has been made in Ireland through the passing of the 31st Amendment to the Constitution (the amendment on children’s rights), which will be examined in detail later in this chapter, it is clear that as a nation, Ireland has a long way to go in complying with the guidelines.

⁹² Child Friendly Justice Guidelines (n 90) [35].

2. European Social Charter

The revised European Social Charter⁹³ came into effect in November 2000 and covers economic, social and cultural rights. Of relevance to children and families are Articles 16 and 17 which provide for the rights of both families and young people to appropriate social, legal and economic protection, ensuring that children reach their full development and education and that they are ‘protected from negligence, violence or exploitation’⁹⁴.

B. EU Law

1. Brussels II *bis*

EU Council Regulation 2201/2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and Matters Relating to Parental Responsibility⁹⁵ known as Brussels II *bis* came into force on 1 March 2005. Recital 5 of Brussels II *bis* states that ‘... to ensure equality for all children, this regulation covers all decisions on parental responsibility, including measures for the protection of the child...’ and as a Regulation, results in “complete automatic enforcement”.⁹⁶

Brussels II *bis* sets out three aims in relation to parental responsibility:

- ‘to extend the rules on mutual recognition and enforcement of decisions in relation to parental responsibility;
- to strengthen the right of the child in respect of preserving contact with both parents, through automatic recognition and enforcement;

⁹³ European Social Charter ETS No 163 (Revised) 1996
<<http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm> >

⁹⁴ Article 17 1 (b) of the European Social Charter.

⁹⁵ Council Regulation (EC) 2201/2003 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters relating to parental responsibility (Brussels II *bis*) [2003]OJ L338/1.

⁹⁶ Shannon, (n 89) 109.

- to deter abduction of the child by a parent, through buttressing the obligations of the courts in ordering the return of children in abduction cases within the EU.’⁹⁷

Clause 19 states that:

‘The hearing of the child plays an important role in the application of this regulation, although this instrument is not intended to modify national procedures applicable.’

This clause applies to all of the provisions of the regulation, which includes issues like separation and divorce. However, it is likely that most States Parties will rely on the assurance that the Regulation is ‘not intended to modify national procedures’ in order to allow for a “business as normal” approach to the way cases are dealt with. Under Article 11(2) of the Regulation dealing with child abduction cases, however, there is a provision that the child **must**⁹⁸ now be heard ‘unless it is inappropriate having regard to his or her age or degree of maturity’.

The significance of this requirement will be displayed later in this chapter as the majority of cases where the courts in Ireland have addressed the issue of the voice of the child have been cases to which Brussels II *bis* Article 11(2) relates. In accordance with seemingly preferred national procedures in Ireland, the views of the child are most often obtained through the services of a section 47 reporter.

2. Charter of Fundamental Rights

As a result of Ireland ratifying the Lisbon treaty in 2009, the Charter of Fundamental Rights of the European Union became ‘an integral part of EU law’⁹⁹. Article 24 of the Charter provides for the rights of the child:

⁹⁷ *ibid* 116.

⁹⁸ Emphasis added.

⁹⁹ Jim Nestor, *An Introduction to Irish Family Law* (4th edn, Gill & Macmillan 2011) 6.

‘1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.’

The Charter, though not creating any new rights, reiterates the “best interests” principle, the right of the child to be heard, again in accordance with their age and maturity as specified in the UNCRC and once again, notes the right of the child to maintain contact with his or her parents.

In February 2011, the European Commission published the *EU Agenda for the Rights of the Child*¹⁰⁰. The Commission confirmed its strong commitment to protecting and fulfilling the rights of the child in all EU policies in accordance with the Europe 2020 Strategy¹⁰¹ and the Commission’s Action Plan to implement the Stockholm Programme¹⁰². They listed a number of actions which they propose to take in this regard, which include a commitment to promoting the Child Friendly Justice Guidelines, ‘taking them into account in future legal instruments in the field of civil and criminal justice’¹⁰³ and also supporting the training of judges, guardians and public authorities that are in contact with unaccompanied children.

¹⁰⁰ European Commission sets out EU agenda for the rights of the child < http://europa.eu/rapid/press-release_IP-11-156_en.htm?locale=en > .

¹⁰¹ The Europe 2020 Strategy sets out a vision for Europe's social market economy over the next decade < http://ec.europa.eu/europe2020/index_en.htm > .

¹⁰² In December 2009 European leaders endorsed 170 initiatives known as the Stockholm Programme. The measures are aimed at creating a genuine European area of freedom, security and justice in the next five years.

¹⁰³ European Commission sets out EU agenda for the rights of the child < http://europa.eu/rapid/press-release_IP-11-156_en.htm?locale=en > .

IV. Children's rights in Ireland

A. Pre the 31st Amendment to the Constitution

Further to the examination of what constitutes childhood and how it is to be determined as set out in chapter one, Shannon writing on childhood in an Irish context is of the view that Article 42 of the Constitution 'is not limiting as to the age at which childhood is deemed to end and adulthood begin'. He remarks that '... childhood has always proved markedly fluid in statute law',¹⁰⁴ referring, in particular, to the Family Law Acts under which an individual is considered a child up to the age of 18 years or up to the age of 23 if in full time education. However, this issue was addressed by the Irish Supreme court in the case of *Sinnott (suing by his mother and next friend Kathryn Sinnott) v Minister for Education, Ireland and the Attorney General*.¹⁰⁵ This case examined the issue of education rights and the Supreme Court held that an individual can no longer be considered a child once he or she reaches the age of 18.

Prior to the passing of the 31st amendment to the Constitution on 10th November 2012, there was, as noted by Shannon, 'minimal express mention of children's rights within the Constitution.'¹⁰⁶ The courts, however, had acknowledged that children, as citizens, had certain unenumerated personal rights under Article 40. 3. Specifically, in the case of *G v An Bord Uchtála*,¹⁰⁷ O' Higgins CJ held that:

'The child also has natural rights. ...[T]he child has a right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being.'¹⁰⁸

¹⁰⁴ Shannon, (n 89)164.

¹⁰⁵ [2001] IESC 63, [2001] 2 IR (SC) 545.

¹⁰⁶ Shannon, (n 89) 8.

¹⁰⁷ *G v An Bord Uchtála* [1980] IR 32 (SC).

¹⁰⁸ *ibid* 55-56.

However, Article 40.3 was, and continues to be, overshadowed by the provisions in Article 41 of the Constitution in which ‘the family’ is described as ‘a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law’. Family, as interpreted by the courts, is the family based on marriage¹⁰⁹. Thus the importance placed on the status of the family as a unit impacts on the individual rights of members within the family and the children in particular. This was confirmed in the case of *Murray v Ireland*¹¹⁰ where Costello J held:

‘[T]he rights in Article 41.1.1 are those which can be properly said to belong to the institution itself as distinct from the personal rights which each individual member might enjoy by virtue of membership of the family.’¹¹¹

Prior to the amendment, Article 42.5 further strengthened the powers of the family as a whole and the autonomy of parents by providing that the State may only intervene:

‘In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.’

B. Rights versus Welfare

Emanating therefore from the position of parents and the family in the Constitution, the legislative framework in Ireland takes a similar protectionist approach referring to the welfare of the child. Welfare is defined under section 2 of the Guardianship of Infants Act 1964 as including the religious, moral, intellectual, physical and social welfare of the child.

¹⁰⁹ *The State (Nicolaou) v An Bord Uchtála* [1966] IR 567 (SC).

¹¹⁰ *Murray v Ireland* [1985] IR 532(HC).

¹¹¹ *ibid* 538.

Section 3 of the Guardianship of Infants Act 1964 provides:

‘3.—Where in any proceedings before any court the custody, guardianship or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration.’

On analysing section 3 further in *G v an Bord Uchtála*¹¹² Walsh J held:

‘The word “paramount” by itself is not by any means an indication of exclusivity; no doubt if the Oireachtas had intended the welfare of the child to be the sole consideration it would have said so. The use of the word “paramount” certainly indicates that the welfare of the child is to be the superior or the most important consideration, in so far as it can be, having regard to the law or the provisions of the Constitution, applicable to any given case.’¹¹³

Therefore, the welfare of the child has to have ‘regard to the law or the provisions of the Constitution’ and it is clear that the Constitutional view is that the welfare of the children is best served within the ‘family’. This was confirmed by the Supreme Court in the case of *Re JH, an infant*¹¹⁴ where Finlay CJ stated that the:

‘...constitutional presumption that the welfare of the child, which is defined in s.2 of the Act in terms of those identical to Article 42, s.1, is to be found within the family unless the Court is satisfied on the evidence that there are compelling reasons why this cannot be achieved, or unless the Court is satisfied that the evidence established an exceptional case where the parents have failed to

¹¹² *G v an Bord Uchtála* [1980] IR 32 (SC).

¹¹³ *ibid* 76.

¹¹⁴ *Re JH, an infant* [1985] IR 375 (SC).

provide education for the child and to continue to fail to provide education for the child for moral or physical reasons...’¹¹⁵

This presumption can only be rebutted in ‘exceptional circumstances’ as was established in the case of *North Western Health Board v HW*.¹¹⁶ In that case the child’s parents refused to allow the Health Board to carry out a diagnostic PKU test. This test, which involves the taking of a small sample of blood by means of a heel-prick, is effective in detecting a range of easily treatable childhood diseases and it is, as noted by Murphy J, ‘beyond debate that the performance of the PKU test, viewed in medical terms, is unquestionably in the best interests of the infant tested’.¹¹⁷ However, the majority decision of the Supreme Court was of the view that ‘unwise and disturbing’¹¹⁸ as the parents’ decision not to allow the child to undergo this test was, the constitutional presumption is that the welfare of the child is to be found within the family and that only in “exceptional circumstances” would it be interfered with.

Murray J commented that there must be:

‘some immediate and fundamental threat to the capacity of the child to continue to function as a human person, physically morally or socially, deriving from an exceptional dereliction of duty on the part of the parents to justify such an intervention.’¹¹⁹

In general, parents have been deemed to be in the best position to judge what is in the welfare of their children. ‘Welfare’ as acknowledged earlier, is therefore a paternalistic standard that is based on what parents or other adults consider most appropriate for the child. Section 25 of the Guardianship of Infants Act 1964 as amended refers to the fact that the child’s “wishes” should be taken into account when the court considers ‘it appropriate and practicable having regard to the age and understanding of the child’. Kilkelly notes ‘the fact that the court is only required to consider

¹¹⁵ *ibid* 395.

¹¹⁶ *North Western Health Board v HW* [2001] IESC 90 [171] (Denham J), [2001] 3 IR 622 (SC).

¹¹⁷ *ibid* 729.

¹¹⁸ *ibid* 741.

¹¹⁹ *ibid* 740-741.

the child's wishes, and not the child's views', thus limiting 'the value of a child's involvement to 'what the child wants', rather than any broader appreciation of the merits of the child's participation, and indeed the right of the child to be so involved'.¹²⁰

Indeed, in many cases the courts have referred interchangeably to 'welfare' and 'best interests'. In the case of *McK v Information Commissioner*¹²¹ a child's father sought access to the child's medical records. The Information Commissioner took the view that records would only be released when they were satisfied that it was in the "best interests" of the child. However, the Supreme Court held that there was a presumption that a parent's actions would be in accordance with the best interests of the child. The Supreme Court held that '[i]t is presumed that his or her actions are in accordance with the best interests of the child. This presumption while not absolute is fundamental'.¹²²

Therefore, as noted by Shannon, when it comes to the rights of children, the duty of the State has been 'delegated to a third party', namely their parents, and the State has therefore a reduced obligation to children as citizens. 'The child of the constitutional family is expected to entrust its welfare to the autonomous decisions of its parents.'¹²³

But what about children who are not part of a constitutional family? Prior to the passing of the referendum, there was a discrepancy as to the treatment of children within the Constitutional definition of 'family', that is the family based on marriage and children of non-marital unions. It is clear from the case law that when examining the situation of children of non-marital unions the courts are not restricted by this presumption that the parents know what is best for the child, and the courts will instead focus on assessing what is actually in the best interests of the child itself.

¹²⁰ Ursula Kilkelly, *Children's Rights in Ireland Law, Policy and Practice* (Tottel 2008) 216. See also Taylor, Tapp and Henaghan 'Respecting Children's Participation in Family Law Proceedings' (2007) 15 *International Journal of Children's Rights* 61,74.

¹²¹ *McK v Information Commissioner* [2006] 1 IR 260 (SC).

¹²² *ibid* 267.

¹²³ Shannon, (n 89) 19.

As a result, children who were members of a married family were left in a more exposed position than those whose parents were not married. This was demonstrated in the cases of *K v W*¹²⁴ and *WO'R v EH*¹²⁵ both of which involved natural fathers who were asserting their rights to guardianship with a view to having an input into subsequent adoption proceedings. In both cases, the courts examined the rights of the father from the child's point of view and the extent to which the relationship would be in the child's best interests.

Hamilton CJ held that:

'[T]here may be considerations appropriate to the welfare of the child... as may make it desirable for the child to enjoy the society, protection and guardianship of its father.... The extent and character of the rights of the [natural] father of a child... accrue not from any constitutional right vested in the natural father to be appointed guardian but from the relationship of the father to the child.'¹²⁶

This discrepancy in treatment was evident in the case of *N v Health Service Executive (Baby Ann)*.¹²⁷ This was a case where a mother placed her child for adoption and subsequently changed her mind. At the time the case came before the High Court the mother and natural father of the child were not married. Evidence was given in the High Court that removing the child from her adoptive parents would be extremely traumatic for the child as, at that point, she did not know her natural parents. The High Court ordered that in the best interests of the child, she should remain with her adoptive parents. The natural parents appealed the decision to the Supreme Court. By the time the appeal was heard the natural parents had married. They were therefore considered a "family" under the Constitution. In the Supreme Court Mc Guinness J stated that with their marriage:

'The central issue to be considered by the Court underwent a metamorphosis; it was no longer the best interests of the child but

¹²⁴ *K v W* [1990] 2 IR 437 (SC).

¹²⁵ *WO'R v EH* [1996] 2 IR 248 (SC).

¹²⁶ *ibid* 261-262.

¹²⁷ *N v Health Service Executive* 2006 IESC 60, [2006] 4 IR (SC) 374.

the lawfulness or otherwise of the second and third respondents' custody of her. When deciding whether the second and third respondents' custody of Ann is in accordance with the law it is no longer possible for the court to follow the original approach of Lynch J. in *In Re JH(inf.)* [1985] I.R.375 :-“to look at it through the eyes, or from the point of view of the child.”¹²⁸It is clear that the court is bound by the decision in *In Re J.H(inf.)*; the full rigour of the test established in that case must be applied.’¹²⁹

Another issue raised in Chapter One was that of how young children can actually exercise their rights, with writers such as Eekelaar suggesting methods like “dynamic self determinism” and the “least detrimental alternative”¹³⁰. But how have the Irish Courts addressed this issue? It appears that the Irish courts take the view that it is the responsibility of the parent to, as it were, hold the child's rights in trust and for the courts to balance those rights with those of the parents. In *North Western Health Board v HW* (PKU case) referred to earlier, Denham J held:

‘The child is the responsibility of the parents. The rights of the parents in exercising their responsibility are not absolute; the child has personal constitutional rights. The child has rights both as part of the unit of the family and as an individual.’¹³¹

She went on to say:

‘The court has a constitutional duty to protect the life and health of the child from serious threat and the court has a constitutional duty

¹²⁸ *In Re J.H.* [1985] I.R. 375

¹²⁹ *N v Health Services Executive* [2006] IESC 60 [16], [2006] 4 IR 374 (SC) 497 McGuinness J referring to the: ...constitutional presumption that the welfare of the child, which is defined in s.2 of the Act in terms of those identical to Article 42, s.1, is to be found within the family unless the Court is satisfied on the evidence that there are compelling reasons why this cannot be achieved, or unless the Court is satisfied that the evidence established an exceptional case where the parents have failed to provide education for the child and to continue to fail to provide education for the child for moral or physical reasons...(as set out in the case of *Re JH*).

¹³⁰ “Dynamic self determinism” suggests that one needs to give children the opportunity to decide for themselves. “Least detrimental alternative” examines the views of all concerned and ascertains what is the least detrimental.

¹³¹ *North Western Health Board v HW* [2001] IESC 90, [2001] 3 IR 622 (SC) 718.

to protect the family. A just and constitutional balance has to be sought.’¹³²

This was also addressed by the Irish Supreme Court in the case of *N v Health Service Executive*, also referred to above, where Hardiman J held that:

‘...especially in dealing with very young children who can express no meaningful views of their own... A right conferred on or deemed to inhere in a very young child will in practice fall to be exercised by another on his or her behalf. In practice, therefore, though such right might be ascribed to a child, it will actually empower whoever is in a position to assert it, and not the child himself or herself.’¹³³

Therefore it is clear that the Irish courts are of the view that children’s rights vest in their parents until such time as the children are in a position to assert them for themselves. The result has been that the child’s voice is rarely heard in matters that affect them, with the courts taking the view that the parents have the child’s “best interests” in mind. This was highlighted in the case of *N v Health Service Executive* by Mc Guinness J when she noted that:

‘... the one person whose particular rights and interests, constitutional and otherwise, were not separately represented, whether by solicitor and counsel or through a guardian *ad litem*, was the child herself.’¹³⁴

Again in the case of *Mc D v PL*¹³⁵ a case involving a dispute between the natural father of the child and the child’s mother and her partner, Denham J held:

‘At the core of this case is the infant, H.L. His welfare is of paramount importance. While submissions were made by counsel as to the balance of convenience to the applicant and the respondents,

¹³² *ibid* 726.

¹³³ *N v Health Service Executive* (n 127) 503.

¹³⁴ *ibid* 475.

¹³⁵ *Mc D v PL* [2007] IESC 28.

no counsel was before the Court to make submissions on behalf of the infant.’¹³⁶

C. Voice of the Child

It is clear from these cases that the courts have traditionally taken a paternalistic attitude as to what constitutes the “welfare” of the child. As noted earlier, s.11 of the Children’s Act 1997 inserted a new s.25 into the Guardian of Infants Act 1964 which provides that:

‘25. In any proceedings, to which section 3 applies, the court shall, as it thinks appropriate and practicable having regard to the age and understanding of the child, take into account the child’s wishes in the matter.’

In the case of *F N and EB v CO, HO and EK*¹³⁷ Finlay Geoghegan J held that:

‘[S]ection 25 [of the 1964 GIA ACT] should be construed as enacted for the purpose of, *inter alia*, giving effect to the procedural right guaranteed by Article 40.3 to children of a certain age and understanding to have their wishes taken into account by a court in making a decision under the Act of 1964, relating to the guardianship, custody or upbringing of a child.’¹³⁸

However, in any particular case the judge will have quite considerable discretion and must think it both “appropriate and practical”. Section 25 refers to “age and understanding”. This issue of participation has obviously posed some difficulties for the courts - how do they determine when a child should be consulted or participate, when may it be appropriate to do so and how do they determine “understanding”? The Convention refers to “age and maturity”. Again how is this interpreted by the courts?

¹³⁶ *ibid* [18].

¹³⁷ *FN and EB v CO, HO and EK* [2004] 4 IR 311.

¹³⁸ *ibid* 322.

In the English case of *Mabon v Mabon*¹³⁹ where there were three children ranging in age from 13 to 17, the Court of Appeal held that it would be unimaginable not to allow the children the opportunity to participate. Thorpe LJ stated that:

‘In testing the sufficiency of a child’s understanding, I would not say that welfare has no place. If direct participation would pose an obvious risk of harm to the child arising out of the nature of the continuing proceedings and, if the child is incapable of comprehending that risk, then the judge is entitled to find that sufficient understanding has not been demonstrated. But judges have to be equally alive to the risk of emotional harm that might arise from denying the child knowledge of and participation in the continuing proceedings.’¹⁴⁰

A similar approach was taken by Ms. Justice Finlay-Geoghegan in the Irish case of *MN v RN*.¹⁴¹ She concluded that:

‘...the primary consideration of the court in determining whether or not a child should be given an opportunity to be heard is whether the child on the evidence appears prima facie to be at an age or level of maturity at which he is capable of forming his own views.’¹⁴²

‘... The starting point is that the child should be heard. The Court is only relieved of the obligation where it is established that it would be inappropriate...’¹⁴³

In that case, Ms. Justice Finlay-Geoghegan was happy that the six year old was:

‘of a maturity at least consistent with his chronological age. ... Anyone who has had contact with normal six year olds knows that

¹³⁹*Mabon v Mabon* [2005] EWCA Civ 634.

¹⁴⁰ *ibid* [29].

¹⁴¹ *MN v RN* 2008 IEHC 382, [2009] IR 388.

¹⁴² *ibid* [27].

¹⁴³ *ibid* [19].

they are capable of forming their own views about many matters of relevance to them in their ordinary everyday life.’¹⁴⁴

Some confusion has arisen in that the judgment of Finlay-Geoghegan in *MN v RN* was cited with approval by Denham J in the Supreme Court case of *Bu v Be (Child Abduction)*.¹⁴⁵ In the *Bu* case, involving a child who was 5 years of age, Denham J interpreted Finlay-Geoghegan’s judgment in *MN v RN* as meaning that it was ‘inappropriate to hear a child under the age of six’. Denham J noted that ‘[t]his is not an inflexible rule but will depend on the circumstances of the case’¹⁴⁶. In a subsequent case of *RP v SB*¹⁴⁷ Finlay-Geoghegan sought to clarify the position lest there be any precedent set as to a specific age and noted that:

‘As appears, this decision of the Supreme Court (*Bu v Be*) was reached on all the evidence before the Court, including the age of the child. It does not appear to bind the High Court in another case on the evidence before it to hold that it is inappropriate to give a child of 5 an opportunity to be heard pursuant to Article 11(2).’¹⁴⁸

However, age of itself will not be a determining factor. In the case of *Youth Care Agency v VB and Others*¹⁴⁹ a fifteen year old child expressed the view that she wanted to stay in Ireland rather than return to her country of origin. The Supreme Court, having heard evidence that the girl had been in care in the Netherlands prior to her arrival in Ireland and that she had been found by Gardai in the course of a drugs raid on the premises in which she had been staying, agreed that the High Court was correct in exercising discretion by ordering her return to the Netherlands. Thus, the views expressed by a child in accordance with the provisions of Article 11(2), regardless of the age of the child in question, must be weighed against other considerations, in this case, her safety.

¹⁴⁴ *ibid* [32].

¹⁴⁵ *Bu v. Be* [2010] IEHC 77, [2010] 3 IR 737.

¹⁴⁶ *ibid* 740.

¹⁴⁷ *RP v SB* [2012] IEHC 188.

¹⁴⁸ *ibid* [29].

¹⁴⁹ *Youth Care Agency v VB and Others* (SC, 18 August 2010)

In the leading case of *UA v UTN*¹⁵⁰ two children, aged 7 and 8 at the time of the proceedings, had been wrongfully removed from their place of habitual residence in New York and brought to live with their mother in Ireland. The High Court, having heard evidence by Dr. Byrne-Lynch that she was satisfied that the children were mature and had expressed a clear desire to remain in Ireland with their mother, refused to return the children to their father in New York. On appeal to the Supreme Court, Denham J in reaching her decision referred to the English Appeal case of *RM (Abduction: Zimbabwe)*¹⁵¹ where Baroness Hale held:

‘Taking account does not mean that these views are always determinative or even presumptively so. Once the discretion comes into play, the Court may have to consider the nature and strength of the child’s objections, the extent to which they are: “authentically her own” or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child’s objections should only prevail in the most exceptional circumstances.’¹⁵²

Denham J in agreeing with this analysis was satisfied that the views expressed by the children had been their own views based on their experience of living with their father and the fact that the 8 year old had developed a blocking strategy to try to shield himself from his father’s anger. She held that:

‘In this case the learned High Court judge was entitled to conclude, in the light of all the evidence before him, that the objections of the children to being removed from their stable home in Ireland, with the respondent, and to being moved to New York, were strong; that

¹⁵⁰ *UA v UTN* [2011] IESC 39.

¹⁵¹ *RM (Abduction: Zimbabwe)* 2008 1 AC 1288.

¹⁵² *ibid* [46].

the children had the requisite age and degree of maturity; that the learned trial judge could attach weight to the views of the children; and that it would not be in the best interests of the children that they be returned to New York. I endorse the conclusion of the learned High Court judge that it would be in an exceptional case that the views of children of eight and seven years would result in a refusal to return the children under Article 13, but that this is such an exceptional case.¹⁵³

In the matter of LC (Children),¹⁵⁴ the UK Supreme Court examined the importance of the "wishes", "views", "intentions" and "decisions" of the children and decided that none of these words were apt. Lord Wilson was of the view that the older child's 'state of mind'¹⁵⁵ must also be taken into account.¹⁵⁶ He went on to consider that '[s]uch is evidence which, although the mother might have a valuable perspective on it, neither of the parents can give.'¹⁵⁷ Lady Hale, in agreeing with Lord Wilson's view, also noted that 'the question (of the child's state of mind) cannot be restricted to adolescent children. It also arises in relation to the two younger children'.¹⁵⁸ While noting that interviewing the children in this case was not in their best interests, as they had already been interviewed on two previous occasions and that it would be 'damaging to their relationship with their mother', she commented that '[i]t would be even more damaging if they were to be called to give evidence and it is not suggested that they should be'. However, despite this, Lady Hale was of the view that the child must be interviewed again:

¹⁵³ *UA v UTN* [2011] IESC 39 [38].

¹⁵⁴ *In the matter of LC (Children)* (No 2) [2014] UKSC 1, [2014] WLR(D) 11, [2014] 2 WLR 124

¹⁵⁵ See *A v A (Children: Habitual Residence)* [2013] UKSC 60, [2013] 3 WLR 761. In this case the Court held that the test for whether a child was habitually resident in a particular place is whether there was some degree of integration by the child in a social and family environment. This case was important in that it rejected the earlier principle that a child will inevitably share the habitual residence of the parent with whom they are living.

¹⁵⁶ *In the matter of LC (Children)* (n 154) [37]

¹⁵⁷ *ibid* [54]

¹⁵⁸ *ibid* [57]

‘If the matter were governed by the best interests of the children, therefore, I would hold that it is not in their best interests for us to remit the question of their habitual residence to be decided afresh in the High Court. But this matter is governed by the interests of justice, in reaching the right result in a fair manner. I have therefore carefully considered whether it is necessary, in the interests of justice to all parties, to remit the matter.’¹⁵⁹

Thus, while a significant decision in highlighting the importance of children’s views regardless of their chronological age, this case may raise a question as to whether children can be compelled to express a view in satisfying ‘the interests of justice’ over and above what may be in their own best interests.

However, as noted at the outset, many of these cases involved issues of the removal of children from the jurisdiction in which they had habitually resided and decisions made in such cases will not be enforceable if the child’s voice is not heard.¹⁶⁰ Less attention may be paid to this issue in what may be described as “ordinary” separation or divorce cases. Whether this position will change subsequent to the enactment of the Thirty-First Amendment of the Constitution (Children) Dáil Bill (2012), remains to be seen.

D. The 31st Amendment to the Irish Constitution

On the 10th November 2012, the Irish people by a majority of 58% to 42% approved the 31st amendment to the Constitution, which was to become the Constitution (Children) Bill 2012, as follows:

1. The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.

¹⁵⁹ *ibid* [68]

¹⁶⁰ *Brussels II bis* (n 95)

1° In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

2° Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.

2. Provision shall be made by law for the voluntary placement for adoption and the adoption of any child.

3. 1° Provision shall be made by law that in the resolution of all proceedings-

i brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or

ii concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration.

2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.¹⁶¹

¹⁶¹ The result of the referendum is being challenged to the Supreme Court See (n 12).

Article 42 A as set out above will replace Article 42.5, what will this mean for the status of children's rights in Ireland and the issue of the child's right to participate in general?

Firstly, rights will now apply to "all children". The amendment also removes the distinction between children of married and unmarried parents and it is hoped that this will extend the protection to married children in situations where the State may now need to intervene. While the State can still only intervene in "exceptional circumstances", this has been qualified to include situations where 'the safety or welfare of any of their children is likely to be prejudicially affected'. In theory, this will extend the protection to children in that there arguably no longer needs to be an 'immediate and fundamental threat to the capacity of the child to continue to function as a human person, physically morally or socially, deriving from an exceptional dereliction of duty on the part of the parents to justify such an intervention'.¹⁶² However, as Article 41 of the Constitution and the position of importance that it provides to the family are unchanged, it remains to be seen how the courts will interpret this provision when there is a direct conflict between the rights of the parents and the welfare of the child.

Under the amendment, children of married parents can now be placed for adoption. The referendum introduces the "best interests" test into Irish law; however, it is disappointing to see that it only applies in certain categories of cases and not to all matters, judicial and administrative, affecting the child. It is notable that the amendment specifies that "best interests" are "the paramount consideration", which in line with Article 21 of the UNCRC on adoption and is stronger than the standard set by Article 3 of the UNCRC which refers to "best interests" as "a" primary consideration.

With regard to the voice of the child, it is clear that the amendment does not reflect Article of the 12 of the UNCRC. Firstly it does not provide a direct right for a child to have their voices heard. Instead it states that 'provision shall be made by law'. This now places an obligation on the State to enact

¹⁶² *North Western Health Board v HW* [2001] IESC 90, [230] (Murray J).

legislation, as was determined by Finlay J in the case of *The State (Walsh) v Murphy*¹⁶³ :

‘Further it seems to me that there are to be found in the Constitution several instances where the Oireachtas is actively obliged to regulate certain matters by law; in other words to enact statutory provisions for them...

The effect of these provisions seems to me to be that the Oireachtas, while retaining a discretion as to the details of the legislation concerned and as to the precise regulation created thereby has a constitutional obligation to make some regulation or some provisions.’¹⁶⁴

However, there remains the noted ‘discretion as to the details of the legislation’. Questions remain as to whether the Government will set up a state funded mechanism to ascertain the child’s views, as it would appear that without this service or mechanism the right would be ineffective.¹⁶⁵ Crucially it only refers to certain proceedings in which these provisions should be made and not as per Article 12 in all judicial and administrative proceedings. This is also at variance with the Child Friendly Justice Guidelines referred to earlier.¹⁶⁶ It also raises the question as to whose responsibility it will be to bring the children’s issues before the court when they are generally not represented; will it be the responsibility of the parents’ lawyers or the judge?

However, even with such legislation in place, the influence of the judiciary cannot be underestimated. Judges generally determine whether a child’s voice is heard in any given case. Under Irish law, this may be by the judge agreeing to appoint an independent person to prepare a report, such as a section 47 reporter¹⁶⁷ or the appointment of a Guardian ad Litem,¹⁶⁸ or

¹⁶³ *The State (Walsh) v Murphy* 1981 IIR 275 (HC).

¹⁶⁴ *ibid* 285.

¹⁶⁵ Mary O’Toole, ‘The Voice of the Child’ (Dublin Family Lawyer’s Association April 30, 2013).

¹⁶⁶ Child Friendly Justice Guidelines (n 90).

¹⁶⁷ A reporter instructed by the court under section 47 of the Family Law Act 1995.

¹⁶⁸ Appointed under section 26 of the Child Law Act 1991.

ultimately whether they choose to speak to the child directly themselves. Therefore, as commented by Raitt, ‘the way that judges exercise discretion in family justice proceedings profoundly affects the extent to which children’s voices can be heard in those proceedings’¹⁶⁹ and ‘the method selected impinges appreciably on a child’s opportunity to express wishes and feelings.’¹⁷⁰

V. Mechanisms used to hear the Voice of the Child in Irish Courts

A. Direct Evidence

Section 28 of the Children Act 1997 provides that any child under the age of 14 years who is considered capable of giving an “intelligible account” of evidence may give direct unsworn evidence in court.¹⁷¹ It has generally been considered that having children give evidence in court is not the best method because of the risks of children feeling that they have to choose or express preference for one parent over the other in open court. General Comment No.12 issued by the Committee on the Rights of the Child, while recommending that the child themselves be allowed to decide how he or she wants to be heard, states that ‘[p]referably, a child should not be heard in open court, but under conditions of confidentiality’.¹⁷² However, a recent decision of the Supreme Court in the UK case of *Re W (Children)*¹⁷³ Lady Hale was of the view that there should no longer be an assumption against children giving evidence in family law proceedings and that:

‘The essential test is whether justice can be done to all the parties without further questioning of the child. Our prediction is that, if the court is called upon to do it, the consequence of the balancing exercise will usually be that the additional benefits to the court’s task in calling the child do not outweigh the additional harm that it will do to the child.

¹⁶⁹Fiona Raitt, ‘Judicial Discretion and Methods of Ascertaining The Views of A Child’ (2004) 16 (2) *Child and Family Law Quarterly* 151.

¹⁷⁰ *ibid* 155.

¹⁷¹ Section 28(3) allows a child to be convicted of perjury if the child knowingly makes a false statement.

¹⁷² General Comment No. 12 (n 1) [43].

¹⁷³ *Re W (Children)* [2010] UKSC 12, [2010] 1 W.L.R. 701

A wise parent with his child's interests truly at heart will understand that too.¹⁷⁴

B. Section 47 Reports

Under section 47 of the Family Law Act 1995, the Court¹⁷⁵:

‘may, of its own motion or on application to it in that behalf by a party to the proceedings, by order give such directions as it thinks proper for the purpose of procuring a report in writing on any question affecting the welfare of a party to the proceedings or any other person to whom they relate....’¹⁷⁶

The Act specifies that the report may be prepared by a Probation and Welfare officer, such person nominated by a health board as a “suitably qualified person” or may be “any other person as specified in the order”.¹⁷⁷ In practice, the persons preparing the reports are child psychologists, family therapists, child psychiatrists or qualified social workers. These reports are generally requested to assist the judge to make a decision on the welfare of the child as some judges may feel that they are not qualified to make this determination without expert advice and assistance. The Law Reform Commission (LRC) commented that such reports provide a ‘child-centred brief before the court’, to include background information and recommendations as to further steps necessary perhaps in appointing legal representation or a guardian *ad litem*. The LRC also noted advantages of these reports in ensuring that the children were less likely to be overlooked and in diffusing the adversarial nature of the court process.¹⁷⁸

Applications for a section 47 report may be made under the following Acts

- (a) Guardianship Of Infants Act 1964,
- (b) Family Law (Maintenance of Spouses and Children) Act 1976;

¹⁷⁴ *ibid* para 30.

¹⁷⁵ The Circuit Court or the High Court.

¹⁷⁶ Section 47 of The Family Law Act 1995.

¹⁷⁷ *ibid*.

¹⁷⁸ Law Reform Commission, *Report on Family Courts* (LRC 52-1996) 10.13.

- (c) Family Home Protection Act 1976;
- (d) Status of Children Act 1987;
- (e) Judicial Separation and Law reform Act 1989;
- (f) Child Abduction and Enforcement of Custody Orders Act 1991;
- (g) Under the Family Law Act 1995,
- (h) Family Law (Divorce) Act 1996.

The Family Law Act 1995 sets out that a copy of the report must be given to all parties to the proceedings and to the person to whom it relates and it may be received as evidence in the proceedings. Shatter argues that allowing children who are ‘too young to understand’ access to these reports ‘may be contrary to the child’s welfare and may damage a child’s relationship with one or both parents’.¹⁷⁹ While it is accepted that children should not be exposed to information that would be detrimental to their welfare, it is submitted that they should be informed of the contents of the reports in an age appropriate manner and in accordance with their rights under international law.

While these reports ‘play a central role in resolving disputes concerning children, there is, as of yet, no guidance for the family law practitioners who commission such reports, the experts who prepare them or the judges who must evaluate the findings contained therein’.¹⁸⁰ For example, the provisions of section 47 of the Family Law Act do not include a statutory requirement for section 47 reporters to speak directly to the children involved. But what happens in practice, how do section 47 reporters carry out their assessments? How do they hear and assess the views of the child, how do they address concerns about their age and maturity and how do they assess the weight to be given to the views expressed by children when making their recommendations to the court?

¹⁷⁹ Alan Shatter, *Shatter’s Family Law* (4th edn, Tottel Publishing 1997) 118.

¹⁸⁰ Claire Hogan and Sinead Kelly, ‘Section 47 Reports in Family Law Proceedings: Purpose, Evidential Weight and Proposals for Reform’ (2011) 14 (2) *Irish Journal of Family Law* 27.

Two section 47 reporters were interviewed for the purposes of the research undertaken as part of this thesis in order to answer some of these questions. Both reporters acknowledged that there is no set procedure and that each reporter may approach a case differently depending on their own backgrounds. One indicated that she, as a child psychologist, takes a very child focused approach, whereas a family therapist may take a more systemic view or an adult psychologist would perhaps concentrate more on the parents' capacity to parent the children

Both assessors interviewed indicated that they watch for attachment issues when they observe the children in the company of their parents and that quite a lot of information can be gleaned from these meetings, without the parents possibly being aware of the issues being observed. The assessor then schedules one meeting with all of the siblings together and then a meeting where she meets each child for a short period of time on their own. In recent times, the assessor interviewed has begun to schedule a final meeting where she brings the family back together. She has noted that this has been extremely beneficial in terms of reaching agreement between the parties.¹⁸¹ Parents, they both agreed, tend to view their meeting with the assessor as their opportunity to impress upon the assessor how much they have contributed to the child's life compared to the other parent.

One assessor advised that in determining issue of "age and understanding", she breaks the children down into different categories:

‘pre-oedipal¹⁸², oedipal¹⁸³, latency¹⁸⁴ and adolescence¹⁸⁵ depending on the different developmental stages, so your assessment is different and the weight you give to their wishes is different at different stages.’¹⁸⁶

¹⁸¹ Interview with CR 1, March 2011.

¹⁸² Less than three and a half years/ four years of age.

¹⁸³ Three and a half/four to six and a half.

¹⁸⁴ Six and a half to eleven or twelve.

¹⁸⁵ Adolescence then would start at eleven or twelve and again you would have various stages of adolescence, early adolescence, middle adolescence and late adolescence.

¹⁸⁶ Interview with CR 1, March 2011.

She indicated that in her experience 60-70% of the latency children, that is, children between the ages of six and a half to eleven or twelve:

‘...tend to opt for 50/50, they are trying to be very fair and even handed, even if it is not their own desire. I would see that as the problem, getting through the fairness, the wanting to be fair...not to upset anybody. They are trying to reduce the amount of conflict between the parents and they think this is the way to go about it. They have the hours measured out almost and what is frustrating is sometimes I am thinking you are going to be a little bit let down because your fairness around this isn’t going to modify the conflict in any way.’¹⁸⁷

1. Concerns with Section 47 reports

The advantages of these reports can, in some cases, be outweighed by the delays involved in obtaining the reports and the costs involved. Delay can be detrimental where cases involve children. ‘Mindful that “justice delayed” is “justice denied”, or at least diminished, the jurisprudence of the ECtHR has tended to lean towards requiring that national authorities display special diligence in expediting proceedings involving children.’¹⁸⁸ Notably in the case of *Glaser v UK*¹⁸⁹ the ECtHR stated ‘that it is essential that custody and access cases be dealt with speedily.’¹⁹⁰ Delay will not be justified by the volume of work or shortage of resources.

As mentioned earlier, another potential difficulty with these reports is that the recommendations made may also be influenced by the person preparing the report. The Law Reform Commission acknowledge that such assessments and the recommendations made in these reports ‘varies from

¹⁸⁷ Interview with CR 1, March 2011.

¹⁸⁸ Shannon, (n 89) 96.

¹⁸⁹ *Glaser V UK* App. No.32346/96 Judgment of September 19, 2000.

¹⁹⁰ *ibid* [93].

expert to expert, often depending on the background of the expert and his/her professional qualifications.’¹⁹¹

As noted by Hogan and Kelly, case law in Ireland clearly reflects the importance that many judges place on such reports ‘as important and useful tools in deciding what course of action is in the best interests and welfare of the child.’¹⁹² However, in the case of *LB v T MacC*, O’Higgins J, in the High Court, stated that ‘it would be wrong of the court to accept unquestioningly the evidence of an expert and to substitute expert opinion for the independent judgment of the court’.¹⁹³ Judges, however, differ significantly in their views on this issue with Hedigan J, in the case of *McD v L*, referring to the fact that a section 47 reporter prepares the report on the instructions of the court and therefore ‘the report should be accorded great weight. Save for grave reasons against, which I think the court should set out clearly, the s.47 report ought to be accepted in its recommendations.’¹⁹⁴

However, this view was rejected by the Supreme Court on appeal¹⁹⁵ Denham J stated:

‘The [s.47] report is produced to assist the court. While it is a matter to be weighed in all the circumstances of the case, it should not, as a mandatory matter, be accorded great weight. A court is neither obliged to accept the report, nor is it required to expressly specify its reasons for non-acceptance of the report.’¹⁹⁶

Justice Denham goes on to say that:

‘the learned trial judge erred in determining that the s.47 report should be accepted as a mandatory matter, save for grave reasons, which the court should set out clearly. Such an approach is erroneous and would alter the role of the court. The court is the

¹⁹¹ Hogan and Kelly (n 180) 28.

¹⁹² *ibid* 27.

¹⁹³ *L.B v T.MacC* [2004] IEHC 409 14.

¹⁹⁴ *Mc D v L* [2008] IEHC 96.

¹⁹⁵ *JMcD v PL and B.M.* [2009] IESC 81.

¹⁹⁶ *ibid* [56].

decision-maker. The court is required to consider all the circumstances and evidence. The s. 47 report is part of the evidence to be considered by the court. It is for the court to determine, in accordance with the law, what is in the best interests of the child, the paramount consideration being the welfare of the child, in determining issues such as access and guardianship.¹⁹⁷

Denham J therefore highlights “welfare” as the paramount consideration and that in deciding such welfare the “best interests” are one of the factors to be taken into account.

Therefore while section 47 reports are extremely useful for the court in determining the issues between the parties, it is and ultimately always should be the Court that makes the final decision based on the judge’s assessment of the case, the evidence and the attitude of the parties involved, taking into account the recommendations made in such independent reports.

An additional factor that needs to be examined is the issue of costs. When a court instructs that a section 47 reporter be engaged, this is usually at the cost of the parents, either jointly or in such proportions as is feasible based on their respective incomes. In general, the costs of these reports may be quite high.¹⁹⁸

Section 47 reporters in Ireland have expressed a general concern about the lack of instructions or guidance given to them by the courts or family lawyers with respect to the issues that they wish to have them address in their reports¹⁹⁹. In the UK a practice direction has been issued addressing this issue. The direction entitled ‘Experts in Family Law Proceedings Relating to Children’ 2008²⁰⁰ sets out the format required in a report. The guidelines also recommend some sample questions that those instructing the reporters may ask them to address, issues like behaviours, emotional issues, attachment issues, relationship with siblings, education, physical issues,

¹⁹⁷ *JMcD v PL* [2009] IESC 81 [57].

¹⁹⁸ Hogan and Kelly (n 180) 27.

¹⁹⁹ *ibid.*

²⁰⁰ Available at <http://www.hmcourts-service.gov.uk/cms/files/Experts-PD-flagB-final-version-14-01-08.pdf> appendix A accessed November 29 2013.

growth and development, any health issues, nature of care giving etc. Such guidance would be beneficial in this jurisdiction and would be welcomed also by family lawyers, the section 47 reporters themselves and the courts.

C. The Guardian ad Litem System

The Child Care Act 1991 was a significant piece of legislation for the development of child law in Ireland. Section 3 (2) (b) of the Child Care Act 1991 charges the Health Service Executive (HSE) with the role of promoting the welfare of the child, again, having regard ‘to the rights and duties of parents, whether under the Constitution or otherwise’.

The Act legislates for the welfare of children who are subject to public law proceedings, that is, children who may, for example, be the subject of an application to be taken into the care of the State. In recognition of the precarious position of children in such circumstances and the need for children to have representation generally in family law proceedings, section 26 of the Act provides, for the first time in Irish legislation, for the appointment of a Guardian *ad Litem* (GAL). While the Act does not define the role of the GAL, Shannon has described the GAL as ‘an independent representative appointed by the court to represent the child’s personal and legal interests....’²⁰¹ Freda McKittrick, Head of the Guardian ad Litem service at Barnardos points out that ‘[t]he guardian does not themselves have a therapeutic role, their role is to ensure that the child’s voice is heard (although by itself this could be argued to have a therapeutic impact) and that their interests are met by their caregivers, whether this is family, state, or both.’²⁰²

The Child Care Act 1991 therefore is significant in that it provides the legislative basis for one of the few channels available through which children may seek to have their voices heard in the Irish Family Law

²⁰¹ Shannon, (n 89) 418.

²⁰² Freda McKittrick, ‘The role of the Guardian ad Litem – to express a view on the child’s best interest or to relay the views of the child?’ (Legal Aid Board, Annual Family Law Conference, Dublin June 21, 2011).

system. The Children Act, which followed in 1997, inserted a new Part IV into the Guardianship of Infants Act 1964. Section 28(1) and (2) of the Guardianship of Infants Act 1964 as amended, provides for the appointment of a guardian *ad litem* in private law proceedings. Under the 1997 Act therefore, a GAL could be appointed in “special circumstances” cases concerning issues of guardianship, custody and access to children and the costs of the guardian must be borne by the parties to the proceedings. The need for “special circumstances” indicates a high threshold as to when a GAL may be appropriate. Section 28(3) of the 1997 Act states that the author of a section 47 report may be a suitable candidate to act as GAL; however, other than that, no guidance is given as to the role of the GAL.

To date, the full provisions of the Children Act 1997 have not been commenced, leaving children in the private law system without any specific channel of representation. In practice, it appears that Guardians are being appointed in private law cases, by mutual agreement of the parties, under section 47 of the 1995 Act, which makes provision for the so-called s.47 reports as outlined above. However, both in public and private law matters, there appear to be huge discrepancies across the country as to whether guardians are appointed or not, often depending on several factors including the attitude of the particular judge, the availability of guardians *ad litem* and the costs involved.

The focus of this thesis is on the voice of the child within the private family law system, through the courts process and through alternative methods of dispute resolution and therefore the GAL is not strictly relevant as it does not, as yet, apply in private law cases. However, in view of the promise made by the Minister for Children and Youth Affairs, Frances Fitzgerald, at the Legal Aid Board Annual Family Law Conference in June 2011²⁰³ that the GAL would be extended into the private family law system, it is important to briefly examine the model currently in existence in the public law system, to ascertain how it operates and what, if any, changes or

²⁰³Paper presented to the Legal Aid Board, Annual Family Law Conference, 21 June 2011.

improvements could be made if and when the Government decide to extend the service to all children.

1. Guardian ad litem under the Child Care Act 1991

The key sections of the Child Care Act 1991²⁰⁴ that are relevant in the context of the issues discussed in this thesis are sections 24, 25 and section 26. In addition, it is also important to address some of the anomalies in the Act overall. Specifically, these are the lack of a definition of the role of the GAL and the lack of guidance as to who may be appointed and what their functions should be; the issue of the independence of the GAL and importantly the issue of “dual representation”²⁰⁵ that arises as a result of the provisions of section 25 of the Act.

Section 24 of the Act, having regard to the rights and duties of parents, reiterates that the court must regard the welfare of the child as the first and paramount consideration and that it must:

‘(b) in so far as is practicable, give due consideration, having regard to his age and understanding, to the wishes of the child.’

The provisions of the Child Care Act are therefore similar to the Guardianship of Infants Act in that regard must be had to the ‘age and understanding of the child’. The challenges for the courts in establishing when a child is of sufficient age and understanding have already been addressed. What is new in this is that there is also a provision that the hearing of the child’s wishes must as be ‘practicable’. Under the Irish courts’ system, where there are no proper structures in place, it may be reasonable for the courts to indicate that it is not practicable to hear the wishes of a child in any given case.

²⁰⁴ Child Care Act 1991 *Number 17 of 1991* Available at www.irishstatutebook.ie/1991/en/act/pub/0017/index.html .

²⁰⁵ “Dual representation” effectively means that child cannot have a guardian *ad litem* and at the same time be represented by a solicitor in the same proceedings.

Section 26 of the Act provides for the appointment of the Guardian and states that:

‘If in any proceedings under *Part IV* or *VI* the child to whom the proceedings relate is not a party, the court may, if it is satisfied that it is necessary in the interests of the child and in the interests of justice to do so, appoint a guardian *ad litem* for the child.’²⁰⁶

With regard to the actual appointment of the Guardian *ad litem*, we note that it must firstly be ‘necessary in the interests of the child’ but there is the additional requirement that it must also be ‘in the interests of justice’. The Act does not specify what factors are to be considered in establishing whether these requirements are met. It is regrettable that there is such a need for justification in appointing a guardian in this jurisdiction.

This issue has been commented on by members of the judiciary in Ireland who have also expressed a view that a GAL should be appointed as a matter of course. Judge Conal M. Gibbons, in particular, has commented that:

‘There is a cogent case to be made that it should be mandatory to appoint a GAL in all child care proceedings. This is so in order that there would be no doubt about the child’s voice being represented. By so doing, the UN Convention on the Rights of the Child would be complied with and due consideration would be given to the wishes of the child as required by the Child Care Act.’²⁰⁷

Section 25 of the Child Care Act, in many respects, further complicates the process. This section provides that a child may be joined as a party to the proceedings. Once a child has been joined as a party to the proceedings, they are entitled to legal representation; however once so joined, subsection (4) of section 26 precludes the appointment of a guardian *ad litem* for the child, and if a guardian has been appointed, their appointment will cease.

²⁰⁶ Section 26 of the Child Care Act 1991.

²⁰⁷ Judge Conal M. Gibbons, ‘Aspects of Child Care in the District Court’ (2007) *Judicial Studies Institute Journal* 187.

This issue of what has been termed “dual representation” effectively means that a child cannot have a guardian *ad litem* and at the same time be represented by a solicitor in the same proceedings.

This anomaly in relation to legal representation for the child was raised in the National Children's Office Review²⁰⁸, where they noted that:

‘a child cannot have a Guardian *ad litem* and be party or be legally represented (the issue of dual representation). In practice, it has been reported that, in a number of cases where a solicitor has been appointed and wishes to have the involvement of a GAL, the judge dismisses the solicitor and appoints a GAL who then appoints the solicitor to represent them. This is just as expensive as dual representation but leaves the child him/herself unrepresented and not able to be a party, and means that the GAL interacts with the court as if s/he were a party rather than as an officer of the court.’²⁰⁹

The Review therefore recommended that children should be allowed legal representation and the continued support of a GAL and that the legislation, namely the Child Care Act 1991 and the Children Act 1997, should be amended to allow for such representation.

The Child Care Act, in taking an important first step by providing for the appointment of a guardian *ad litem*, is, however, vague about who should be so appointed, what exactly their role should be or what functions they are permitted or required to perform. Indeed, practitioners’ frustration with the vagueness of the GAL system in Ireland led the Law Society of Ireland to comment in 2001 that:

‘[to] have a GAL system existing without regulation, supervision or accountability is not only unsatisfactory from the point of view of

²⁰⁸ Capita Consulting in conjunction with the Nuffield Institute for Health were appointed to undertake this review in 2003. The completed report was published in 2004. Shane McQuillan, Andy Bilson, and Sue White, Review of the Guardian Ad Litem Service: Final Report from Capita Consulting Ireland, in Association with the Nuffield Institute for Health (National Children's Office 2004).

²⁰⁹ *ibid* 30.

these children and families in the middle of such proceedings; it is also unsatisfactory from the point of view of the other stakeholders involved: the courts and legal professionals; the health board and health board professionals; and the other related professionals and individuals who are, or who may be, affected by the appointment of a GAL. It is also, of course, unsatisfactory from the perspective of those acting as guardian *ad litem*.²¹⁰

In addition, the Review also addressed the issue of the independence of the GAL. Under the Child Care Act, the Health Service Executive (HSE) routinely recommends certain persons when the court is considering the appointment of a GAL. In addition, the Act provides that the costs of the GAL are also to be borne by the HSE. The Review recognised that this was not satisfactory for the HSE or for the GAL and that an alternative and independent funding mechanism, not under the control of the HSE, should be provided for the GAL.

As part of the Review carried out by the National Children's office, a number of options for improving the service were considered including self regulation, an independent national agency, regional panels, a centrally regulated service, a GAL service plus an independent advocacy service and volunteer advocacy services.²¹¹ Carr notes that, '[b]ased on the premise that a wider provision would be 'too costly', the review proposed the following option: that the GAL service be considered for the "most vulnerable persons and/ or complex issues" and an "advocacy service" in other cases". Carr goes on to note that if you take into account the fact that the 'GAL service pertains in the main to proceedings under the Child Care Act 1991' and these cases 'relate to children in care or who are involved in care proceedings, in relative terms it is fair to categorise all such cases as "complex" and the children concerned are all "most vulnerable persons". Furthermore, given that the Review identified huge variations in practice,

²¹⁰ *ibid* 27.

²¹¹ (n 208) 103.

the question arises as to who would be arbiter of this proposed GAL/Advocate divide?’²¹²

The Review did not recommend the establishment of a separate state body with responsibility for the regulation and monitoring of the GAL. However, they considered the Probation and Welfare Services as a possible body that could oversee the GAL, to set guidelines and to outline the circumstances in which a GAL should be appointed and their functions on taking up the appointment. However, the recommendations of the Review were not implemented.

2. The Irish Courts’ View

It is clear that, at this time, the courts too were frustrated with the lack of guidance in relation to the Guardian ad Litem system. In the case of *Health Service Executive v D.K. (a minor)*²¹³, a child who needed special care died before the Special Care Order could be implemented. Mac Menamin J noted ‘[t]he function of the guardian should be twofold; firstly to place the views of the child before the court, and secondly to give the guardian’s views as to what is in the best interests of the child.’²¹⁴ Mac Menamin J also noted that the GAL should bring to the attention of the HSE and the court any risks that they perceived to the best interests of the child, that they should share relevant information with other experts as is necessary to establish a full picture of the child’s history and that the GAL should meet with the minor and his or her family as is necessary.²¹⁵ While Mr. Justice Mac Menamin was dealing with the appointment of a GAL in cases where there was an application for a special care order, his judgment was instrumental in providing much needed clarity on the role of the GAL. While he was, as Carr notes, careful to frame his judgment with “due regard to the separation

²¹² Nicola Carr, ‘Guiding the GALs: A Case of Hesitant Policy-making in the Republic of Ireland’ (2009) 12(3) *Irish Journal of Family Law* 60, 64.

²¹³ *HSE v K [a minor]* [2007] IEHC 488.

²¹⁴ *ibid* [59].

²¹⁵ *ibid*.

of powers, it is nonetheless clearly evident that his judgment was intended to act as an operational device in an area of legislative vacuum”.²¹⁶

3. Children’s Act Advisory Board in Ireland

By 2007, no advancement had been made with regard to legislating for the Guardian ad Litem system. The Children Care (Amendment) Act 2007²¹⁷ led to the establishment of the Children’s Act Advisory Board (CAAB). One of the tasks assigned to the Board was to review the Guardian ad Litem system to ensure that the voice of the child is always appropriately heard in child care proceedings. The Board published their report in May 2009 entitled ‘*Giving a Voice to Children’s wishes, feelings and interests, Guidance on the Role, Criteria for Appointment, Qualifications and Training of Guardians ad litem Appointed for Children in Proceedings under the Child Care Act 1991*’.²¹⁸

The Report defines the role of the guardian ad litem as ‘to independently establish the wishes, feelings and interests of the child and present them to the court with recommendations.’²¹⁹ Mc Kittick acknowledges that there is a ‘constant balancing exercise between wishes, feelings and interests.’ She notes that ‘[u]ltimately it is for the court to be the final arbiter on which is to prevail’²²⁰ but even ‘...where a guardian and a child cannot reconcile their views on the child’s interests, it is still crucial that the child’s wishes are represented, clearly and without interpretation’.²²¹

²¹⁶ Carr (n 212) 66.

²¹⁷ This impetus for this Act was to enable foster parents and relatives who have been taking care of a child for a period of not less than 5 years to apply for a court order in relation to the care of the child; and to provide for related matters and also changed the name of the Special Residential Services Board to the Children’s Act Advisory Board.

²¹⁸ Children’s Act Advisory Board ‘*Giving a Voice to Children’s wishes, feelings and interests, Guidance on the Role, Criteria for Appointment, Qualifications and Training of Guardians ad litem Appointed for Children in Proceedings under the Child Care Act 1991*’ (May, 2009).

²¹⁹ *ibid* [1.1] 3.

²²⁰ Mc Ketrick (n 202) 5.

²²¹ *ibid* 11.

The Report goes on to set out “Standards for Good Practice”²²² that the GAL system should possess; independence from all other staff involved in the child’s case; inclusiveness of the views of all the relevant parties; inquiry into the child’s circumstances which should be ‘planned, focused and flexible’; interests of the child to include meeting the child ‘as often as is necessary to ensure that his/ her wishes, feelings and interests are ascertained and adequately represented to the court’; evaluation and report; attendance at court and closing the case.

In addition, “Appointment Standards” are set out as to what qualifications are required to act as a GAL and guidance for the court as to when a GAL should be appointed. The guidelines also set out what are considered reasons to appoint a GAL in the “interests of the child”, “the interests of justice” and for the “benefit of the court” as is required under the Act. The Report goes on to set out, in detail, the steps to be taken by the GAL when representing a child.

The Report provides for the GAL to consult with ‘the child’s family’ and to conduct a ‘thorough inquiry into the child’s circumstances and provide independent recommendations to the court’²²³. However, while the guidance sets out what qualifications and training are required, it does not specify who will monitor the service or provide training. In addition ‘[t]here is no method of reviewing the appointment if the parties are dissatisfied with the appointment.’²²⁴ ‘Adequate access to records (such as the HSE and Social Worker’s reports) should, arguably, also be afforded.’²²⁵

These guidelines, while useful, remain guidelines. It appears that they will not be placed on a statutory footing. None of the recommendations made during the various reviews by the National Children’s Office or the guidelines recommended by the CAAB have been implemented and therefore are of no practical benefit to children in need of representation within the Irish Family law system.

²²² *ibid* Para. 1.2.1 3.

²²³ Children’s Act Advisory Board (n 218) [2.2] 8.

²²⁴ Shannon, (n 89) 269.

²²⁵ *ibid* 421.

All indications are that the GAL, when appointed, makes a significant difference to the lives of the children whom they represent, but it appears that their appointment will continue to be on an ad hoc basis and much will be determined by where a child lives and the attitude of the local judge. It is hoped that the Government, if extending the GAL into the private family law system will, in addition, use the opportunity to place the GAL system on a statutory footing, with proper regulation and training and a clearly defined role. It is also hoped that the provisions of section 25 will be amended to avoid a situation where a child, having been joined as a party to the proceedings, is no longer entitled to the support and assistance of a GAL.

In examining the suggestions made by the National Children's Office Review, in relation to the advocate/ GAL divide, perhaps an alternative way of dealing with the matter would be that advocates are appointed for all children, from a panel of qualified and vetted experts with experience in child psychology or similar qualifications and that every child that comes in contact with the courts' system be granted one consultation with the advocate as a matter of routine. This should be done immediately once proceedings are issued so that issues for children can be addressed and dealt with earlier. Once assessed, if the case is deemed to be more "complex", then a guardian should be appointed. The fees for this once-off consultation should be set and capped at an hourly rate. Some children may not wish to engage and this is their choice. In these instances, the assessment may only take a short period of time. Where children do want to engage they should be given adequate opportunity to speak and express their wishes and views. This should be confidential. The advocate, having obtained some insight into the child and their situation would then recommend the appointment of a GAL or not depending on their circumstances. If a GAL is required, the advocate should then assist the child in liaising with the GAL and in that way provide some continuity of care. Otherwise, it may just add another layer for children who need help to have to transfer from one type of representative to another.

Advocates within this system should be provided with full training, be monitored and reviewed. Reasons should have to be given by these advocates as to why they decided that the child needed an advocate or the GAL, and these decisions should be subject to scrutiny by the court, who would be the ultimate decision maker in the event that a dispute or difficulties arose. This opportunity should be there for all children regardless of their age and should be structured so that children are cared for in an age appropriate manner. In this way, we may be able to use the current economic recession in a productive way, as there may be a number of suitably qualified persons who could undergo a standard training course, within set guidelines.

From empirical research undertaken for this thesis, which will be outlined in detail in Chapter 5, in the vast majority of cases, children will not need representation in court, but rather someone in an advocate type role who will assist them with any queries or concerns that they may have, explain the legal system to them and provide support.

4. Child Care (Amendment) Act 2011

The Child Care (Amendment) Act,²²⁶ which was enacted on 31st July 2011, amends section 26 of the 1991 Act. It provides in section 13 (2B) that:

‘A guardian *ad litem* shall for the purpose of the proceedings for which he or she is appointed promote the best interests of the child concerned and convey the views of that child to the court, in so far as is practicable, having regard to the age and understanding of the child.’

Additionally section 13 (2C) provides that the guardian ad litem:

‘may instruct a solicitor to represent him or her in respect of those proceedings and, if necessary, having regard to the circumstances

²²⁶ Child Care (Amendment) Act. No 19 of 2011 available at www.irishstatutebook.ie/2011/en/act/pub/0019/index.html

of the case, may instruct counsel in respect of those proceedings...’

Under section 13 therefore, the guardian’s role is clarified as promoting the best interests of the child and importantly conveying their views to the court. Again, there is the proviso in “so far as is practicable” and again having regard to the “age and understanding” of the child in question. While it is a move in the right direction and also the fact that a guardian *ad litem* may now instruct a solicitor and / or counsel is beneficial, it appears that the provisions of section 25 remain unchanged and for a child that has been joined as a party to the proceedings the issue of dual representation still remains in these types of cases.

5. Guardian *ad litem* and the Children and Family Court Advisory and Support Service (CAFCASS) in the UK

It is interesting to contrast the requirements under the Irish legislation with the position in England, which has been referred to by Shannon as ‘a model of best practice.’²²⁷ Under the Children Act 1989 in England, the court *must* appoint a GAL unless it is satisfied that it is not necessary in that particular case.²²⁸ By having a GAL or similar child representative in each case ‘[t]he child therefore is an *actor*, an active participant in their destiny, rather than a passive recipient of adult concern. Even when the child’s view cannot be supported for reasons of their safety, they can be helped understand why decisions have been made in the way that they have and therefore know that they were meaningfully consulted’.²²⁹ Contrasting the provisions of section 25 with the corresponding provisions under the Children Act 1989, in England, it is notable that in the English system the GAL *must* appoint a solicitor to act on behalf of the child. If the child decides to instruct a solicitor independently then the GAL remains as an independent advisor to the court. Such a default mechanism would provide a level of reassurance

²²⁷ Shannon, (n 89) 422.

²²⁸ *ibid.*

²²⁹ Mc Kittrick (n 202) 6.

that children in need of help and protection would not be left without the assistance they require.

Again, contrasting the Irish GAL with the position in England, it is worth noting that in England GALs are appointed from an ‘independent panel of persons deemed to be suitable for the task.’²³⁰ As noted by Sir Stephen Browne in the case of *R v Cornwall County Council*, ‘[it] is important that the courts and the public should have confidence in the independence of the guardians. It is important that the guardians themselves should feel confident in their status.’²³¹

In addition, in 2001, the Children and Family Court Advisory and Support Service (CAFCASS), was established under the Criminal Justice and Court Service Act 2000.²³² It brought together the Family Court Welfare Service and the Children’s Division of the Official Solicitors office in the UK. CAFCASS provides services to children and families under both the public and private family law system. It describes its role as ‘the voice of the child in the family courts and helps to ensure that the children’s welfare is put first during the proceedings.’²³³ CAFCASS also provides advice and support to children and their families where agreement cannot be reached between the parties themselves as to what in the best interests of the child and will normally be engaged when court proceedings are issued. In this regard, it provides an element of support and advice for children and their parents early in the proceedings, and thus has the potential to alleviate some of the difficulties that were highlighted by the participants in this research, lack of information, advice and support (See chapter 6). More recently, CAFCASS has taken part in a pilot project referred to as CAFCASS Plus. The aim of the project is to provide earlier intervention in public law cases, intervention that precedes any proceedings being issued. Research into the project, though small scale, has indicated that there are achievable benefits in pre-

²³⁰ Shannon, (n 89) 422.

²³¹ *R v Cornwall County Council ex parte G* [1992] 1 FLR 270.

²³² Criminal Justice and Court Service Act 2000.

²³³ <https://www.cafcass.gov.uk/about-cafcass.aspx>

proceeding intervention.²³⁴ It is conceivable that such pre-proceedings intervention within the private family law system would also provide earlier and more focused intervention for separating parties and their children, providing advice and support and thus enabling participation and a voice for all children, not just those whose parents' cases end up before the courts' system. Arguably, an approach such as this must be taken in order to be UNCRC compliant in providing the right for children to participate in all matters that affect them.

D. Judicial Interviews

Whether judges should engage in hearing the views of children in their chambers has been a matter that has been the subject of much debate. There are no specific rules governing the matter in this jurisdiction, nor has any significant empirical research been carried out in this jurisdiction to ascertain the views of judges, how many choose to speak to children directly, and when used, how effective it has been for the judge in reaching a decision and more importantly for the child in having their voice heard.

E. Research internationally

In contrast, many studies have been carried out internationally, in an attempt to assess the views of judges on speaking to children in their chambers and, with children who chose to avail of this option as to how they perceived the process.

²³⁴Dr Karen Broadhurst, Dr Paula Doherty and Ms Emily Yeend, Coventry and Warwickshire Pre--Proceedings Pilot, Final Research Report, May 2013 available at https://www.cafcass.gov.uk/media/167143/coventry_and_warwickshire_pre-proceedings_pilot_final_report_july_4_2013.pdf

1. Australia

Parkinson and Cashmore²³⁵ carried out extensive research in this area, across Australia, interviewing judges and children who had agreed to speak to judges and their parents, in an effort to establish the benefits or otherwise of this procedure. They found that of the 20 judges interviewed, 15:

‘indicated either that they would never talk with children for a forensic purpose before reaching a final decision in a case, or were extremely reluctant to do so.’²³⁶

However, these judges were in agreement as to the significance of the child’s wishes directly related to their age and understanding and they recognised the fact that it is difficult to order older children to live with a parent with whom they do not wish to live. They referred to the importance of reports prepared by social workers or mental health experts employed by the court, but agreed that while these reports were influential and would be given great weight, this would not prevent a judge from coming to a conclusion that would vary from the opinion of such reporter. The judges were of the view that any interviews carried out by them should be ‘in addition’²³⁷ to the experts’ reports and not as a replacement for these reports. ‘Children can make impressive interviewees if given the opportunity, and they can persuade judges to attach a great deal of weight to their views.’²³⁸

The main concerns raised by the Australian judges were in relation to issues of transparency and the ‘denial of due process.’²³⁹ Conversations with children should not, they opined, be considered private. However, the extent to which these interviews are recorded again varies considerably. Atwood,

²³⁵ Patrick Parkinson and Judy Cashmore ‘Judicial Conversations with Children in Parenting Disputes: The Views of Australian Judges’ *International Journal of Law, Policy and the Family* (2007) (21) 160.

²³⁶ *ibid* 162.

²³⁷ *ibid* 160.

²³⁸ Fiona Raitt, ‘Judicial Discretion and Methods of Ascertaining The Views of A Child’ (2004) 16 (2) *Child and Family Law Quarterly* 155.

²³⁹ Parkinson and Cashmore (n 235)) 164.

in her research in the US, concluded that only about half the judges interviewed made a record of the interview²⁴⁰. In the Parkinson research, judges raised concerns about their lack of skill in interviewing children as their main stumbling block, expressing fears that this lack of skill would affect the quality of decision-making, and cause risks to the process of decision-making, the issue of due process rights and the risks to the child. However, the researchers noted that ‘in contrast to the concerns of those who thought that judicial interviews could lead to poor decision-making were the experiences of judges who felt that talking with the children had led to better decision-making’²⁴¹.

Judges that had interviewed children outlined the benefits for judicial decision-making as hearing from the children first hand, which had given them a much better sense of the children’s views than would have been possible through reading a report, with one judge referring to the “colour”²⁴² it gave to the family report prepared by the court expert. In addition, speaking directly to the children gave the judges an opportunity to ‘explore the finer details of the options the judge is contemplating’.²⁴³ Sir Mark Potter comments that enabling the child to meet with the judge allows the child to have a picture of the judge in his or her mind, enables the child to tell the judge directly his or her wishes, and that it provides reassurance for the child that the judge had understood them and has taken their wishes into account.²⁴⁴

Judges that had taken the opportunity to speak to children spoke of the benefits of doing so in expediting the process rather than having to wait for a court report, particularly in urgent cases or where there are limited resources. Another important consideration for judges was that it gave them an up to date picture of the child’s circumstances in cases where a court report may have been prepared some time ago and things may have changed

²⁴⁰ Barbara Atwood, ‘*The Child’s Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform*’ 45 *Arizona Law Review* (2003) 629.

²⁴¹ Parkinson and Cashmore (n 235) 171.

²⁴² *ibid* 175.

²⁴³ *ibid*.

²⁴⁴ Mark Potter, ‘The Voice of the Child: Children’s Rights in Family Law Proceedings’ (2008) *Irish Journal of Family Law* 140, 146-147.

in the interim and in many instances the interview proved a “tool for settlement” when a judge could say to parents ‘well I saw your children and this is what they told me.’²⁴⁵ Even the judges that were against talking to children acknowledged that they should do so if the child wanted them to see them.

Judges were also adamant that children be advised that they would be listened to but ultimately the Judges would be the ones making the final decision. This they believed left the children with no doubt as to how the process operates and took some of the pressure from the children in that they did not feel that they had to make the ultimate decision.

Parkinson and Cashmore went on to set guidelines for judges based on the findings of their research. Judges, they advise, should speak to children when:

- (1) There is a recommendation from the family report writer or the child representative to do so or circumstances of urgency make it the optimal course;
- (2) The parties agree or the judge is satisfied that it is in the best interests of the child to meet even without a parent’s agreement;
- (3) The child has either requested to talk with the judge or has agreed to do so;
- (4) There is at least an audiotape of the discussion and report available on the record to indicate what was said;
- (5) A welfare professional should be present and should report back in open court,
- (6) The child should be told before the meeting with the judge, and then again at the beginning of the meeting, that it is not possible to tell the judge things on a confidential basis.²⁴⁶

It is interesting to note that non-resident parents raised concerns about children being interviewed directly by judges, whereas this was not an issue

²⁴⁵ Parkinson and Cashmore (n 235) 179.

²⁴⁶ *ibid* 182-185.

for parents who had custody of the children. Similarly children of contested proceedings were more interested in speaking to judges than children in cases that were not contested. In the cases that were not contested children expressed the view that they could discuss these matters with their parents and therefore did not see the need for intervention by a third party. Eighty-five per cent of children said that they should have the opportunity to talk directly to a judge if they wished to do so. They cited their main reasons for wanting to speak to the judge as having their views heard by the ultimate decision-maker and that they wanted the judge to know exactly how they felt without interpretation from anyone else. Children indicated that they trusted the judge to make a fair decision.²⁴⁷

2. US and Canada

In 2003, Atwood²⁴⁸ surveyed 160 judges in Arizona. Of the 48 completed questionnaires received²⁴⁹ she found that a quarter of the judges had never interviewed children. Birnbaum and Bala²⁵⁰ carried out a study in Canada and the US which involved interviewing 16 judges in Ohio, where they are statutorily mandated to interview children if an interview is requested and 30 judges in Ontario where there is no such requirement. Interestingly, judges in Ohio where children are interviewed viewed it ‘as a routine matter; while a few of them expressed some concerns in this practice, the vast majority of them believe that it is child’s right to be heard by them. These judges also believe that meeting a child helps them to better understand the child and the case, and thus to make better decisions.’²⁵¹

In contrast, judges in Ontario raised concerns about ‘their ability to interview children in cases involving alienation, attachment disorders, or high conflict disputes; the concern expressed is that such action, by an

²⁴⁷ Patrick Parkinson and Judy Cashmore, ‘What Responsibility Do Courts have to Hear Children’s Voices’ (2007) *International Journal of Children’s Rights* 15, 51.

²⁴⁸ Barbara Atwood (n 240) 636.

²⁴⁹ A total of sixty judges responded, twelve of whom indicated that they did not preside over child custody disputes and returned blank questionnaires.

²⁵⁰ Rachel Birnbaum and Nicholas Bala, ‘Judicial Interviews with Children in Custody and Access Cases: Comparing Experiences in Ontario and Ohio’ (2010) *International Journal of Law, Policy and the Family* 24 (3), 300.

²⁵¹ *ibid* 324.

untrained person, could traumatise the child'²⁵². They felt that their 'role as judges is to make decisions based on the evidence presented by the parties, and the interviewing of children is not consistent with this role'.²⁵³

It is clear then that when judges routinely interview children they see it as 'more about "having a conversation" with a child rather than using the interview to gather evidence... they view the purpose of the interview as a way of "getting to know" the children, rather than fact-finding'²⁵⁴.

Judges need guidance and training in this area and possibly much of their resistance to the idea of interviewing children stems from a fear of perhaps causing more harm than good. If properly trained and with proper procedures in place judges would feel more comfortable. Birnbaum and Bala go on to recommend the following steps to be followed in interviewing children:

1. Explanation at the start of the meeting: Explaining the purpose of the meeting, explaining to the child that the decisions will be made based on their best interests and that the child's wishes though considered will not be the deciding factor. This reduces the pressure on children who may feel that the onus is on them to choose one parent over the other.
2. Confidentiality: Will what they saw remain a matter between them and the judge? It is important that a judge does not give this assurance if it is not a case that this can be complied with.
3. Communication: Judges should communicate with children in language they understand, and should be open ended giving the children an opportunity to volunteer information without any prompts.

²⁵² *ibid* 308.

²⁵³ *ibid* 324.

²⁵⁴ *ibid*.

4. Time for the meeting: Enough time should be allocated so that children do not feel rushed and the interviews should take place at a time of the day that is suitable to that particular child based on their age.
5. Siblings: Judges should interview siblings both together and separately, which may allow individual children to express concerns to the judge that they may not feel comfortable doing in front of other siblings.
6. Length of the meeting: This will vary depending on the child's age and how fully they wish to engage.²⁵⁵

3. The Judicial Interview in Ireland

There was a consensus amongst the solicitors and barristers interviewed for the research undertaken as part of this thesis that judges are reluctant to interview children in chambers. Surveys were sent by the author to a sample of judges of the District, Circuit and High Court in Ireland for their views. Fifteen judges replied. Eight of the judges who replied had been barristers before being appointed to the bench and seven had practised as solicitors. The replies indicate that, on average, judges will hear the voice of the child in chambers in less than 5% of cases. However, two judges specifically commented that the number had gone up slightly since the referendum.

A. Preferred method of hearing the voice of the child

Only three judges who replied indicated that their first preference was to hear the child directly, two of whom had practised as barristers before being appointed to the bench and one who was a solicitor. In the majority of the cases judges preferred to rely on the assistance of an expert, with the GAL

²⁵⁵ *ibid* 328-329.

being the most preferred expert, followed by a section 47 reporter or child psychologist. Six judges (2 solicitors and 4 barristers) indicated that their second preference would be to talk to the child.

B. Views on hearing a child in chambers

In general, judges indicated a willingness to hear a child directly where the child requested such meeting or where the judge felt that it would be for the child's benefit. However there were some diverse views with one judge (former solicitor) commenting:

1. 'Each time I have interviewed children I have found it hugely helpful in understanding what the real issues are.
2. With training I would do much more interviews.
3. Proper facilities are important - some courthouses are not suitable.
4. In some cases I have seen children with a psychologist e.g. where there has been alienation and the child refuses to see a parent.
5. On occasion I have seen children after reaching a decision – e.g. on a relocation application to explain why I have reached a particular decision and to deflect any anger against a parent.'

While another (former barrister) had quite a different view:

'Listening to the child is not new. Formerly we were advised to listen through the filter of a professional witness to guard against coaching and to allow for a more developed response. The present wish to have child interviewed by judge is merely a passing fad for which there is no convincing evidence.'

C. Concerns regarding talking to the child directly

The main concern that Irish judges expressed with regard to speaking to a child in chambers was the judges' lack of training in this regard.²⁵⁶ This is in accordance with the research carried out in Canada and Australia, referred to earlier, in that once judges feel that they have the competence and know the parameters of what they are trying to achieve, it becomes more acceptable. Equally rated amongst the other concerns raised by Irish judges were; the fear that the child would be coached by one of the parents; lack of proper facilities and concern that the child may be frightened or that the experience may have a negative impact on the child. Commenting further in the issue of training one judge was of the view that judges should be provided with a 'protocol for hearing children in chambers: possibly specimen questions and advice should be made available to judges'.

Examining references to judicial interviews in the case law in Ireland, it is notable that in 2002, Keane CJ urged caution in relation to seeing a child in chambers because of the impact on their parents' procedural rights to have evidence heard on oath in the presence of the parties²⁵⁷. However, a later case to note is that of *SJ O'D v P C O'D*²⁵⁸ in which Mr. Justice Abbott addressed this issue. He commented as follows:

'While the s. 47 report procedure is the usual way in which this imperative may be observed, I found, in the past, that this procedure can be too cumbersome, expensive, intrusive or time consuming, and in these cases I decided, in certain instances, to briefly speak with the children to ascertain their views, subject to agreeing terms of reference for this procedure with the parents, who are parties to the family litigation.'²⁵⁹

Mr. Justice Abbot noted that he was fortunate to have some training in the area of interviewing children and he went on to set out guidelines which he

²⁵⁶ 47%

²⁵⁷ *AS (or se AB) v RB* [2002] 2 IR 428.

²⁵⁸ [2008] IEHC 468.

²⁵⁹ *ibid* [8.3].

has taken from the trainings he attended. He set out the guidelines as follows:

- ‘1. The judge shall be clear about the legislative or forensic framework in which he is embarking on the role of talking to the children as different codes may require or only permit different approaches.
2. The judge should never seek to act as an expert and should reach such conclusions from the process as may be justified by common sense only, and the judge’s own experience.
3. The principles of a fair trial and natural justice should be observed by agreeing terms of reference with the parties prior to relying on the record of the meeting with children.
4. The judge should explain to the children the fact that the judge is charged with resolving issues between the parents of the child and should reassure the child that in speaking to the judge the child is not taking on the onus of judging the case itself and should assure the child that while the wishes of children may be taken into consideration by the court, their wishes will not be solely (or necessarily at all) determinative of the ultimate decision of the court.
5. The judge should explain the development of the convention and legislative background relating to the courts in more recent times actively seeking out the voice of the child in such simple terms as the child may understand.
6. The court should, at an early stage ascertain whether the age and maturity of the child is such as to necessitate hearing the voice of the child. In most cases the parents in dispute in the litigation are likely to assist and agree on this aspect. In the absence of such agreement then it is advisable for the court to

seek expert advice from the s. 47 procedure, unless of course such qualification is patently obvious.

7. The court should, avoid a situation where the children speak in confidence to the court unless of course the parents agree. In this case the children sought such confidence and I agreed to give it to them subject to the stenographer and registrar recording same. Such a course, while very desirable from the child's point of view is generally not consistent with the proper forensic progression of a case unless the parents in the litigation are informed and do not object, as was the situation in this case.²⁶⁰

Interestingly, the guidelines set by Abbot J, in particular his recognition of the fact that a judge in speaking to a child should not set himself out as “an expert and should reach such conclusions from the process as may be justified by common sense only, and the judge's own experience” corresponds closely with the view expressed by one of the s.47 reporters interviewed for this research. She noted that:

‘I think it is natural intuitive style with children and judges should probably have a measure of that themselves, whether they have a natural ability with children. It is not rocket science interviewing children. It is if you want to tap into something more than just what they have said, if you want to tap into their unconscious then ... you need some extra skills, but the interviewing bit, there is no mystery about it.’²⁶¹

VI. Views of Adult Children

What about the needs and wishes of children who may not be the subject of court proceedings, in that they may be over 18? Are their needs or wishes considered? Both section 47 reporters interviewed for this thesis advised

²⁶⁰ [2008] IEHC 468 [10].

²⁶¹ Interview with CR 1, March 2011.

that they would ‘consider the entire family context’ and would therefore include children that are over 18. In addition they include new partners of the parents if they are going to be closely involved in the children’s lives.

One of the reporters indicated that she thinks:

‘...that children at this age can sometimes need help, that they can get caught. Well, what happens for boys at that stage is that their development is accelerated by a separation so that they are inclined to leave the family home too early. They don’t use it as a base. They cut and move....Girls can get held, they can have what is called a “consoling alliance” with a mother and their development can get stalled or arrested at the time of assessment. So, it is really important to make sure that they are on task developmentally, that they are getting to college or wherever they want to go.’²⁶²

Both reporters acknowledged the importance of speaking to the children, in an age appropriate manner and both were of the view that children value the opportunity to contribute. When asked about the impact that it can have on children when the final decision made by their parents or the court does not reflect their wishes, both reporters indicated that children generally accept the outcome once it has been explained to them and they have been consulted and they know that their views were taken into account. In the words of one of the reporters:

‘The child has a right and psychologically also it is in children’s best interests also to have their voice heard, to know and feel that they are heard and then if that is not what happens to have it explained to them in a way that they can understand.... The greatest emphasis would be on the child’s best interests but it is within the child’s best interests to have their voice heard and understood and an assurance that they have been heard and understood.’²⁶³

²⁶² *ibid.*

²⁶³ Interview with CR 2, May 2011.

On the issue of whether it is appropriate to involve children, or as has been alleged by the anti-participation movement, upset them by involving them in adult concerns, a reporter commented:

‘It is entirely age appropriate for [a] very young child to be experiencing anxiety if they don’t see their mammy for five days.... It can be very helpful to a child to have somebody to express that to and quite often, they can get upset in the course of talking about it. But that, in itself, can be a release of distress, rather than that it heightens distress. It might appear to an observer that this is far too upsetting for the child, he’s crying or she’s crying but actually that can be an emotional release so it is very important that that is facilitated by a person who has the necessary skills to facilitate that and to contain the distress of the child in ...a way that helps a child progress...’²⁶⁴

The reporters also assert that there are advantages for the parents themselves in listening to their children’s experience of the separation. Hearing ‘...what it is like for the young person for their parents to be separated and what it has been like for them to be living in the midst of conflict, quite often, it can be a revelation for the parents that it has been distressing to the child’²⁶⁵. Perhaps the most telling comment made during the course of the interviews with the section 47 reporters was that one reporter indicated that in the ‘sixteen years that I have been doing it, I have only had a complaint from one child and my experience is that most children ask to come back to me – they like it’²⁶⁶.

This view has proven to be accurate based on the interviews with young adults undertaken as part the research for this thesis. These views will be detailed in chapter 5. These young adults were keen to point out that they wanted an explanation from their parents. Regardless of their age at the time of separation, they wanted an assurance that they would be looked after. Lawyers have a tendency to focus their attentions on the younger children,

²⁶⁴ *ibid.*

²⁶⁵ *ibid.*

²⁶⁶ Interview with CR 1, March 2011.

whereas these young adults felt that support and structure was equally, if not more, important throughout their teens and early 20s. In general legal negotiations, once children are over 18 they are not considered and this may need to change, especially in view of the fact that children are now starting to live at home until they are much older. Their views should be considered as a matter of showing them respect as part of the family.

VII. Conclusions

To date, there has been a paternalistic attitude to children's rights in Ireland, focusing on the need to protect their welfare and based on an assumption, endorsed by the courts, that their parents are the best placed to guarantee such welfare within the Constitutional family. Ironically, children of non-married parents were more likely to have their "best interests" considered objectively and not based on any preconceptions. The passing of the referendum, if approved by the Supreme Court, will remedy this situation and provide rights for all children, regardless of the marital status of their parents.

Though, as detailed above, the "best interests" standard has been criticised as being vague, it is regrettable that it has not been extended to all judicial and administrative proceedings as envisaged under the UNCRC and that the amendment has fallen short of the standard set out in the Child Friendly Justice Guidelines. Though it may be indeterminate, having examined more exacting standards like the primary care taker standard and the approximation rule, the "best interests" standard allows an element of flexibility to consider the whole child context. Referring back to the works of Bronfenbrenner as detailed in chapter one, it is essential to take the child's environment into account. As was noted in the Child Friendly Guidelines, 'a comprehensive approach should be adopted by all relevant authorities so as to take due account of all interests at stake, including psychological and physical well-being and legal, social and economic

interests of the child'.²⁶⁷ Irish judges would benefit from guidelines, a list of factors that they should consider when assessing the best interests of the child.

With regard to Article 12, again, the referendum, if upheld, falls short. It does not provide a specific right to children to have their voices heard, rather it places an obligation on Government to provide legislation in this regard. Similarly the obligation has been restricted to certain types of actions and does not apply to all judicial and administrative proceedings affecting the child. As is evidenced from the decisions examined, it is clearly difficult for judges to determine issues of “age and maturity”, particularly when they have not been provided with any training in this regard. It is imperative that judges be assisted in this regard as it is clear from the research carried out internationally and my own research in Ireland, judges are more willing to speak to children and consider their views when they feel equipped to do so.

It may be useful to start a pilot programme where section 47 reporters or such qualified professionals would sit in on interviews that judges hold with children, as a safety net for judges and for the children being interviewed. If the section 47 reporters have any concerns in relation to children, then these could be brought to the attention of the judge. With this training and support judges may become more pro-active, perhaps reducing the need for costly written reports, which may often be out of date when the case is actually listed for hearing. While the research carried out in Australia by Parkinson and Cashmore indicates that judges like to interview children in addition to having an expert’s report, this may not be feasible in an Irish context. Judges are restricted due to the long nature of the lists before them and also lack of resources. If such interviews are to be done sensitively, the children would need adequate time to express their wishes and the judges need time to explain the process and ultimately their decision to the children.

²⁶⁷ Guidelines on child friendly justice (n 90) III B 2 (c).

The fact that section 28 of the Children Act 1997 has not been commenced means that in effect there is ‘no legal provision in force allowing for children involved in private law proceedings to be granted separate representation.’²⁶⁸ Comparing this to the position in the UK where children are automatically provided with a GAL and, in situations where there is conflict between their parents may also have the benefit of the services provided by CAFASS, children in Ireland are largely left unrepresented and unsupported and may end up in a situation where their parents’ case is coming before the courts and no one will have spoken directly to them as to how the conflict has impacted on them or heard their voices. It is submitted that with the obligation to provide legislation to deal with the changes required as a result of the Constitutional amendment, if upheld by the Supreme Court, that the legislature should review the entire system, place the GAL on a statutory footing, extend the service so that it is available for all the children and provide training and adequate regulation of the system. It is also submitted that this service and a support mechanism should be provided at a much earlier point in the separation/divorce process. Evidence from the research into the CAFCASS Plus programme in the UK has clearly demonstrated the benefits of pre-proceeding intervention in public law cases and children within the private family law system would also benefit from such support.

Having established the mechanisms available through which to hear the voice of the child through the courts’ process in Ireland as a benchmark, this thesis will now go on to assess the effectiveness of mediation and collaborative practice as dispute resolution processes in a family law context and the extent to which they are either more or less effective at providing an established and robust avenue through which to hear the voice of the child and thus to ensure that children’s rights under Article 12 of the UNCRC are upheld.

²⁶⁸ Kilkelly (n 64) 222.

CHAPTER 3: The Irish Mediation Landscape

I. Introduction

In addressing the research question as to the effectiveness of mediation as a dispute resolution processes in a family law context and the extent to which it provides an avenue to hear the voice of the child as per their rights under Article 12 of the United Nations Convention on the Rights of the Child, this chapter will examine the development of mediation in a family law context in Ireland. It will outline the legislative framework under which mediation currently operates, the existing research on the process in Ireland and the recommendations made by the Law Reform Commission (LRC) in their report entitled *Alternative Dispute Resolution: Conciliation and Mediation*¹. Specifically, it will examine the role of the child within the Irish family mediation landscape, the research carried out internationally on child-inclusive² and child focused mediation³ and recent developments to include the European Communities (Mediation) Regulation 2011⁴ and the Draft General Scheme of the Mediation Bill 2012 (hereafter referred to as the Draft Mediation Bill)⁵.

II. Brief history of Mediation

Mediation can be traced back to ancient Greek and Roman societies. From anthropological studies, it is known that the tradition of the using of a

¹ Law Reform Commission, *Alternative Dispute Resolution: Mediation and Conciliation* (LRC 98-2010).

² Jennifer McIntosh, Yvonne Wells and Caroline Long, 'Child-Focused and Child-Inclusive Family Law Dispute Resolution: One year findings from a prospective study of outcomes' (2007) 13 *Journal of Family Studies* 8.

³ Jill Goldson, 'Hello, I'm Voice, Let me Talk: Child-Inclusive Mediation in Family Separation' (Families Commission, Innovative Practice Report No1/06 December 2006) <<http://www.jillgoldson.co.nz/>>

⁴ SI No. 209/2011 European Communities (Mediation) Regulation 2011 <http://www.irishstatutebook.ie/2011/en/si/0209.html>

⁵ Draft General Scheme of the Mediation Bill 2012 <<http://www.justice.ie/en/JELR/MedBillGSFinal.pdf/Files/MedBillGSFinal.pdf>>

‘headman’⁶, a neutral third party to resolve disputes was found, for example, among the Navajo Indians in South Western America⁷. When a dispute arose in the community, the disputing parties would go to the ‘headman’ for advice. He would meet with all the parties involved and they would continue to talk until it was agreed as to how the matter was to be resolved.⁸ This intervention by the headman would ensure that the dispute was kept between the parties themselves and had at its core an element of social control based on their particular beliefs and norms.

With the spread of colonialism and the imposition of common law, these traditional conflict resolving methods were cast aside in favour of rules of law, courts and an adversarial system, which changed the dynamics of disputes. The dispute was no longer something to be resolved by the parties but was to be adjudicated upon by a court, with an emphasis on procedure, moving from a societal based approach to focus more on the individual rights of the victim. With colonialism, litigation became the ‘perceived’ more appropriate way to deal with conflict, based on the maxim that ‘all parties were equal before the law’ when entering court to have their dispute resolved, and that, at the conclusion, there is a ‘winner’ and a ‘loser.’⁹

However, by the mid 1960s in the U.S. the courts were struggling to cope with the volume of cases coming before them. Twining notes that three particular concerns predominated: ‘a feeling on the part of the American legal establishment that the court system had become intolerably overloaded...: a felt need on the part of professionals and others for specialised private fora to serve particular interests; and a view that over and above the concomitant increase in congestion, delay and expense, the

⁶ Headmen were chosen from ‘...among those who possessed the necessary qualities. The headmen needed to be eloquent and persuasive, since they exerted persuasion rather than coercion. Teaching ethics and encouraging the people to live in peace and harmony were emphasized’ Chief Justice Tom Tso ‘The Process of Decision Making in Tribal Courts’(1989) 31 *Arizona Law Review* 225, 226.

⁷ Harold Brown, ‘The Navajo Nation’s Peacemaker Division: An Integrated Community-Based Dispute Resolution Forum’ (May/ July 2002) *Dispute Resolution Journal* 43.

⁸ Tso, ‘The Tribal Court Survives in America’ (1986) 25 *Judges’ Journal* 23.

⁹ Robert H. Mnookin and Lewis Kornhauser, ‘Bargaining in the Shadow of the Law: The Case of Divorce (1978-1979) 88 *Yale Law Journal* 950, 958.

system was incapable in a more fundamental way of living up to the ideals of “access to justice” for all.’¹⁰ Chief Justice Warren Burger was instrumental in promoting alternative means of dispute resolution in the 1970s. He commented that ‘[o]ur distant forebears moved slowly from trial by battle and other barbaric means of resolving conflicts and disputes and we must move away from total reliance on the adversary contest for resolving all disputes.’¹¹

Mediation seeks to address the issue of “conflict” between the parties. Social theorists ‘see conflict as variable: sometimes “destructive,” but sometimes “constructive” or even creative, ... an opportunity for learning and growth.’¹² Simmel and Lewis argue that conflict is a positive force that causes problems to be aired and leads to creative problem solving. By addressing this conflict, disputes can be transformed¹³ leading to better understanding.

The adversarial system, while still of vital importance in the resolution of disputes, may not suit all cases, particularly in instances where the parties wish to have some form of ongoing business or personal relationship after the particular dispute at hand is resolved. Family law, which encompasses issues relating to separation, divorce and custody and access to children, is seen as an area particularly suited to the mediation process. In these cases, ‘[d]isputants want to regain control and retreat from the professional management of family transition’.¹⁴

¹⁰ Twining William, ‘Alternative to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics’ (1993) 56 *Modern Law Review* 380.

¹¹ Warren Burger, ‘The State of Justice’ (1984) 70 (4) *American Bar Association Journal* 62, 66.

¹² Carrie Menkel-Meadow, ‘Mothers and Fathers of Invention: The Intellectual Founders of ADR’ (2000) 16 *Ohio Journal of Dispute Resolution* 1, 6.

¹³ William Felstiner, Richard Abel and Austin Sarat, ‘The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...’ (1980-1981) 15 (3-4) *Law and Society* 631.

¹⁴ Sinead Conneely, *Family Mediation in Ireland* (Ashgate 2002) 10 quoting Roberts, Simon ‘Decision making for life apart’ (1995) 58 *Modern law Review* 714.

III. What is mediation?

There have been many attempts at defining mediation. The Centre for Effective Dispute Resolution, which provides accredited training for mediators, has defined it as:

‘a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated settlement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.’¹⁵

Defining mediation as a “flexible process” acknowledges both the variations in the way the mediation process may be carried out and models available. Such variation will also occur depending on the type of issue that it is being used to resolve, for example, commercial disputes, employment law issues or family law issues and also the differences in procedure between various mediation organisations.

The most frequently used models of mediation are the evaluative model, the transformative model and the facilitative model. The evaluative model, most common in the US, is based closely on the traditional legal process and focuses on rights. Therefore during an evaluative mediation process the mediator is actively involved in evaluating proposals and assisting the parties towards settlement.¹⁶ The transformative model aspires to ‘transforming people in the very midst of conflict’¹⁷ with the mediator moving the parties from disempowerment to empowerment, both in their own personal development, and in the resolution of their dispute. Finally, facilitative mediation, which is the most commonly used model in Ireland and that upon which the state run Family Mediation Service is based, urges mediators to gain an understanding of the issues between the parties and to

¹⁵ *The CEDR Mediator Handbook* (4th edn, Centre for Effective Dispute Resolution, 2004) 26. CEDR is an organisation which trains and accredits mediators.

¹⁶ Niamh Lehane, ‘Making Talk Work’ in Delma Sweeney and Mary Lloyd (eds) *Mediation in Focus: A Celebration of the Family Mediation Service in Ireland* (Family Mediation Service 2011) 99,103.

¹⁷ Joseph Bush and Robert Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (Jossey-Bass 1994) 2.

seek to ‘empower the parties to make their own decisions’.¹⁸ The adoption of the facilitative model has also been confirmed in the definition of mediation under the Draft Mediation Bill which provides that:

“mediation” means a facilitative and confidential process in which a mediator assists parties to a dispute to attempt by themselves, on a voluntary basis, to reach a mutually acceptable and voluntary agreement to resolve their dispute¹⁹.

IV. The Development of Mediation at European level

A. Council of Europe

Since the mid 1990s, there have been many developments at European level focusing on the need to promote the use of mediation as a method of dispute resolution. In 1996, the European Convention on the Exercise of Children’s Rights included a provision under Article 13 that State Parties ‘shall encourage the provision of mediation or other processes to resolve disputes’ in an effort to avoid the use of judicial proceedings in matters ‘affecting children’²⁰.

In 1998, the Committee of Ministers of the Council of Europe adopted Recommendation (98)1 on Family Mediation²¹ which recommends that the governments of member states:

- i. ... introduce or promote family mediation or, where necessary, strengthen existing family mediation;

Recommendation (98) 1, set out a detailed list of principles which confirmed the voluntary nature of the process and promoted the need for

¹⁸ Lehane, (n 16)103.

¹⁹ Draft Mediation Bill 2012 (n 5).

²⁰ European Convention on the Exercise of Children’s Rights 1996 (Council of Europe) Available at

<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=160&CL=ENG> .

²¹ Available at

<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1153972&SecMode=1&DocId=450792&Usage=2> .

proper training of mediators and a mediator's code of conduct. It also highlighted the importance of the mediator's impartiality and confirmed the confidential nature of the process. Referring to Article 13 of the European Convention on the Exercise of Children's Rights, as set out above, Recommendation (98) 1 provides that:

‘viii. the mediator should have a special concern for the welfare and best interests of the children, should **encourage** parents to focus on the needs of children and should remind parents of their prime responsibility relating to the welfare of their children and the need for them to inform and consult their children.’²²

However, research carried out by the European Commission for the Efficiency of Justice (CEPEJ) eight years later in 2006 noted a continued lack of awareness of Recommendation (98) 1 and of mediation amongst professionals.²³ The CEPEJ also noted that mediation costs were high, and that there were disparities both in the qualifications and training of mediators and the extent to which mediating parties were assured of confidentiality. In 2007, the CEPEJ issued ‘Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters.’²⁴ In setting out these non-binding guidelines they outlined minimum requirements which should be complied with for meditation training²⁵ and recommended that:

‘... member states and other bodies involved in family mediation work together to establish common valuation criteria to serve the best interest of the child, **including the possibility for children to take part in the mediation process**. These criteria should include the relevance of the child's age or mental maturity, the role of

²² *ibid* vii (Emphasis added).

²³ http://www.coe.int/t/dghl/standardsetting/family/7th%20conference_en_files/CEPEJ-2007-14%20E%20-%20guidelines%20family%20mediation%20and%20mediation%20in%20civil%20matters.pdf para 7.2. Questionnaires were sent to 16 representative States. 52 replies were received from States and from practitioners.

²⁴ Guidelines concerning family mediation (n 23).

²⁵ *ibid* para 22.

parents and the nature of the dispute. This could be facilitated by the Council of Europe in cooperation with the European Union.’²⁶

These guidelines, while acknowledging that it is ‘hard to break society’s reliance on the traditional court process as the principal way of resolving disputes’,²⁷ also highlighted the fact that ‘[j]udges play a crucial role in fostering a culture of amicable dispute resolution. It is essential therefore that they have a full knowledge and understanding of the process and benefits of mediation’²⁸. The guidelines stressed the importance of raising public awareness of mediation and also awareness amongst lawyers, noting that ‘[m]ediation should be included in the curricula of initial as well as continuous training programmes for lawyers.’²⁹

Significantly, these guidelines show a move from the more *child-focused* approach set out in Recommendation (98) 1 where it was the mediator’s role to “encourage” parents to inform and consult their children, to a more *child inclusive* approach where the possibility of children taking part in the process is mentioned.

B. European Union

Developments at EU level, though not focusing specifically on the role of mediation in a family law context, have also been instrumental in setting standards for mediators and in raising the profile and awareness of mediation as a process.

In 2008, the European Parliament and the Council of the EU issued Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters.³⁰ The objective of the Directive was to:

‘facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation

²⁶ *ibid* para 27 (Emphasis added).

²⁷ *ibid* para 37.

²⁸ *ibid*

²⁹ *ibid* para 52.

³⁰ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, Article 1 < <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0052:en:NOT>>

and by ensuring a balanced relationship between mediation and judicial proceedings.’³¹

Interestingly, while many critics of alternative dispute resolution methods argue that such processes impede access to justice³², recital 3 of the Directive acknowledged the need to ‘simplify and improve access to justice’ and in doing so sought to promote mediation as an ‘extrajudicial’³³ method of access to justice. The Directive provides that there needs to be a ‘...predictable legal framework’³⁴ and that therefore it is ‘necessary to introduce framework legislation addressing, in particular, key aspects of civil procedure’.³⁵ The Directive has sought to provide this predictability through addressing issues of training/ conduct of mediators,³⁶ the need to provide the public with information on the process³⁷ and addressed the issue of confidentiality within the process.³⁸ Recital 19 of the Directive also specifies that ‘[m]ediation should not be regarded as a poorer alternative to judicial proceedings’ relying on the ‘good will’ of the parties for enforcement. To counter act these assertions, the Directive provides that there should be proper enforcement mechanisms in place.

Another argument frequently made is that having to engage in a mediation process before court action is a violation of one’s right of access to justice under Article 6 of the European Convention on Human Rights (discussed in more detail later in this chapter). The Directive promotes the voluntary nature of the mediation process under Article 5 but provides that this is without prejudice to any laws that individual Member States may have that make it compulsory to attend mediation. If parties are compelled to attend mediation as a prerequisite to initiating court proceedings, limitation periods for issuing such court proceedings must make allowances for periods that

³¹ *ibid* Article 1.

³² Owen Fiss, ‘Against Settlement’ (1986) 93 (6) *Yale Law Journal* 1073.

³³ *ibid* recital 6.

³⁴ *ibid* recital 7.

³⁵ *ibid*.

³⁶ Article 4.

³⁷ Article 9.

³⁸ Article 7.

the parties have spent in the mediation process to prevent any infringement of their right of access to justice.³⁹

The European Commission also introduced a European Code of Conduct for Mediators⁴⁰ setting out the general standards for mediators in terms of competency, the procedure to be followed in a mediation process and again, stressing the importance of confidentiality within the process. Strengthening the mediation process in this way at EU level should be influential in terms of increasing users' confidence in the process as an effective method of dispute resolution.

V. Development of Mediation in Ireland

At present, while there are provisions under various Acts⁴¹ and under the Rules of the Circuit⁴² and Superior Courts⁴³ for disputes to be referred to mediation, there is no legislation specifically governing the practice of domestic mediation or regulating the mediation profession in Ireland. In a family law context, the Judicial Separation and Family Law Reform Act 1989⁴⁴ places a statutory obligation on solicitors to notify clients prior to issuing court proceedings under the Act, about the availability of reconciliation and mediation and to provide them with information. Section 5(1) provides:

- (a) discuss with the applicant the possibility of reconciliation and give him the names and address of persons qualified to help effect a reconciliation between the spouses who have become estranged, and
- (b) discuss with the applicant the possibility of engaging in mediation to help effect a separation on an agreed basis with an

³⁹ *ibid* Article 8. See also Recital 24.

⁴⁰ European Code of Conduct

http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf

⁴¹ Judicial Separation and Family Law Reform Act 1989; Family Law (Divorce) Act 1996; Guardianship of Infants Act 1964; Civil Liability and Courts Act 2004.

⁴² Circuit Court Rules (Case Progression in Family Law Proceedings) 2008 SI 2008/538.

⁴³ Rules of the Superior Courts (Commercial Proceedings) SI 2004/ 2; Rules of the Superior Court (Mediation and Conciliation) SI 2010/ 502.

⁴⁴ Judicial Separation and Family Law Reform Act 1989 (n 43).

estranged spouse and give to him the names and addresses of persons and organisations qualified to provide a mediation service, and

- (c) discuss with the applicant the possibility of effecting a separation by the negotiation and conclusion of a separation deed or written separation agreement.

Section 5 (2) of the Act further provides that the solicitor must furnish a certificate when filing proceedings to confirm that such advice was given to the applicant. Similar obligations are placed on the solicitor acting for the respondent under section 6 of the Act.⁴⁵ If such certificates are not filed, the judge may adjourn the proceedings until this provision has been complied with.

Similar provisions with regard to reconciliation and mediation apply under the Family Law (Divorce) Act 1996⁴⁶ under sections 6 and 7 of the Act. In addition, when an applicant is considering applying for a divorce under s 6 (3):

‘... a solicitor shall also ensure that the applicant is aware of judicial separation as an alternative to divorce where a decree of judicial separation in relation to the applicant and the other spouse is not in force.’⁴⁷

Again, under the Family Law (Divorce) Act, 1996 each solicitor is required to file a certificate to confirm that the applicant, under section 6 of the Act and the respondent under section 7, has been so advised and if these certificates are not filed the judge will adjourn the proceedings to give the parties time to comply with this obligation.

More recently, Section 20 of the Guardianship of Infants Act 1964⁴⁸, as inserted by the Children Act 1997⁴⁹, also requires a solicitor acting for an

⁴⁵ Judicial Separation and Family Law Reform Act 1989, ss 5 and 6.

<http://www.irishstatutebook.ie/1989/en/act/pub/0006/index.html> .

⁴⁶ Family Law (Divorce) Act 1996 <http://www.irishstatutebook.ie/1996/en/act/pub/0033/>

⁴⁷ *ibid* s.6 (3)

⁴⁸ Guardianship of Infants Act 1964

<http://www.irishstatutebook.ie/1964/en/act/pub/0007/index.html> .

applicant for guardianship to discuss the possibility of using mediation as a means through which to reach an agreement about custody, access or the welfare of the child in question⁵⁰. Again, a certificate must be filed with the proceedings to say that the applicant has been so advised. All such discussions are inadmissible as evidence in court under section 23 of the Guardianship of Infants Act 1964 as inserted by the Children Act 1997.⁵¹

However, in recent years efforts have been made through practice directions and amendment of the rules of the Circuit and Superior Courts to provide an avenue for the courts to refer matters to mediation.

1. Circuit & Superior Court Rules

In 2008 amendments were made to the Circuit Court Rules under Circuit Court Rules (Case Progression in Family Law Proceedings) 2008⁵². The aim was to ensure that proceedings are ‘prepared for trial in a manner which is just, expeditious and likely to minimise the costs of the proceedings and that the time and other resources of the Court are employed optimally.’⁵³ Research carried out for the purposes of this thesis has shown that many practitioners feel that there are benefits in encouraging the lawyers to address the issues in a case at an early stage but they also expressed frustration at some practitioners not taking these meetings seriously, therefore requiring further case progressions and wasting time rather than just getting on with the case.

⁴⁹ Children Act 1997 <http://www.irishstatutebook.ie/1997/en/act/pub/0040/index.html> .

⁵⁰ The introduction of mediation in issues related to custody, access and the welfare of the child was welcomed during the debates leading up to the enactment of the Children Act 1997. It was widely accepted that such issues should be resolved outside of the court process, if possible. <http://historical-debates.oireachtas.ie/S/0152/S.0152.199711190017.html> .

⁵¹ 23.—An oral or written communication between any of the parties concerned and a third party for the purpose of seeking assistance to reach agreement between them regarding the custody of the child, the right of access to the child or any question affecting the welfare of the child (whether or not made in the presence or with the knowledge of the other party) and any record of such communication, made or caused to be made by any of the parties concerned or such a third party, shall not be admissible as evidence in any court. <http://www.irishstatutebook.ie/1997/en/act/pub/0040/index.html> .

⁵² Circuit Court Rules under Circuit Court Rules (Case Progression in Family Law Proceedings) 2008 SI 2008/ 538.

⁵³ *ibid.*

Similarly, in the High Court, Practice Directions have been put in place which “recommend”⁵⁴ or “invite”⁵⁵ parties to consider resolving their issues through less adversarial means.

2. Law Reform Commission: *Alternative Dispute Resolution: Conciliation and Mediation*

In 2010, the LRC published a report entitled *Alternative Dispute Resolution: Conciliation and Mediation*. In this report they sought to address the continuing issue of the low-uptake on mediation in Ireland.⁵⁶ The LRC recommended that all those proposing to issue family law proceedings be required to attend a ‘Mandatory Information Session’. At these mandatory sessions, objective and independent information would be provided to potential litigants on all of the various processes available to resolve their legal issues.⁵⁷ An exception is made for parties who fear for their safety. In such cases, the matter may proceed directly to court. The LRC also recommended that the courts should have authority to adjourn the proceedings to allow attendance at these information sessions for non-exempt parties that have failed to attend.

Two other important recommendations made by the LRC were, firstly, that alternative dispute resolution, namely mediation and collaborative practice should be incorporated into third level study of law and also into the professional training as provided by the Law Society of Ireland and the Honourable Society of Kings Inns.⁵⁸ In making this recommendation the

⁵⁴ Practice Direction 51 of 2009 – came into effect on October 5, 2009 deals specifically with family law proceedings.

⁵⁵ SI 502 of 2010. The rules of the Superior Court were amended under Order 56A s2 (1) This Statutory Instrument also included an amendment to Order 99, thus inserting a new rule 1B which provides that a court may take into account when awarding costs whether the parties had refused or failed without good reason to engage in mediation. Therefore it is clear that efforts were being made by the courts to facilitate the use of mediation in the resolution of disputes. <http://www.irishstatutebook.ie/pdf/2010/en.si.2010.0502.pdf>

⁵⁶ Law Reform Commission, *Alternative Dispute Resolution: Mediation and Conciliation* (LRC 98 -2010) 6.13, 108.

⁵⁷ *ibid* 6.31, 111.

⁵⁸ This is in line with the Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters’ issued by the CEPEJ. See (n 15).

LRC referred to the words of Ward LJ in the English case of *Burchall v Bullard*:

‘The court has given its stamp of approval to mediation and it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate.’⁵⁹

Secondly, the LRC recommended:

‘...that a pilot Court-annexed mediation scheme should be established in the Circuit Court based on the principles of the voluntary participation of the litigants.’⁶⁰

In April 2011, the Department of Finance sanctioned a pilot project to be run by the Courts Service, the Family Mediation Service (FMS) and the Legal Aid Board (LAB) to provide an on-site mediation information service, and follow on mediation services for those who chose to use the process at Dolphin House District Court House in Dublin.

This service was provided for family law applicants who were seeking guardianship, custody, access or maintenance⁶¹. The project has been very successful and it has been reported that it assisted 260 applicants to reach settlement in its first year of operation.⁶² Therefore, increasing potential litigants’ awareness of mediation and making the service easily accessible seem to be important factors in the success of the process.

Since the publication of the LRC report there have been significant legislative developments in mediation, namely the transposition of the European Mediation Directive and the publication of the Draft Mediation Bill. Many of the provisions set out in the Heads of the Draft Mediation Bill are based on the recommendations of the LRC.

⁵⁹ [2005] EWCA Civ 358.

⁶⁰ LRC, *Alternative Dispute Resolution* (n 1) 84.

⁶¹ Geoffrey Corry, ‘Origins and Policy Development Issues of the Family Mediation Service in Ireland (1986-2011) in Delma Sweeney and Mary Lloyd (eds) *Mediation in Focus: A Celebration of the Family Mediation Service in Ireland* (Family Mediation Service 2011) 11,27.

⁶² http://www.themii.ie/full-article.jsp?id_news=258

3. The European Communities (Mediation) Regulations 2011 (SI 209 of 2011)

The EU Mediation Directive 2008/52/EC was transposed into Irish Law by the Department of Justice in May 2011 as The European Communities (Mediation) Regulations 2011 (SI 209 of 2011). The Regulations provide that in cross border disputes to which the Directive applies, the court may 'invite' the parties to consider mediation and may adjourn the proceedings to allow this to occur. If mediation has been suggested by the court, the parties may then apply to the court to rule that the agreement is enforceable. If the parties have reached a mediated agreement outside of a court action, they may apply to the Master of the High Court to seek to rule the terms of the agreement, thus making it directly enforceable.⁶³

In examining the EU Directive, and the Ministerial Regulations that transposed it into Irish Law, it is notable that there is no provision in either piece of legislation which would ensure that the voice of the child is heard in any matters that affect them in accordance with their rights under Article 12 of the United Nations Convention on the Rights of the Child or Article 13 of the Convention on the Exercise of Children's Rights, if ratified. In fact, the only reference to children in the Directive is with regard to ensuring their protection is not compromised as a result of the confidentiality requirements of the process.⁶⁴ However, in transposing the Directive into Irish law special provision is made for issues which concern parental responsibility or maintenance. In these cases, the Master of the High Court may rule that any such agreement be made an order of the court and that the order is to take effect as if it were an order of the District Court.⁶⁵

⁶³ S.I. No. 357/2012 - Rules of the Superior Courts (European Communities (Mediation) Regulations 2011) 2012, 5 in Order 56A in the Rules of the Superior Courts.

⁶⁴ Article 7(a) of the Directive and Article 4 (2) (a) (1) of the Regulation.

⁶⁵ Article 5 (3) (a) of the Directive.

4. Draft General Scheme of the Mediation Bill 2012

The long awaited Draft Mediation Bill was published by the Government on 1st March 2012. In many respects, this draft bill merely puts into place, in other areas of law, what has been the case in Family Law since the provisions of the Judicial Separation and Family Law Reform Act 1989. The Draft Mediation Bill states that nothing will change the provisions for mediation already in place but it provides a useful framework to ensure consistency of practice across the mediation services provided.

In examining the draft Mediation Bill as published, it is clear the legislature have not sought to make mediation mandatory in any particular case. To the contrary, the word ‘voluntary’ is used twice within the definition of mediation alone.⁶⁶

The Bill places an increased obligation on solicitors and now, also on barristers, to notify clients about the availability and benefits of mediation. Barristers have been included due to the proposed changes which may come into effect under the Legal Services Regulation Bill 2011⁶⁷ if enacted, allowing members of the public direct access to barristers in certain types of cases. Under the draft Mediation Bill, the obligation on solicitors now extends to providing clients with a “written statement” and such statement has to be signed by the solicitor and the client⁶⁸. It appears, in contrast, that a barrister will just have to certify in writing that they have advised the client regarding mediation. There are also additional requirements for solicitors to provide clients with an estimate of the costs in the event of court proceedings and an estimate of the ‘likely duration’⁶⁹ of the proceedings. Such provision seeks to prevent solicitors merely filing these certificates, as a matter of course, without actually having discussed mediation with their clients.

⁶⁶ Draft Mediation Bill (n 5).

⁶⁷ Available at <http://www.oireachtas.ie/documents/bills28/bills/2011/5811/document2.pdf>

⁶⁸ *ibid* Head 4 2 (a).

⁶⁹ *ibid* Head 4 1 (iv) II.

The Bill goes further than the previous Circuit or Superior Court Rules in that while it similarly provides that a court may 'invite' the parties to consider mediation, it also provides that the court may 'direct' the parties to attend an information session. Refusal to consider mediation 'where such a process had, in the opinion of the court, a reasonable prospect of success'⁷⁰, or an unjustified refusal to attend an information session on mediation may be taken into account when a court is addressing the issues of costs.

In accordance with the LRC recommendation, section 3 of Head 17 provides that this requirement to attend an information session will not apply in family law matters where there are any fears for the safety of the parties, where a party or the family is in need of maintenance or where there may be a danger to the family home or the welfare of a child. Other sections of the Draft Mediation Bill are referred to throughout the chapter as different aspects of the process are discussed.

VI. Mediation in Family Law in Ireland

During the early 1980's there was much debate in Ireland about the issue of marriage breakdown. In 1985 the Joint Committee on Marriage Breakdown⁷¹ examined mediation as a means of dealing with this issue. Mediation, the Committee concluded, was a procedure that could be tailored to deal with specific problems caused by the breakdown, where the parties themselves were responsible for the resolution of the issues between them and where such resolution was reached in a spirit of continued interaction and cooperation between the spouses.⁷² The preferred model decided upon by the Committee was one 'which was voluntary, independent, nationwide, comprehensive and available before court proceedings arose'.⁷³

⁷⁰ *ibid* Head 17.

⁷¹ *Report of the Joint Committee on Marriage Breakdown* (Stationery Office 27 March 1985).

⁷² *ibid* Chapter 8, PI. 3074.

⁷³ Conneely, (n 14) 15.

The Family Mediation Service (FMS) was established as a pilot project in July 1986.⁷⁴ Initial research carried out in 1989 showed that the service was effective in reaching amicable settlements, with settlement rates of 64.3% recorded.⁷⁵ The service continued on uncertain footing throughout successive changes in government.

The issue of mediation was addressed by the LRC in their *Consultation Paper on Family Courts*⁷⁶ published in 1994. The LRC were of the view that mediation had certain advantages, namely mediation was less hostile than litigation, it reduced friction and fostered co-operation to work towards attaining a workable solution for the future, giving the parties control over their future arrangements, reducing costs and achieving a more speedy solution. They pointed out that agreements reached during mediation were more likely to be adhered to and noted the private and confidential nature of the process.⁷⁷ In terms of the disadvantages of mediation, the LRC noted the difficulties posed by unequal bargaining power, the lack of protection of legal norms and principles, the potential for mediator bias and the level of procedure involved in the process, when, perhaps, cases could be settled by ‘simpler’ means, such as settlement through solicitors. They also stated that it could not be confirmed that mediation was always necessarily less expensive than litigation.⁷⁸ Though this consultation paper was published in 1994, many of the same issues continue to arise in debates on the process between supporters of mediation and those who see it as a poor substitute for court. In its follow up report, *Report on Family Courts*⁷⁹ in 1996, the LRC recommended that mediation should be available to divert suitable cases away from court and should be considered by parties before litigation.

⁷⁴ For a detailed history of the Family Mediation Service see Delma Sweeney and Mary Lloyd (eds) *Mediation in Focus: A Celebration of the Family Mediation Service in Ireland* (Family Mediation Service 2011) 11.

⁷⁵ Marie Nic Ghiolla Phadraig, ‘Marital Separation in Ireland: situating the results of research on the first three years of operation of the Family Mediation Service’ in Gabriel Kiely (ed) *In and Out of Marriage: Irish and European Experiences*, (UCD Family Studies Centre 1992).

⁷⁶ Law Reform Commission, *Consultation Paper on Family Courts* (LRC CP -1994).

⁷⁷ *ibid* 32.

⁷⁸ *ibid* 32.

⁷⁹ Law Reform Commission, *Report on the Family Court* (LRC- 52-1996).

Throughout this time the FMS continued to operate on a somewhat ad hoc basis. It was eventually placed on a statutory footing as part of the Family Support Agency under the Family Support Agency Act 2001⁸⁰ which came into effect in 2003. The FMS now runs a nationwide service with four full-time offices in Dublin, Cork, Limerick and Galway and a number of part-time offices. The service is confidential and provides mediation services to couples who have decided to separate, or who may have already separated, to assist them to negotiate their own agreement without the need to resort to the courts. The mediators employed by the FMS are trained by the Mediators Institute of Ireland and agree to abide by the FMS Code of Ethics and Professional Conduct (FMS Code)⁸¹. In 2011, the Legal Aid Board took over responsibility for the FMS.⁸² It is expected therefore that mediation will be more easily accessible for clients who are registered with the Board.

The FMS operate on an 'all issues' basis. Therefore the mediators address the financial issues dealing with the assets and liabilities of the separating couple, the family home and maintenance and also address parenting issues, namely custody and access.

VII. Structure of the Mediation Process

In Ireland, at present there are also a number of organisations offering private mediation services. The profession is not regulated and, as yet, there is no standard code of practice or ethics. It is beyond the scope of this thesis to examine the practices of all such organisations and therefore it will, instead, focus on the leading organisation in the family law arena, the FMS. Issues that arise will therefore be discussed with reference to the FMS Code.⁸³

⁸⁰ Family Support Agency Act 2001

<<http://www.irishstatutebook.ie/2001/en/act/pub/0054/index.html>>

⁸¹ Family Mediation Service, Code of Ethics and Professional Conduct 2002. Available by request from the Family Mediation Service.

⁸² Civil Law (Miscellaneous Provisions) Act 2011 Part 16

<http://www.irishstatutebook.ie/2011/en/act/pub/0023/> Commenced November 1, 2011.

⁸³ *ibid.*

During the initial ‘Intake Session’ the mediator explains the process, outlining that the process is voluntary and that the parties are free to leave at any time. At this initial session a mediator will also interview each party separately to screen for issues of domestic violence. If the parties disclose issues confirming that there has been domestic violence in their relationship, the mediator will assess whether s/he thinks it is appropriate to proceed with the process. Research has indicated that 17% of those who have experienced domestic violence in their relationship will choose not to proceed with mediation after this intake session.⁸⁴ If the parties choose to proceed with mediation, the mediator will decide whether it is appropriate to facilitate the negotiations with both parties in the same room, as is the norm in family mediation, or whether it is more appropriate for the mediator to use ‘shuttle’ mediation where s/he keeps the parties in separate rooms and mediator moves between the rooms during the negotiation process. In these cases, as in all mediations, the mediator must continuously assess the parties’ ability to participate, conscious of the dangers of intimidation or undue influence. Specifically, the FMS code states that:

‘Where mediation does take place, mediators must uphold throughout the principles of voluntariness of participation, fairness and safety... In addition, steps must be taken to ensure the safety of all clients on arrival and departure.’⁸⁵

In general, where there are no such concerns, a family mediator will meet with both parties together during the mediation process. In keeping with the “interests based” nature of the process, a mediator will ask the parties to outline what they perceive as the issues to be resolved and their goals for the process. Once these goals have been identified, the mediator will begin to work through each issue, often starting with the least contentious issue to allow the parties an opportunity to settle in to the process and to feel like they are making progress. The mediator thus controls the process and the parties determine the outcome.

⁸⁴ Martin Long, ‘An Exploration Of How The Family Mediation Service of Ireland Facilitates People Who Have Experienced Domestic Violence Negotiate Separation Agreements. (2006) Unpublished Masters thesis, National University of Ireland Maynooth.

⁸⁵ FMS Code (n 81)5.20.

Next, the mediator will begin the exploratory stage where s/he explores the facts of the dispute. Again, in family law mediations this would normally be done with both parties present. Once communication has been established, the mediator moves to the bargaining phase where s/he assists the parties to discuss possible heads of agreement. It is important that the parties understand that by agreeing to the resolution of one aspect of a dispute during the course of negotiations, they will not be bound by this agreement until such time as everything is agreed and reduced to writing.

If full agreement is reached, the mediator will draft the mediated agreement very carefully, checking to ensure that all parties are clear on the terms of the agreement. Also, in family mediation, the mediator will give the parties an opportunity to have a family session where all members are present and can comment on the post separation arrangements. Some parents will avail of this, while others choose not to involve their children. Lawyers may be present at the mediation. Generally, however, in family law matters, lawyers do not attend.

VIII. The Role of the Mediator

A mediator, as defined under the Draft Mediation Bill is:

‘... a person who assists parties to reach a voluntary agreement to resolve their dispute whilst acting at all times in accordance with the principles of impartiality, integrity, fairness and confidentiality, with respect for all parties involved in the mediation.’⁸⁶

Head 7 of the Draft Mediation Bill 2012 sets out in detail what is required with regard to the role of the mediator. If approved and enacted, it will place statutory obligations on a mediator to ensure that the mediation process is explained clearly to the parties, specifically that their participation is

⁸⁶Draft Mediation Bill (n 1), Head 2-Interpretation. Under the FMS Code, as set out earlier, a mediator must possess certain attributes including ‘...impartiality, empowerment, confidentiality, competence, fairness, psychological well-being, self determination, equitable distribution of property, financial security and freedom from unnecessary outside influence’.⁸⁶ This has also been set out in the European Code of Conduct for Mediators⁸⁶.

voluntary; that they may withdraw at any time; that it is for them to determine the outcome; that the costs shall not be ‘contingent on the outcome’; that they may be accompanied to the mediation by ‘such non-party participants’ as they consider appropriate and that the mediator will advise them if he or she encounters any conflict of interest.

In addition to the obligation to screen for capacity, the draft bill also places obligations on a mediator to act with impartiality and to be even handed with all parties, ‘to ensure that the parties understand and consent to any agreement arising from the mediation process’⁸⁷, to give the parties adequate time to consider the issues and to advise them of their rights to seek legal advice and the advisability of such legal advice before signing any agreement.⁸⁸ Mediators will also be required to comply with a Code of Practice. This Code will outline the obligations on the mediator with regard to confidentiality, ethical obligations, qualifications and continuing training, procedures for the mediation process, clarity as to how costs are to be determined and will set out procedures for redress in the event of a complaint.⁸⁹

To be effective, mediators must gain the trust of the parties and be empathetic to their point of view. The mediator must ask useful questions, use creative problem-solving techniques, challenge settlement suggestions to see if they are workable in practice and assist the parties to reach agreement in a manner which reflects their value systems. Boelle and Kelly refer to the need for a mediator to foster a cooperative framework which promotes communication, fairness and empowers the parties.⁹⁰

It is essential therefore that a mediator remains neutral and unbiased and is not influenced by his or her own beliefs, values or preconceived ideas. It is imperative that there is no bias or ‘stereotyping in relation to gender, race, profession, economic status, age, religion ...The mediator should aim to

⁸⁷ Draft Mediation Bill (n 5) Head 7 (2) (e).

⁸⁸ *ibid* Head 7(2).

⁸⁹ *ibid* 9.

⁹⁰ Laurence Boule and Kathleen Kelly, *Mediation: Principles, Process, Practice* (Butterworths 1998). See also Arghavan Gerami, ‘Bridging the Theory-and-Practice Gap: Mediator Power in Practice’ (2009) 26(4) *Conflict Resolution Quarterly* 433.

treat each person as an individual to be valued and respected.’⁹¹ However, this is not an easy task. Myers referred to the fact that a person will often filter communications through their own values and attitudes⁹², while Beck and Sales highlight what they call the ABC’s of attitudes, A being the affective or the emotional reaction to what is said or done, B the behavioural impulse in the actions one takes and C the cognitive reaction in the way that one thinks about what they have heard or seen⁹³.

Mediators may come from any professional background. At present, many mediators are lawyers. Vanderkooi and Pearson note that lawyer mediators tend to focus on issues ‘typically covered by court settlements’ whereas mediators from a mental health background focus on ‘the adjustment of children to the divorce, their developmental needs, and the sustainability of contemplated custody and visitation arrangements for children of various ages’.⁹⁴ It is to be welcomed, therefore, that the Draft Mediation Bill provides that, if requested, mediators will be obliged to provide details of their training to clients.

IX. Feminist Perspective on Mediation

Mediation, as a method of resolving family law disputes, was initially welcomed by feminists. They viewed it as a more caring, less paternalistic way to deal with family law disputes that enabled the parties to make their own decisions. Grillo describes the courts’ system as a ‘patriarchal paradigm characterised by hierarchy, linear reasoning, (seeking) the resolution of disputes through the application of abstract principles...’⁹⁵. However, the format of mediation perhaps envisaged by feminists, where the emotional issues associated with the separation could be aired and resolved as part of the overall separation process, was not the format that

⁹¹ *ibid* 49.

⁹² David G Myers, *Social psychology* (5th edn, McGraw Hill 1996).

⁹³ Connie Beck and Bruce Sales, ‘A Critical Reappraisal of Divorce Mediation Research and Policy’ (2000) 6 (4) *Psychology, Public Policy, and Law* 989, 1002.

⁹⁴ Losi Vanderkooi and Jessica Pearson, ‘Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles’ (1983) *Family Relations* 557,561.

⁹⁵ Trina Grillo, ‘The mediation alternative: Process dangers for women’ (1991) 100 *Yale Law Journal* 1545, 1547.

emerged in practice. While the mediator may need to allow parties to vent some of their feelings, s/he will want to help the parties focus on the future, ‘where the parties want to be, not where they are’⁹⁶ or where they were.

Family mediation does not concern itself with issues of marital misconduct. While this is in accordance both with the ethos of mediation in focusing on the future and also the concept of “no fault” divorce as established under Irish legislation⁹⁷, there is provision when a case reaches court for the court to consider the conduct of a spouse if it ‘is such that in the opinion of the court it would in all the circumstances of the case be unjust to disregard it’⁹⁸. In the case of *Wachdel v Wachdel*⁹⁹ Lord Denning referred to misconduct that was ‘obvious and gross’ and this expression and standard have been adopted by the Irish Courts.¹⁰⁰ Where such behaviour has been seen to occur and is accepted as having occurred by the court, the aggrieved spouse may be in a stronger legal position and this may be reflected in the financial compensation he or she receives. There is no similar recognition given to an aggrieved spouse as part of the mediation process. This was obviously a concern for feminists and indeed, is a concern in the settlement of cases in any such private setting where there may not be adequate public scrutiny of decisions and protection for women.

Feminists therefore grew concerned that women would not be treated as equals in the mediation process. Carbone, for example, contends that the ‘... egalitarian model of husbands and wives holding comparable jobs and sharing domestic responsibilities largely does not exist’¹⁰¹ and thus that ‘private ordering in itself can only be detrimental to women, because their economic, social and psychological vulnerability all militate against an image of equal bargaining being presumed in mediation.’¹⁰² Carbone poses the difficulty that ‘[i]n entering marriage, fathers, but not mothers, are free

⁹⁶ *The CEDR Mediator Handbook* (4th edn, Centre for Effective Dispute Resolution 2004) 57.

⁹⁷ Family Law (Divorce) Act 1996 s.5

⁹⁸ Family Law Act 1995, s16(2)(i); Family Law (Divorce) Act 1996, s.20(2)(i).

⁹⁹ *Watchdel v Watchdel* [1973] 1 All ER 829.

¹⁰⁰ *DT v CT* [2002] 3 IR 334 (Keane CJ); [2003] 1ILRM 321.

¹⁰¹ June R. Carbone, ‘A Feminist Perspective on Divorce: The Future of Children’ (2004) 4 (1) *Children and Divorce* 183,192.

¹⁰² Conneely, (n 14) 63.

to devote the central part of their energies to enhancing their careers, and at divorce, they retain the full advantage from that investment.’¹⁰³ For women who make this commitment to the home and to their children it may, understandably, be difficult to accept that fathers who, during the marriage showed little or no interest in the fathering role, are to be supported and encouraged on the breakup of the marriage to take an active role. Czapanskiy observes that ‘[f]athers are given support and reinforcement for being volunteer parents, people whose duties toward their children are limited, but whose autonomy and parenting is broadly protected. Mothers are defined as draftees, people whose duties toward their children are extensive, but whose autonomy about parenting receives little protection.’¹⁰⁴ Thus, it is possibly the difficulties attached to the divorce itself that may cause hardship for women, more so than the process they use to resolve it.

Many feminists have also expressed concern at the danger of a woman losing her own sense of identity within the mediation process. Bottemley suggests that the focus of mediation on the interests of the children may ‘deny a woman’s need for a fresh start’¹⁰⁵ and that ‘the child-centred orientation fails to draw a distinction between a woman as a separate individual and the woman in her mothering role. As a result, the woman’s interests will be considered only as they relate to her role within the family and she will continue to be defined by her mothering role.’¹⁰⁶ These issues, while a concern for feminists in taking part in mediation, would equally be a concern for women taking part in court proceedings. Under the laws of most jurisdictions, children’s “best interests” will be a central deciding factor which, arguably, will prevail over the needs of their parents, mothers or fathers.

It has been shown through empirical research that feminists’ concerns in relation to mediation have not been borne out in practice. Conneely found that women are commonly satisfied with their experiences of mediation and

¹⁰³ Carbone, (n 101) 191.

¹⁰⁴ Karen Czapanskiy, ‘Volunteers and draftees: The struggle for parental equality’ (1991) 38 *University of California Law Review*, 1415,1416.

¹⁰⁵ Anne Bottemley, *Feminist Perspectives on the Foundational Subjects of Law* (Cavendish 1996) 28.

¹⁰⁶ *ibid* 28.

her research did not reveal any element of gender discrimination within the mediation process.¹⁰⁷ Emery *et al* carried out a longitudinal study where parties were randomly assigned to mediation or adversary processes (court or lawyer negotiation). They found that many men did not want the separation and often contested custody as a means of contesting the divorce.¹⁰⁸ In completing their research, Emery *et al* noted that their study ‘does not suggest that mediation disadvantages women as much as litigation disadvantages men.’¹⁰⁹

However, one area of concern, both to feminists and all parties, is how the issue of domestic violence is dealt with during the mediation process. While it has been argued that it would be wrong to deprive parties who want to mediate of the opportunity to do so because of the existence of domestic violence,¹¹⁰ adequate safeguards must be in place to ensure that the victim’s rights are protected. Conneely notes that ‘[t]he fear of the victim can cause a failure to communicate the presence of abuse and will undermine the ability of the victim to negotiate effectively.’¹¹¹

Such concerns, once again, highlight the need for adequate screening before parties engage in the mediation process and the importance of ‘the skill and competence of the mediator, the implementation of well-developed screening programmes, structural and procedural safeguards as well as high standards of practice, provision and delivery.’¹¹²

X. Co-Mediation

Co-mediation occurs when two mediators work together on a particular mediation. This can be effective in combining the skills of two individual mediators, one of whom may be an expert in the particular area of the

¹⁰⁷ Conneely, (n14) 255.

¹⁰⁸ Robert Emery *et al*, ‘Child Custody Mediation and Litigation: Custody, Contact, and Co-parenting 12 Years After Initial Dispute Resolution’ 69 (2) (2001) *Journal of Consulting and Clinical Psychology* 323,331.

¹⁰⁹ *ibid*.

¹¹⁰ Connie Beck and Lynda Frost, ‘Competence as an Element of “Mediation Readiness”’ 25 (2) (2007) *Conflict Resolution Quarterly* 255.

¹¹¹ Conneely, (n 14) 70.

¹¹² Marian Roberts, *Mediation in Family Disputes: Principles of Practice* (2nd ed, Arena, 1997) 162.

dispute. A co-mediation team will frequently consist of one male and one female mediator, with, ideally, one being from a legal and one from a psycho-social background.¹¹³ This method can be effective therefore in reducing concerns about mediator bias and may allay the fears expressed by feminists in ensuring that there is no element of gender bias. It is important that mediators are fully trained and are able to work together effectively to assist the parties reach a settlement. Love and Stulberg set out guidelines for co-mediation which include choosing a ‘partner with a similar vision’, assigning roles to each mediator and having an overall plan and structure for how the process will work and how they will communicate with each other.¹¹⁴

There are several mediation organisations offering co-mediation in Ireland.¹¹⁵ Additionally, co-mediation has been considered particularly helpful in resolving child abduction cases, where one of the mediators may be from each of the parents’ countries. In these types of cases both parties would normally have their lawyers attend to address any complex issues that may arise under international law and to draft the final agreement. Walsh notes that the ‘voice of the child or children will usually be brought into the mediation, either directly or by means of an interview with a third party such as a psychologist or social worker’¹¹⁶. How often this happens in practise in the field of co-mediation is something which has not been researched to date. In opting for co-mediation the parties would also have to consider the increased costs of employing two mediators against the benefits for the resolution of the issues between them, especially in cases where the parties each have legal representation as well.

¹¹³ Sabine Walsh, ‘New Frontiers in Cross Border Family Mediation’ Kluwer Mediation Blog, November 2011.

¹¹⁴ Lela Love and Joseph Stulberg, ‘Practice Guidelines for Co-Mediation: Making Certain That “Two Heads are Better than One”’ (1996) 13 (3) *Mediation Quarterly* 179, 181.

¹¹⁵ For example, Family Law Ireland, Mediate Ireland.

¹¹⁶ Walsh, (n 113).

XI. Questions and Concerns in addressing the Effectiveness of Mediation

Having outlined the nature of the process and the role of the mediator, in addressing the research question as to the effectiveness of the process as a dispute resolution mechanism in family law, questions arise as to whether mediation provides “access to justice” for those who use it or whether it is a lesser form of justice being promoted simply to try to clear the “congestion” within the courts’ system? In seeking to resolve such disputes outside of the courts’ system, does it ensure that the parties’ rights to a fair procedure are upheld? How does it meet the needs of couples who use it in the Irish Family law system and does it protect their statutory and Constitutional rights to ‘proper provision’¹¹⁷ and ensure the protection of their ‘welfare’?¹¹⁸ Specifically, in the context of this thesis, does engaging in the mediation process provide an avenue to hear the voice of the child in a more protected and direct way?

A. Access to Justice

Article 6 (1) of the European Convention on Human Rights¹¹⁹ provides:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a **fair and public hearing within a reasonable time** by an **independent and impartial** tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent

¹¹⁷ Section 3(2)(a) of the Judicial Separation and Family Law Reform Act 1989 (Emphasis Added)

¹¹⁸ Article 41.3.2 of the Irish Constitution; Family Law (Divorce) Act 1996 s. 5.

¹¹⁹ http://www.echr.coe.int/Documents/Convention_ENG.pdf

strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.¹²⁰

Does engaging in mediation provide or impede access to justice? The essence of mediation is that it is a voluntary process, and this is the model which is in existence in Ireland. Thus, the parties choose to engage in the mediation process rather than take their cases before the court. Having made that choice, they trust in the mediator as being ‘independent and impartial’, to act in a manner consistent with ‘...the central quality of mediation, namely, its capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions towards one another.’¹²¹ The ‘hearing’ is held in private rather than in public. However, if this case was to progress before the family law courts, the hearing - pending legislative changes to the *in camera* rule – would also be held in private.¹²² In court, the decision is made by a judge as arbiter. In mediation, the agreement is made by the parties but the judge remains the final arbiter in that family law mediated agreements are not legally binding and as noted below (see page 161-163), court approval is still required.¹²³ Also, either party may decide to withdraw from the process at any point and proceed before the courts.

It is now the practice in certain jurisdictions,¹²⁴ however, that mediation is mandatory and that parties must attend and at least attempt mediation before they can proceed with a court action. Parties, while they may be “forced” to attend mediation, obviously cannot be forced to settle the issues between them through the mediation process.

¹²⁰ (Emphasis Added)

¹²¹ Lon L. Fuller, ‘Mediation-Its Forms and Functions’ (1971) 44 *Southern California Law Review*, 44 305, 325.

¹²² Section 5 of the Courts and Civil Law (Miscellaneous) Provisions Act 2013 amending s.40 of the Civil Liability and Courts Act 2004.

¹²³ Head 17 of the Draft Mediation Bill (n 5)

¹²⁴ Notably Italy, Norway, Germany, Australia and parts of Canada and the US.

In England, the leading case on the issue of mandatory mediation is that of *Halsey v Milton Keynes*.¹²⁵ In the Halsey case it was held by Dyson LJ that the court cannot require a party to proceed to mediation against his will, on the basis that such an order would contravene the party's rights of access to the court under Article 6 of the ECHR. This judgment has placed significant obstacles in the path of mandatory mediation in England. It has been argued that Lord Dyson was wrong in his decision and others, like Lightman J, believe that '[a]n order for mediation does not interfere with the right to a trial: at most it merely imposes a short delay to afford an opportunity for settlement...'¹²⁶ This issue was addressed most recently in April 2013, in the English case of *Colin Wright and Michael Wright Supplies Ltd v Turner Wright Investments Ltd*¹²⁷ where Sir Alan Ward commented:

'Perhaps, therefore, it is time to review the rule in *Halsey v Milton Keynes General NMS Trust*...Is a stay really "an unacceptable obstruction" to the right of access to the court if they have to wait a while before being allowed across the court's threshold? Perhaps some bold judge will accede to an invitation to rule on these questions so that the court can have another look at *Halsey* in the light of the past 10 years of developments in this field.'¹²⁸

Since April 2011 in the UK, attendance is now required, save in specified circumstances, at Mandatory Information and Assessment Hearings under Practice Direction 3A Pre Application Protocol for Mediation and Assessment prior to family law matters being brought before the courts. There is also a provision in section 10 of the Children and Families Bill

¹²⁵ *Halsey v Milton Keynes General NHS Trust*, Court of Appeal - Civil Division, May 11, 2004, [2004] CP Rep 34, [2004] 4 All ER 920, [2004] EWCA Civ 576, (2005) 81 BMLR 108, [2004] 1 WLR 3002, [2004] 3 Costs LR 393 <http://vlex.co.uk/vid/and-52571548#ixzz0nWBtLu9M>

¹²⁶ Mr. Justice Lightman. "Mediation: An Approximation to Justice" at S J Berwins, 28th June 2007.

¹²⁷ [2013] EWCA Civ 234 < <http://www.bailii.org/ew/cases/EWCA/Civ/2013/234.html>>

¹²⁸ *ibid* [3].

2013¹²⁹ under which families will be required to attend mediation information sessions.

This issue was also addressed by the European Court of Justice in the Italian case of *Rosalba Alassini*.¹³⁰ In this case (a commercial dispute under the Universal Services Directive) the plaintiffs argued that the Italian legislature had erred in the transposition of Article 34 of the Universal Service Directive 2002/22¹³¹ by making mediation a compulsory step prior to bringing disputes before the court. They argued that it violated their rights of access to justice. The ECJ held that bearing in ‘mind that the principle of effective judicial protection is a general principle of EU law stemming from constitutional traditions common to Member States, which has been enshrined in Articles 6 and 13 of the ECHR and which has been reaffirmed by Article 47 of the Charter of Fundamental Rights of the EU’¹³² that :

‘Nevertheless, it is settled case-law that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed ...’¹³³

Therefore, the courts have taken the view that mandatory mediation at worst delays but does not prevent, access to justice. However, is justice delayed, justice denied? Does the imposition of compulsory mediation prior to litigation affect a party’s rights under Article 6 to have the matter determined ‘within a reasonable time’? How has this issue of ‘reasonable

¹²⁹ Children and Families Bill 2013 <

<http://www.publications.parliament.uk/pa/bills/lbill/2013-2014/0032/14032.pdf>. >

¹³⁰ *Rosalba Alassini v. Telecom Italia SpA (C-317/08)*, *Filomena Califano v. Wind SpA (C-318/08)*, *Lucia Anna Giorgia Iacono v Telecom Italia SpA (C-319/08)* and *Multiservice Srl v Telecom Italia SpA (C-320/08)* ECR [2010] I-02213 < <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008CJ0317:EN:PDF>

¹³¹ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:108:0051:0051:EN:PDF>

¹³² *ibid* [61].

¹³³ *Rosalba Alassini* (n 131) [Para 63].

time' been interpreted by the ECtHR? The ECtHR's view on the issue of delay has been set out in numerous judgments.¹³⁴ The Court will examine:

'The reasonableness of the length of proceedings is to be determined in the light of the circumstances of the case and with reference to the criteria laid down in the Court's case-law, in particular the **complexity** of the case, the **conduct of the applicant and of the relevant authorities**, and what was **at stake for the applicant in the dispute.**'¹³⁵

These are factors that will have to be assessed in each case. It is not uncommon that delay in family law will be caused by one of the parties to the dispute,¹³⁶ rather than because of difficulties imposed by the process which they chose to resolve it. It was also noted earlier that there are safeguards, for example in the EU Mediation Directive, which provides that Member States must ensure that 'rules on limitation and prescription periods do not prevent the parties from going to court or to arbitration if their mediation attempt fails.'¹³⁷ Additionally, time limits should be imposed to ensure that if the mediation process is not progressing and helping to resolve issues, that the matter will be referred back to the court within a set time frame.

XII. Procedural Issues

A. Screening for Capacity – Protecting the Vulnerable

1. Informed Consent

The need for informed consent entering the mediation process is outlined in the FMS Code. The mediator must advise the parties of 'how it differs from

¹³⁴ *Comingersoll S.A v Portugal* App. No 35382/97 Judgment of April 6, 2000. Also *Silva Pontes v. Portugal* Series A no. 286-A, p. 15, § 39 Judgment of March 23, 1994.

¹³⁵ *Comingersoll* (n 134) [para 19].(Emphasis added)

¹³⁶ Several participants interviewed for this research commented that their cases could have been deal with more expeditiously but for the actions of their ex-spouse.

¹³⁷ EU Mediation Directive (n 32) Recital 24.

other services, such as marriage counselling, therapy or legal process.’¹³⁸ The mediator must also discuss the issues of disclosure, confidentiality and privilege and ‘the mediator’s special concern for the welfare of the children of the family’.¹³⁹

As with any process, one of the keys to successful mediation is that the parties are fully advised at the outset as to how the process works, thus enabling them to make an informed decision as to whether they believe it is a suitable method to resolve their dispute. Any element of duress will render the terms of an agreement invalid. This raises questions as to domestic violence and other factors that may influence capacity to participate.

2. Domestic Violence

Once the parties make an informed decision to use the mediation process, the onus then shifts to the mediator to screen the parties to assess their readiness to mediate and their capacity to take part in the process. The only issue that is referred to in the FMS Code with regard to screening is screening for domestic violence. As noted earlier, the mediator will speak to each party individually at the intake session.¹⁴⁰

It is clearly an onerous task to mediate where issues of violence arise and ‘there is no overall consensus (amongst mediators) on the ability of mediation to handle violence’.¹⁴¹ Some writers believe that the process of mediation should not proceed if there is a history of violence¹⁴², whereas others, like Astor, believe that clients have the right to choose if they wish to use mediation regardless of the history of the marriage.¹⁴³ If there is an admission by the perpetrator and a willingness to move on, then this is a starting point. However, the real difficulty lies when the violence is not disclosed. Conneely in her research concluded that ‘[s]creening is an

¹³⁸ FMS Code of Ethics (n 81) 8.1, 5.

¹³⁹ *ibid.*

¹⁴⁰ Refer to page 141-142 above.

¹⁴¹ Conneely, (n 14) 74.

¹⁴² Susan Gribben, ‘Mediation in Family Law Disputes’ (1992) 6 *Australian Journal of Family Law* 126,133.

¹⁴³ Hilary Astor, ‘Violence and family mediation: Policy’ (1994) 8 *Australian Journal of Family Law* 3.

enormously difficult task in practice'¹⁴⁴ and she raised concerns about the general lack of awareness by mediators as to the impact of such violence.

While the mediator may discuss the matter with the parties and the parties may agree to proceed, it is imperative that the mediator is sure, in so far as is possible, that this agreement to proceed is made freely without any intimidation or ongoing threats. The mediator also needs to be aware of the existence of any court imposed protection or barring orders. If such orders are not in place but are, in the view of the mediator required to ensure a party's safety, the mediator must ensure that the person concerned is referred for appropriate legal advice. Research has shown that violence can tend to increase once it appears that the break-up of the relationship is imminent.¹⁴⁵

Women's Aid, a leading national organisation which deals with domestic violence in Ireland, has stated that it is: ... convinced that neither mediation nor collaborative law are appropriate in cases where domestic violence is present and that their use in these situations could put women at risk and further disadvantage them.¹⁴⁶ They believe that because of the power imbalance and risk of intimidation 'it is unrealistic to think that a perpetrator of violence would cooperate with his victim in an honest and open way, or that this process would be able to reverse what may have been years of dominance and control'.¹⁴⁷

In reviewing the mediation process, the LRC in its report on *Alternative Dispute Resolution: Conciliation and Mediation* also highlighted the need for mediators to ensure that the parties 'can engage in the process safely, both **physically and emotionally**....'¹⁴⁸ The LRC also notes that one of the 'fundamental purposes of screening is to firstly ensure that the parties have

¹⁴⁴ Conneely, (n 14) 255.

¹⁴⁵ Felicity Kaganas and Christine Piper, 'Domestic Violence and divorce mediation' (1994) *Journal of Social Welfare and Family Law* 265, 267.

¹⁴⁶ Women's Aid —*Submission to the Family Law Reporting Committee* (January 2009) 5. Available at: www.womensaid.ie.

¹⁴⁷ *ibid.*

¹⁴⁸ Law Reform Commission, *Alternative Dispute Resolution: Mediation and Conciliation* (LRC 98 -2010) 6.57, 117(Emphasis Added)

the **capacity** to effectively engage in the mediation...¹⁴⁹. The LRC recommended that mediators undergo training with regard to screening.¹⁵⁰ This issue is also addressed in the Draft Mediation Bill. Head 7 (2) (a) provides that the mediator shall:

(a) ensure that at all stages in the mediation process, each party has the capacity to engage in the process.¹⁵¹

However, no guidance is given as to how capacity is to be determined in any particular case or what factors are to be taken into account.

3. Other Factors affecting capacity

The FMS Code does not refer to any other forms of incapacity to mediate, although under the heading “General Principles” it states:

‘If a mediator believes that any client is unable or unwilling to participate freely and fully in the process, the mediator should raise the issue with the clients and may suspend or terminate mediation. The mediator may suggest that the clients obtain such other professional services as are appropriate.’¹⁵²

A standard that has been suggested is that a ‘...person is incompetent to participate in mediation if he or she cannot meet the demands of a specific mediation situation because of functional impairments that severely limit:

1. A rational or factual understanding of the situation;
2. An ability to consider options, appreciate the impact of decisions, and make decisions consistent with his or her own priorities; or

¹⁴⁹ *ibid.*

¹⁵⁰ *ibid* 11.26, 185.

¹⁵¹ <http://www.justice.ie/en/JELR/MedBillGSFinal.pdf/Files/MedBillGSFinal.pdf>

¹⁵² FMS Code (n 81) 5.1, 2.

3. An ability to conform his or her behaviour to the ground rules of mediation.¹⁵³

This is difficult to assess with certainty. One can only assume, pending further empirical research in to the practices of the Family Mediation Service, that this general principle would include screening for issues such as incapacity to mediate based on intellectual capacity or the ability to understand the process, mental or psychological ability, or issues such as a history of, or ongoing, drug or alcohol abuse or significant power-imbalance between the parties. While '[i]ncorrectly assuming that a party lacks capacity denies both parties the opportunity to fashion their own resolution through mediation... proceeding with mediation when a party lacks fundamental capacities is patently unfair to that party, who is thereby denied the protections of a judicial process designed (in theory, if not always in practice) to protect vulnerable parties and ensure a just outcome.'¹⁵⁴

B. Disclosure

In accordance with the Constitutional and legislative provisions referred to earlier, it is imperative that 'proper provision' is made for a spouse and children at a time of separation or divorce. This has generally been interpreted as financial provision. How does the mediation process address this issue?

The FMS Code indicates that parties must be advised at the outset of the 'extent of the disclosure which will be required particularly in cases relating to property and finances...'.¹⁵⁵ It goes on to state that mediators must make it clear that the parties may seek independent advice about the information disclosed and their rights to request further information, if necessary. Mediators must make it clear to the parties that they do not independently verify the information provided. While experienced mediators may pick up

¹⁵³ Connie Beck and Lynda Frost, 'Competence as an Element of "Mediation Readiness"' 25 (2) (2007) *Conflict Resolution Quarterly* 255, 260.

¹⁵⁴ *ibid* 255.

¹⁵⁵ FMS Code (n 81) 8.1, 5.

on irregularities in disclosure, each party is relying on the other to be forthright in the information they provide.

The FMS Code states that the mediator must ‘promote the client’s equal understanding of such information before any final agreement is reached’¹⁵⁶. What does ‘equal understanding’ mean and how is a mediator to achieve this position of equality while at the same time maintaining neutrality? This may be a difficult task. Kressel, in analysing taped mediation session concluded that mediators typically fall into two groups, those who are settlement focused and those who engage in more wide-ranging problem solving.¹⁵⁷ Dingwall and Greatbatch, in their research also noted that mediators may exert pressure, encouraging some options and not others.¹⁵⁸ Solicitors interviewed for the research undertaken for this thesis frequently expressed frustration at the fact that mediators address some but not all of the financial issues, and that therefore the mediated agreements were often incomplete. It may be difficult to ensure that the parties’ constitutional and statutory rights to ‘proper provision’ have been upheld unless full disclosure is made. As the parties are negotiating outside of the court process, there is no recourse to seek an order for discovery¹⁵⁹ and the mediator has no power to make sure order.

C. Legal Advice

In the majority of cases, family law clients attend a mediation session on their own, without the benefit of having lawyers present. Neither is there an absolute requirement that each of the parties will have obtained independent legal advice before entering the process.

¹⁵⁶ *ibid* 8.5, 3.

¹⁵⁷ Kenneth Kressel et al, ‘Research in contested custody-mediations: An illustration of the case study method’ (1989) 24 *Mediation Quarterly* 55

¹⁵⁸ Robert Dingwall and David Greatbatch, ‘Behind Closed Doors: A preliminary report on mediator/client interaction in England’ (1991) 29 (3) *Family and Conciliation Courts Review* 291, 296.

¹⁵⁹ Litigants in a case before the courts may seek an order compelling the disclosure of certain information. This is called an Order for Discovery under the Rules of the Superior Court as amended SI 93 (2009). See <http://www.courts.ie/rules.nsf/SuperiorAmdLookup/No31-> .

The FMS Code is clear that it is not the role of the mediator to give legal advice or to ‘predict the outcome of legal proceedings in such a way as to indicate or influence the clients towards the outcome preferred by the mediator.’¹⁶⁰ However it indicates that ‘[m]ediators must advise clients that it is **desirable** in their own interests to seek independent legal advice before reaching any final agreement and warn them of the risks and disadvantages if they decide not to do so’.¹⁶¹ This issue was also addressed by the LRC who were similarly of the view that a mediator should advise a party to a mediation to consider getting independent legal advice or other professional advice as the party may require.¹⁶² It is notable that provision is made under Head 7 2(f) and (g) of the Draft Mediation Bill that a mediator shall:

(f) ensure that parties are aware of their rights to obtain independent advice, including legal advice, prior to signing any agreement arising from the mediation process,

(g) advise any party not having a legal representative or other professional adviser involved in the mediation process to consider seeking independent advice, whether legal or otherwise, prior to signing any agreement arising from the process.

While the parties are free to negotiate the terms of their own agreement, it is advisable that they obtain legal advice before and during the process to ensure that they can make informed choices as to how they wish to manage their affairs.

D. Confidentiality in Mediation

All discussions in relation to the settlement of issues being disputed between the parties are confidential between the mediator and the parties to the mediation. An assurance of confidentiality is important in allowing the parties the freedom to negotiate without such discussions being referred to in any subsequent court proceedings.

¹⁶⁰ FMS Code (n 81) 8.8, 6.

¹⁶¹ *ibid* 8.9, 6.

¹⁶² LRC, *Alternative Dispute Resolution* (n 1) 6.42, 113.

In the absence of a specific Mediation Act, section 9 of the Family Law (Divorce) Act 1996 has been relied upon by mediators and collaborative law practitioners to claim the inadmissibility of any negotiations which take place prior to a court hearing: Section 9 provides:

‘An oral or written communication between either of the spouses concerned and a third party for the purpose of seeking assistance to effect a reconciliation or to reach agreement between them on some or all of the terms of a separation or a divorce (whether or not made in the presence or with the knowledge of the other spouse), and any record of such a communication, made or caused to be made by either of the spouses concerned or such a third party, shall not be admissible as evidence in any court.’

Amendments were also made to the Civil Legal Aid Act 1995 under the Civil Law (Miscellaneous Provisions) Act 2011 to deal with the issue of confidentiality. These provisions were enacted as part of the transfer of the FMS from the Family Support Agency, who as noted earlier had run the service since 2001, to the Legal Aid Board.¹⁶³ Section 54 of the Civil Law (Miscellaneous Provisions) Act 2011 inserts two new sections, section 36A providing that any discussions held during the mediation process are inadmissible in court and section 36B which provides that the Board will issue guidelines with the objective of preventing disclosure of issues referred to in Section 36A. The Act also states that these provisions are in addition to, and not a substitute for any other statutory provision.¹⁶⁴

Most recently, this issue was addressed under the Draft Mediation Bill 2012. Head 10 of the Bill provides that:

‘mediation communications shall be confidential and shall not be admissible as evidence in any court or other proceedings except where, in the case of a mediation communication of a party, confidentiality is expressly waived by all the parties.’

¹⁶³ (n 82).

¹⁶⁴ Civil Law (Miscellaneous Provisions) Act 2011 <http://www.irishstatutebook.ie/2011/en/act/pub/0023/sec0054.html>

However, under the Draft Mediation Bill, confidentiality will not apply in cases where disclosure is required to ‘implement or enforce the agreement’, or in cases where confidentiality is being claimed to commit or conceal a crime, where it is claimed that the mediator has been negligent, where a party has been threatened or where such information would be readily available through other sources, for example, revenue returns.¹⁶⁵ These provisions on the issue of confidentiality are in accordance with the EU Directive, the European Code of Conduct for Mediators, Recommendation 98(1) and the Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters as drafted by the CEPEJ, referred to earlier at pages 129-130.

E. Safeguards and Legal Certainty

Under the present legislation, in family law matters, a mediated agreement or Memorandum of Understanding, as it is usually called, is not in itself a legally binding document. The parties then take the mediated agreement to their lawyers to obtain a formal legal separation, perhaps by means of separation agreement or an order for Judicial Separation or Divorce. Lawyers must advise the parties of the legality of what they have agreed and may, in order to protect their clients, advise them to reconsider certain aspects of the agreement. This is one of the important safeguards in the process. However, for mediation to be meaningful, it is also important that the lawyers do not try to renegotiate terms that the parties were happy to agree to. It has to be the parties’ agreement in so far as possible. Wing notes that ‘[b]ecause outcomes in mediation are to be based on the needs of the parties, merely comparing them for material equality misses the mark for effective evaluation of the entire experience and process’¹⁶⁶.

¹⁶⁵ Draft Mediation Bill (n 5) Head 10.

¹⁶⁶ Leah Wing, ‘Mediation and Inequality Reconsidered: Bringing the Discussion to the Table’ (2009) *Conflict Resolution Quarterly* 26 (4) Summer, 383, 386.

Debate has ensued as to whether mediated agreements should be legally binding. In 2007, the Report prepared by the Courts Service recommended that:

‘Cases that ended in a mediated or negotiated settlement should be separately listed and ruled. Consideration should be given to establishing a court of limited jurisdiction, presided over by the county registrar, who could rule such consents.’¹⁶⁷

However this proposition was rejected by the Family Law Reporting Committee¹⁶⁸ which was of the view that such rulings should be made by a Court, in line within the Constitutional requirements under Article 41.3.2 and the Family Law (Divorce) Act 1996. Having considered the various positions, the LRC recommended that:

‘a court may, in its discretion, enforce the terms of an agreement reached through a mediation or conciliation where it is satisfied that the agreement adequately protects the rights or entitlements of the parties and their dependents, if any, that the agreement is based on full and **mutual disclosure of assets**, and that **one party has not been overborne by the other in reaching the agreement** and that it complies, where relevant, with any statutory requirement or provision of the Constitution of Ireland, including Article 41.3.2’.¹⁶⁹

Under the Draft Mediation Bill 2012, Head 11, the position remains unchanged. Other mediated agreements may be considered to be binding unless otherwise stated; however the exception remains in family law matters where court approval is required to ensure that:

¹⁶⁷ Carol Coulter *Family Law Reporting Pilot Project: Report to the Board of the Courts Service* (Courts Service October 2007) 61.

¹⁶⁸ This committee was established by the Board of the Court Service to consider the recommendations contained in the report made by Dr. Carol Coulter to the Board of the Court Service in October 2007 (“Family Law Reporting Pilot Project”) and to make proposals to the Board of the Courts Service in relation to recommendations contained in that report. See

[http://www.courts.ie/Courts.ie/library3.nsf/\(WebFiles\)/491532ED22EBA9A4802575CB004E5ABA/\\$FILE/Report%20of%20the%20Family%20Law%20Reporting%20Project%20Committee%20to%20the%20Board%20of%20the%20Courts%20Service.pdf](http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/491532ED22EBA9A4802575CB004E5ABA/$FILE/Report%20of%20the%20Family%20Law%20Reporting%20Project%20Committee%20to%20the%20Board%20of%20the%20Courts%20Service.pdf) 34

¹⁶⁹ LRC, *Alternative Dispute Resolution: Mediation and Conciliation* (n 1) 6.47, 114.

- ‘(a) the agreement adequately protects the rights and entitlements of the parties and their dependents (if any),
- (b) the agreement is based on full and mutual disclosure of assets, and
- (c) a party to the agreement has not been overborne or unduly influenced by any other party or parties in reaching the agreement.’

While this is an important safeguard in the process, especially in situations where the parties may not have sought legal advice, it fails to provide any legal certainty. As noted in the recital to the EU Mediation Directive referred to above, parties are thus relying on the “good will” of the other party for enforcement. One of the participants interviewed for the research undertaken for this thesis addressed this difficulty in the course of discussing mediation. Her reason for deciding not to use the mediation process was, as she put it, ‘at the end of the day I would still have to do it legally anyway.’

XIII. Voice of the Child within the Mediation Process

How does the mediation process address the voice of the child or welfare of the children during a separation or divorce?

The FMS Code of Ethics and Professional Conduct states that:

‘Mediators have a special concern for the welfare of all children of the family. They must **encourage** clients to focus upon the needs of the children as well as on their own needs and must assist the clients to explore the situation;

Mediators must **encourage the clients to consider their children’s own wishes and feelings**. Where appropriate, they may discuss with the clients whether and to what extent it is proper to involve the children themselves in the mediation process in order to consult them about their wishes and feelings.

If, in a particular case, the mediator and clients agree that it is appropriate to consult the child directly in mediation, the mediator should be trained for that purpose, must obtain the child's consent and must provide appropriate facilities.¹⁷⁰

The voice of the child may be brought into the mediation process in a number of ways. The most commonly used method is indirectly, through their parents. Kearney notes that '[f]or most mediators, this is the preferred form of consultation as it encourages parents to consider their child's views and perspectives during the mediation parenting session'.¹⁷¹ Kearney goes on to state that the mediator's role is 'premised on an assumption of parental competence and the emphasis is on parental responsibility as decision makers'.¹⁷² However, she makes this assumption having already acknowledged that at a time of separation parents and their children may have differing views about 'the unwelcome changes in their lives', with parents perhaps seeking 'affirmation' from their children and the children needing 'someone to blame' for the upheaval in all that they considered normal.¹⁷³ Research undertaken as part of this thesis, however, has confirmed that despite their best efforts and intentions parents may not fully understand what this period of transition feels like for the children and what their needs may be.¹⁷⁴

The second method is direct consultation where the mediator will speak directly to the children to ascertain their views. In discussing this, Kearney refers to 'information being needed to move the mediation on'¹⁷⁵, which appears to suggest that children are consulted when an impasse has been reached and the child's view may be necessary to break the deadlock, rather than it being sought for the benefit of the child itself. It is understandable therefore that there are concerns about involving children

¹⁷⁰ FMS Code (n 80) Sections 5.16-5.18, 2.(Emphasis added)

¹⁷¹ Siun Kearney, 'The Voice of the Child in Mediation' in Delma Sweeney and Mary Lloyd (eds) *Mediation in Focus: A Celebration of the Family Mediation Service in Ireland* (Family Mediation Service 2011) 93.

¹⁷² *ibid* 95.

¹⁷³ *ibid*.

¹⁷⁴ See chapters 5 and 6.

¹⁷⁵ Kearney, (n 171) 96.

if their role is to make a decision which their parents have been unable to make. However, Kearney acknowledges the importance of parents demonstrating ‘a willingness to take those views seriously’¹⁷⁶, which is a key factor for children in feeling that they have been heard and understood.

The final method used is the family session, which takes place at the end of the mediation process and provides an opportunity for parents to present the new arrangements to the children in a structured way¹⁷⁷. Implicit in this family session is an understanding that if further issues arise they will be discussed separately by the parents at another session and that the children will not be exposed to witnessing direct confrontation between their parents.

Any attempt by a mediator to take a child focused approach is beneficial, but what actually happens in practice in Irish family mediation?

1. Role of the Child in Irish Mediation

Conneely,¹⁷⁸ in examining the statistics provided to her by the FMS noted children attended mediations in 6.6% of cases. However, in carrying out her own research (through information supplied to her by separating parties that had used the FMS), she found that the figures were much lower, with children only attending in 2% of cases.¹⁷⁹ Research carried out since then indicates that Conneely’s own figures are a more accurate assessment of the situation. For example, in 2006, Majella Foley-Friel, in seeking to gather information on this issue sent a questionnaire to all mediators employed by the FMS. Foley-Friel comments that the findings can be considered ‘representative of the views of the mediators with the FMS’¹⁸⁰ as the

¹⁷⁶ *ibid.*

¹⁷⁷ *ibid* 97.

¹⁷⁸ Connelly (n14). This research was undertaken between 1997 and 1999.

¹⁷⁹ Conneely, (n 14) 209.

¹⁸⁰ Majella Foley-Friel, ‘Unseen but Are they Heard? An exploration of the mediator’s perspective on the role of children in Irish mediation’ in Delma Sweeney and Mary Lloyd

response rate to the survey was high (87.5% of mediators employed by the service responded). It was evident again from this research that only 2% of those who replied had actually involved children in any direct way.¹⁸¹ Foley-Friel comments that this shows ‘a marked reluctance to engage in direct work with children’.¹⁸² Kelly, in referencing Foley-Friel’s research, notes that the reasons given by the mediators were that: ““children are too young”; “offered it before but it was refused”; “lack of skill working with children”; “high level of conflict between parents”; “environment not suitable”; “culture of the organisation”¹⁸³.

The most recent study reported took place between 2006 and 2009. In this study O’Callaghan noted that ‘while the child’s information needs are addressed in some cases, the child is not given an opportunity to express his or her wishes or concerns as regards any new familial arrangements or to participate in any way in the decision-making process’. This falls far short of the standards under international law which provide that children should have both access to information and the right to participate.¹⁸⁴

Parents and mediators take the view that where parents can agree the terms of the separation there is no need or benefit in involving their children in the process. They seem to ‘...implicitly share a view that children are not competent to understand the issues involved and participate in decision-making, or that they should not be asked to take responsibility for decisions that are properly the responsibility of adults, and parents in particular’¹⁸⁵.

(eds) *Mediation in Focus: A Celebration of the Family Mediation Service in Ireland* (Family Mediation Service 2011) 58, 62.

¹⁸¹ *ibid* 58, 61-62.

¹⁸² *ibid* 58, 59.

¹⁸³ Majella Foley-Friel, ‘An Exploration of the Mediator’s Perspective of the Role of Children in Irish Mediation’ Unpublished thesis, 38; quoted in Ann O’ Kelly, ‘Creating Child Inclusive Practice in Family Mediation: The Challenge for the Family Mediation Service’ in Delma Sweeney and Mary Lloyd (eds) *Mediation in Focus: A Celebration of the Family Mediation Service in Ireland* (Family Mediation Service 2011) 86, 87.

¹⁸⁴ Elaine O’Callaghan, ‘The Role of Mediation in Resolving Disputed Contact Cases: An Empirical View’ (2010) 2 *Irish Journal of Family Law* 2 50.

¹⁸⁵ James. A.L, Haugen, G, Rantalaaho, M, Marples, R. ‘The Voice of the Child in Mediation: Norway and England’ 18 (2010) *International Journal of Children’s Rights* 313, 314.

Whether there are benefits in involving the child in the mediation process has been the subject of much debate. Research has shown that parents' views of what children think can differ considerably from what the children themselves think¹⁸⁶ and indeed research carried out on child-inclusive mediation has shown that it can be very beneficial for children.¹⁸⁷ Parents will routinely assure the mediator that all is well with the children and that appropriate arrangements have been made, often without consulting the children directly or recognising issues that are of concern to them. As Kelly observes '[w]ith parents absorbed in their own attempts to cope with the realities and emotions of separation, and lacking understanding that children need relevant and concrete discussion of what is happening, children are left to deal with their confusion and insecurities alone.'¹⁸⁸

Subjectively, mediators often feel that allowing children to be part of the process puts an unfair burden on the children and on the process of mediation itself, pointing out that the mediator then runs the risk of having to abandon his or her neutral role and become an advocate for the child. This also can cause difficulties as it can lead the mediator into the role of providing therapy, which they are not qualified to do. However, different models have been used in Australia¹⁸⁹ and New Zealand¹⁹⁰ (as detailed in the next section) and this demonstrates that it is possible to include children without any adverse consequences to the children and without compromising the mediator's role. Both the children and the parents who took part in these studies were very satisfied with the outcomes.

¹⁸⁶ Marian Roberts, *Mediation in Family Disputes: Principles of Practice* (2nd ed, Arena, 1997) 140. See also recent research incorporating the views of children, Carol Smart and Bren Neale 'It's my life too: Children's perspectives on post-divorce parenting' (2000) *Family Law* 163. This work supports the view that strong presumptions and preferences in relation to child contact may be detrimental to individual children.

¹⁸⁷ McIntosh, Wells and Long, (n 2) 8.

¹⁸⁸ Joan B. Kelly, 'Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice' (2002-2003) *10 Virginia Journal of Social Policy and Law* 129,150.

¹⁸⁹ McIntosh (n 2).

¹⁹⁰ Goldson (n 3).

Importantly, in an Irish context, the draft Mediation bill acknowledges the potential involvement of the child in the mediation process. Head 18 provides:

‘(1) If in a family law dispute **a mediator considers it appropriate** to involve the child of a party directly in the mediation process, the mediator shall—

(a) **obtain the agreement of the parties,**

(b) **obtain the consent of the child,** and

(c) provide or ensure the provision of appropriate facilities for involvement of the child in the process.

(2) In a family law dispute, a mediator may, having obtained the agreement of the parties, allow a suitably qualified adult to participate as a non-party participant on behalf of a child.

(3) In this Head, a “suitably qualified adult” means a person who —

(a) has been appointed guardian *ad litem* for the child,

(b) is over the age of 18 years and who is responsible for the care and welfare of the child, or

(c) has been appointed by the Health Service Executive under the Child Care Acts 1991 to 2007 to care for the child. (Emphasis added).’

The inclusion of this important issue in the Draft Mediation Bill is to be commended. However, the provision, as currently drafted, is of little use to children where the mediator chosen by their parents deems it inappropriate to consult with them in an individual case, or where their parents do not agree to such consultation¹⁹¹. This element of mediator discretion is worrying in view of the fact that research carried out into the practices of the state run FMS indicates that the mediators employed by the service rarely include the children.¹⁹² Nevertheless, this provision can and should be

¹⁹¹ Connie Healy, Opinion Piece, Irish Times, 20 August 2012.

¹⁹² Conneely, (n14); Foley-Friel, (n167) 58; O’ Callaghan, (n 180) 50.

used as a platform to begin a debate into the role of children within the mediation process. In examining the child's right to participate under Article 12, guidance is provided in General Comment No.12 which states that:

‘Many jurisdictions have included in their laws, with respect to the dissolution of a relationship, a provision that the judge must give paramount consideration to the best interests of the child. For this reason, all legislation on separation and divorce has to include the right of the child to be heard by decision makers and in mediation processes.’¹⁹³

The express inclusion of mediation in the General Comment is noteworthy for two reasons: first, it specifically focuses on mediation (and not other ADR mechanisms or ADR generally) and importantly positions it in the frame along with legislation; secondly, it makes the right of the child to be heard an integral component of the process. Also of note is that General Comment No.14 published in May 2013, addressing the “best interests” concept, again acknowledges mediation:

‘The Committee underlines that “courts” refer to all judicial proceedings, in all instances – whether staffed by professional judges or lay persons – and all relevant procedures concerning children, without restriction. This includes conciliation, mediation and arbitration processes.’¹⁹⁴

XIV. International Research

A. Australia

A study carried out in Australia in 2006 focused on comparing two different methods of including children in the mediation process, the child-focused approach (indirect) and child-inclusive approach (direct), examining the

¹⁹³ UN Committee on the Rights of the Child, General Comment No.12 (2009) The Right of the Child to be Heard. UN Doc UNCRC/C/GC/12 1st July 2009 para 52.

¹⁹⁴ General Comment No.14 [para 27]

outcomes for separated parents and their children who took part in each of these processes over a period of one year.¹⁹⁵

In the child-focused group, the mediation proceeded as normal except that the mediator moved away from the traditional neutral role and actively advocated for the children in dialogue with the parents. The mediator, without any direct involvement of the children, sought to educate the parents and provide therapeutic assistance to them to enable them to focus more on the children's needs.

In the child-inclusive group, an independent qualified social services professional held a consultation with the child about their experiences of family separation 'in a supportive developmentally-appropriate forum'¹⁹⁶. Sibling groups were seen together as well as having individual time. The independent specialist then met with the mediator and the children's parents and reported back to the parents the issues which the children wanted to be brought to their attention.

The average age of the children taking part was 8.6 years in the child-focused group and 9.8 years in the child-inclusive groups. Both groups were from similar backgrounds. Parents and families were selected from both voluntary mediation cases and cases where attendance at mediation had been a mandatory requirement. Cases involving a history of violence were not excluded from the study. It was decided that the parents taking part had to have the capacity to usefully participate in the mediation, and had to be able to demonstrate the following: 'some genuine interest to better manage their dispute; perceptions of the children as having needs of their own; and, with support, willingness to consider the children's views and reconsider their own'.¹⁹⁷

It was found that while both interventions led to less conflict and better resolution of conflict, where it did occur, '[a]greements reached by the

¹⁹⁵ McIntosh, Wells and Long, (n 2) 8. Initial interviews with the participants took place at the beginning of the process, further interviews three months after mediation concluded and the final interviews twelve months after the conclusion of the mediation.

¹⁹⁶ *ibid.*

¹⁹⁷ *ibid* 12.

child-inclusive group were significantly more durable and workable over the year, and these parents were half as likely to instigate new litigation over parenting matters in the year after mediation than the child-focused parents'.¹⁹⁸ After this child-inclusive process children reported better relationships with their fathers, a reduction in parental conflict and perceived their mothers to be more understanding. Of the adult participants who took part in the child-inclusive model 'the majority named the feedback from their children as the greatest assistance in the resolution of their dispute'¹⁹⁹. Of the children who took part in the study, '[e]ighty six per cent in the child-inclusive group said it was good or great, and helpful, 6% said it was not needed, but was 'okay' and 8% said it was not helpful'²⁰⁰.

The benefits and level of satisfaction with the process expressed by children who took part in this research confirm that children like to be consulted and listened to and rather than being detrimental to involve children in mediation, '...one year post-intervention, no detrimental outcomes of child-participation were reported by parents or children in any case in this sample. The vast majority of the children found the interview, although confined to a single session, helpful.'²⁰¹

This research carried out in Australia has shown that the assumptions that parents had made about what the children wanted in the child-focused group were often inaccurate. When the children were given the opportunity to express their wishes/opinions in the child-inclusive sessions, parents were often very moved by the feedback they heard from and about their own children and 'named the feedback from their children as the greatest assistance to the resolution of their dispute.'²⁰² Fathers in particular viewed the feedback received from the children as 'valued and transformative, and appeared able to listen to views that often did not support their own argument when these views came from their children and were conveyed

¹⁹⁸ *ibid.*

¹⁹⁹ Jennifer McIntosh, 'Child inclusion as a principle and as evidence-based practice: Applications to family law services and related sectors' (2007) *Australian Institute of Family Studies – Commonwealth of Australia* 1,15 Available at www.aifs.gov.au

²⁰⁰ McIntosh, Wells and Long, (n 2), 20.

²⁰¹ *ibid.*

²⁰² *ibid.*

empathically by an independent specialist.²⁰³ This, in itself, made matters easier for mothers who are often perceived as being the psychological gatekeepers, perhaps preventing a father from access, as the father could be told first hand by his children the reasons why the children preferred certain arrangements regarding custody and access. It was found that this helped both parents make arrangements that were developmentally appropriate for the child, based on their age and wishes, rather than from their own adult perspective of a sense of entitlement to certain allocated access arrangements.

In assessing the results of her research, McIntosh convincingly argues that '[t]he responsibilities of developing policy and implementing child-inclusive practices are many, and require careful thought, but the potential gains for families remain a strong motivating source. In the right environment, the net result of any child-inclusive process is at least threefold: children's views are sensitively and appropriately elicited, their experiences and developmental tensions accurately formulated, and their needs translated to parents and other decision-makers involved in their matters'.²⁰⁴

B. New Zealand

Research was also carried out by Goldson in New Zealand in 2006²⁰⁵ on child-inclusive mediation. While the sample size was small in that only 26 children were interviewed ranging in age from 6 to 18, from 17 families, the families having being selected from Family Court referrals, there was a high level of satisfaction indicated by both the parents and the children with the child-inclusive process. Unlike the Australian study, where an independent specialist was employed, in New Zealand the mediator who met with the parents also met individually with the children. Feedback from the children's session was brought back to their parents. The children were aware of what

²⁰³ *ibid* 22.

²⁰⁴ Jennifer Mc Intosh, 'Child inclusion as a principle and as evidence-based practice: Applications for family law services and related sectors' *Australian Family Relationships Clearinghouse* (2007) Available at <http://aifs.gov.au/afrc/pubs/issues/issues1/issues1.pdf>

²⁰⁵ Goldson, (n 3).

was being discussed with their parents and were provided with an opportunity to decline information that they did not want shared with their parents. The parents and children were then brought together in a joint session to discuss the parenting plan and a subsequent session was held two weeks later to discuss how the implementation of the parenting plan was working, as well as to examine outstanding concerns, if any.²⁰⁶

Similar to the study in Australia, parents found that by using the opportunity to hear their children express their need for co-operation between the parents in arriving at decisions about parenting, they had a heightened level of awareness of how their decisions were impacting on their children's lives. Children felt that this process gave them an opportunity to have a voice.

Both children and parents acknowledged that the children preferred to speak to a mediator who had previous contact with both of their parents.²⁰⁷ Children reported feeling better able to cope with their parents' separation as a result of being given the opportunity to be heard as part of the process.

Goldson's research has shown that the child-inclusive model places 'a clear emphasis on the child's needs and a parenting focus during negotiations between the parties.'²⁰⁸ Child-inclusive mediation, she found, empowers the child through knowledge, improves communication between the parents and their children and helps the child to realise that the parents are co-operating to resolve issues.²⁰⁹ An important issue which arose was the need for parents to refocus from claiming rights over their children to taking responsibility for them.²¹⁰ This, Goldson found, 'led to the child being buffered from conflict, and enhanced that child's ability to develop greater resilience.'²¹¹ This issue was also evident in the interviews conducted as part of this thesis with young adults, who frequently expressed frustration at

²⁰⁶ *ibid.*

²⁰⁷ *ibid.*

²⁰⁸ *ibid* 7.

²⁰⁹ *ibid* 7.

²¹⁰ *ibid* 15.

²¹¹ *ibid.*

their parents for not taking charge of the situation, and as one participant put it ‘just doing what a parent should ... do.’²¹²

C. England and Norway

James *et al* carried out a study to compare the role of children within the mediation process in England and Norway. These countries were chosen because they both promote mediation as an alternative to court but mainly because Norway has incorporated the provisions of Article 12 of the UNCRC into its domestic legislation by virtue of reform of the Children Act 2003. Under Norwegian law, once a child reaches the age of 7:

‘it shall be allowed to voice its view before any decisions are made about the child’s personal situation, including which of the parents it is to live with. When the child reaches the age of 12, the child’s opinion shall carry significant weight.’²¹³

While setting a specific age is against the principles of Article 12, the decision was taken that such rights should be guaranteed to children over the age of 7 but could be extended to younger children as appropriate. James *et al* note however, that ‘[i]n spite of the incorporation of the UNCRC into Norwegian law, ...and in spite of the requirement for compulsory mediation, the Norwegian approach to the practice of mediation remains the same as that in England, in that there is still no formal requirement for mediators to ascertain the wishes and feelings of children, or to ensure that parents themselves offered their child(ren) an opportunity to express an opinion’²¹⁴.

²¹² Interview with YA 2, March 2012.

²¹³ Children Act 5.II s 31.

²¹⁴ Adrian L. James, Gry Mette Haugen, Minna Rantalaiho and Rebecca Marples, ‘The Voice of the Child in Family Mediation: Norway and England’ (2010) 15 *International Journal of Children’s Rights* 313, 329.

XV. Conclusions

A. Mediation as a Process

In answering the research question as to the effectiveness of mediation as a dispute resolution process in family law matters therefore it is important to examine the aim of mediation. If it was, as Twining suggested, to clear the “congestion” in the courts’ system, then it has failed. Despite efforts at raising awareness of the process, take up on mediation remains low. The transposition of the EU directive across Europe has raised awareness about mediation. However, in an Irish context under existing family law legislation, solicitor’s obligations to notify parties of the options of reconciliation and mediation,²¹⁵ while helpful and important, often come too late in the dispute. For instance, when a party is sitting in a solicitor’s office something has generally happened fairly recently that has brought matters to a head. Presenting mediation or reconciliation to a client at this point may not be effective.

Additionally, concerns are evident about the way in which mediation is discussed with clients. The portrayal of the process in a positive or negative light will undoubtedly influence their decision to engage in the process.²¹⁶ Questions arise too as to whether in any particular case encouragement is forthcoming from the solicitors representing both parties, rather than one solicitor trying to promote the benefits of the process.²¹⁷ However, some of the proposed statutory provisions, as set out in the Draft Mediation Bill, for example those requiring a solicitor to provide a “written statement” to the client regarding mediation and that such statement has to be signed by the solicitor and the client, may assist in this regard.

If the aim of mediation is to reduce the level of conflict within a relationship, then the timing as to when mediation takes place is an important factor in family law matters, particularly that an appropriate

²¹⁵ Sections 5 and 6 of the Judicial Separation and Family Law Reform Act 1989 and sections 6 and 7 of the Family Law (Divorce) Act 1996.

²¹⁶ See chapter 1.

²¹⁷ Interview with LI6, February 2012.

amount of time has passed since the break-up of the relationship. What is an ‘appropriate amount of time’ will obviously vary between couples and indeed within couples.²¹⁸ This, perhaps, is one of the difficulties with family mediation, in that parties enter into the process too quickly after the break-up of the relationship when the issues are still about the hurt of the marriage breakdown rather than the more practical issues of resolving the financial or other issues that need to be addressed²¹⁹.

An important first step in advancing family law mediation in Ireland will be the introduction of the mandatory information sessions as recommended by the LRC. These information sessions will provide independent and objective information for all couples experiencing difficulties in a marriage or relationship. Mediation should be explained at this session, together with all other options for resolving issues between the parties. Information should be provided on the studies carried out into the effects of separation and divorce on children and their need to have a voice in the process. Details should also be given to parents of support services that are available and may be of assistance to them.

In Ireland, the report issued by the LRC on Alternative Dispute Resolution clearly provided an impetus for the development of mediation, in that many of its recommendations have been incorporated into the Draft Mediation Bill 2012. Significantly, as noted earlier, the pilot project which was set up at Dolphin House District Court has already had a direct impact on family law litigants in raising awareness and providing an easily accessible service.

Arguably, there may be merit in obliging the parties to attend at least one mediation session in an effort to resolve matters. The comments of Sir Alex Ward in the English case of *Wright*²²⁰ indicating that perhaps the Halsey decision may need to be reassessed, open the door very slightly for similar

²¹⁸ Kelly believes that if this does not happen early on a case, the appropriate time is when the pleadings are closed. This may, however, be quite late to try to resolve matters in family law cases. However, it appears from the research undertaken as part of this thesis that the reason mediation failed in many of the cases was because the process was entered into too quickly after the relationship broke down. See chapter 5.

²¹⁹ This was evident in my research where parties said that they were still going through the hurt of the breakdown when they engaged in mediation.

²²⁰ See (n 127) and (n 128).

moves in England. Additionally, the decision of the European Court of Justice in the *Rosalba Alassini* case somewhat paves the way at European level, in that the court held that mandatory mediation is not deemed to affect one's rights to access to justice under Articles 6 of the European Convention on Human Rights or Article 47 of the Charter of Fundamental Rights. However, it is very important that a proper system is in place to ensure that this mandatory mediation session would not just become another step in an already complex and cumbersome family law process.

As well as raising awareness of the process, there is also a need to increase consumer confidence in the process. Parties need to know that their procedural rights will be upheld and that the mediation process will be a fair and safe venue for discussions. Adequate safeguards need to be in place to ensure that parties are adequately screened and that the vulnerable are protected. Thus, more emphasis needs to be placed on screening for capacity to mediate when mediators are being trained and clear guidelines need to be drawn up for mediators to ensure that all parties taking part in mediation have a certain minimum level of understanding of the process. All parties should have obtained legal advice prior to taking part in the mediation process so that if they decide during the course of the mediation to concede on an issue in dispute, they are making an informed decision. Participating couples also need to be aware of the safeguards that are in place in that agreements reached are not legally binding. However, this can also be a deterrent as it means further legal action has to be taken.

It is important that the Family Mediation Service, as our State run mediation service, has proper procedures in place to give parties this reassurance. The provisions under the Draft Mediation Bill, which provide for more standardised or transparent mediator qualifications and the implementing of a Code of Conduct that will be applicable across all mediating bodies, is a welcome provision and should be instrumental in encouraging more separating parties to engage in the process.

B. The Voice of the Child within the Mediation Process

By engaging in the mediation process, are separating couples choosing a process that is more child-inclusive? Again, the answer appears to be no. Research carried out in Ireland to date has shown that children are rarely included in the mediation process.²²¹ It is significant that the Draft Mediation Bill refers specifically to the voice of the child within the mediation process, but concerning in view of the research referred to above, that discretion in this regard is left to the particular mediator. Also, it is notable that in the discussions held on the Draft Mediation Bill at Oireachtas level to date, none of the mediation organisations represented raised the issue of the voice of the child within the process as being worthy of debate.²²²

Research carried out in Australia and New Zealand has shown that there are many benefits to be gained from a mediation model that provides an opportunity to hear the voice of the child. The fact that parents had to have demonstrated that they had the capacity to engage in the mediation process and to take their children's views into account may have affected the results of the Australian research (refer to page 174). It is arguable that outcomes would have been good for children whose parents display such competence regardless of the process used.

While various models for child inclusion have been tested, no clear consensus exists about the best way to do this. There is an increasing desire to make family law processes more child-centred. The issue, therefore, seems to be how and when the inclusion of children's voices takes place, rather than whether they do.

It is clear from the experience in Norway, where Article 12 of the UNCRC has been incorporated into domestic legislation, that such incorporation will not of itself lead to change unless there is also a cultural change in attitude by parents, mediators and mediation organisations.

²²¹ See (n 14), (n 180), (n 183).

²²² Healy, (n 191).

Efforts are being made to train the mediators within the FMS, but training alone will not bring about change unless there is an ethos of inclusivity and collaboration within the service. Based on the research carried out in Australia and New Zealand and the findings that there were no adverse effects for those who took part, we need to begin tentatively to develop models here to see what best suits the Irish mediation landscape and ensures that the voices of children are heard in a protected and inclusive way.

CHAPTER 4: The Origins and Development of Collaborative Law

I. Introduction

Collaborative law, also known as collaborative practice or collaborative divorce, is an alternative method of dispute resolution used mainly in the area of family law. In addressing the research question as the effectiveness of collaborative practice as dispute resolution processes in a family law context and the extent to which it provides an avenue to hear the voice of the child as per their rights under Article 12 of the United Nations Convention on the Rights of the Child, it is necessary, because it is a process which is new to Ireland, to first outline the origins of collaborative law in the United States in the 1990s, how the process works and its development into an interdisciplinary model that is now used worldwide in the resolution of conflict in family law matters. The collaborative law process is therefore outlined, including its unique elements, namely the participation agreement and the disqualification clause which distinguish it from other methods of dispute resolution, specifically mediation and ordinary lawyer negotiation.¹

Collaborative practice shall be assessed and critically analysed both from the viewpoint of those who advocate for the process and those who raise concerns about the impact of the process on lawyers' advocacy skills, the concept of limited representation and the ethical issues that may arise. It shall examine the efforts being made by collaborative practitioners in the US, as the leaders in the field, to counter these criticisms by establishing procedural frameworks and assurances for the parties taking part in the process. These are the Ethical Guidelines laid down by the International Academy of Collaborative Professionals (hereafter IACP), various State Bar

¹ Recognising that research internationally indicates that only approximately 10% of cases are heard before a court, it was deemed more appropriate to compare collaborative practice to negotiation through lawyers rather than to court proceedings.

Associations in the US, and the Uniform Collaborative Law Act and Rules (UCLA) 2009².

The chapter shall examine the literature on the collaborative process by key writers in the area such as Tesler³, Webb⁴, Hoffman⁵, Cameron⁶ and Gamache⁷ and by Irish writers such as Mallon⁸ and Davy⁹. It shall examine existing research on collaborative practice, including the study carried out by Julie Macfarlane on behalf of the Department of Justice in Canada¹⁰, research carried out by the IACP¹¹ in the US, and that carried out by Resolution¹², a network of family lawyers in the UK.¹³

In examining the development of collaborative practice, and in developing the theme of capacity and participation as outlined in previous chapters, the issue of capacity to participate in the process shall be addressed. The role of the child specialist within the process shall be outlined and the extent to which such specialist provides “scaffolding” for children, thus addressing the research question as to how and whether the voice of the child is heard

² Uniform Collaborative Law Act and Rules 2009<
beta.collaborativepractice.com/lib/PDFs/UCLA%202010%20revision.pdf>.

³ Pauline Tesler, Collaborative Law Practitioner, Founder of the San Francisco Bay Area Collaborative Practice Group.

⁴ Stuart Webb, Founder of Collaborative Practice, based in Minneapolis, Minnesota.

⁵ David Hoffman, Lecturer at Harvard Law School.

⁶ Nancy Cameron, Collaborative Law Practitioner and Author *Collaborative Practice, Deepening the Dialogue* (Continuing Legal Education Society of British Columbia 2004).

⁷ Susan Gamache, Child Specialist, Vancouver.

⁸ Patricia Mallon, ‘Collaborative Practice: An Overview’ *Judicial Studies Institute Journal* (2009) (1)1 3.

⁹ Eugene Davy, ‘Problems Associated with Collaborative Practice’ *Judicial Studies Institute Journal* (2009) (1) 14.

¹⁰ Julie Macfarlane, ‘The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Case Study’ (Department of Justice Canada 2005) Available at www.justice.gc.ca.

¹¹ International Academy of Collaborative Professionals www.collaborativepractice.com

¹² Mark Sefton, ‘Collaborative Family Law: A report for Resolution’, Association of Family Lawyers in the UK.

¹³ Additional smaller scale studies were carried out by: William Schwab, ‘Collaborative Lawyering: A Closer Look at an Emerging Practice’ (2004) 4 *Pepperdine Dispute Resolution Law Journal* 351; Michaela Keet, Wanda Wieggers, & Melanie Morrison, ‘Client Engagement Inside Collaborative Law’ (2008) 24 *Canadian Journal of Family Law* 145; Richard W. Shields, ‘On Becoming a Collaborative Professional: From Paradigm Shifting to Transformative Learning Through Critical Reflection and Dialogue’ (2008) *Journal of Dispute Resolution* 427; John Lande, ‘An Empirical Analysis of Collaborative Practice’ (2011) 49(2) *Family Court Review*, 257. These additional studies will be referred to at certain points throughout the thesis but it is beyond the scope of the thesis to assess each study in detail.

in an appropriate way in accordance with their rights under Article 12 of the United Nations Convention on the Rights of the Child¹⁴.

II. The Collaborative Law Process

The collaborative process originated in the US in the early 1990s. It was developed by Stuart Webb, a lawyer based in Minneapolis, in response to his frustration of dealing with family law matters through the adversarial system. Cognisant of the fact that there is seldom what could be considered a “winner” at the conclusion of a separation or divorce¹⁵, Webb began to look for an alternative way which would, in effect, eliminate or at least postpone the possibility of going to court and, instead, focus on reaching an amicable settlement that is tailored to meet the needs of a particular family. He developed a new process which he called collaborative law.

The Collaborative Law Process has been defined as a ‘voluntary, contractually based alternative dispute resolution process for parties who seek to negotiate a resolution of their matter rather than to have a ruling imposed upon them by a court or arbitrator.’¹⁶ In contrast to ordinary lawyer to lawyer negotiation, the collaborative process facilitates direct client participation. Parties who opt to use the process sign a contract or agreement at the outset, called a ‘participation agreement’. Under the terms of the participation agreement they agree not to litigate the matter before the court during the process. Instead, they focus their efforts solely on attaining a mutually acceptable solution, through joint negotiations which take place at scheduled, face-to-face, four-way meetings, each party with their own collaborative lawyer present.¹⁷ Additionally, enshrined in the participation

¹⁴United Nations Convention on the Rights of the Child. Available at www2.ohchr.org/english/law/crc.htm

¹⁵ Robert Mnookin and Lewis Kornhauser, ‘Bargaining in the Shadow of the Law: The Case of Divorce’ (1978-1979) 88 *Yale Law Journal* 950.

¹⁶ Prefatory Note to the Uniform Collaborative Law Act, page 1. Available at meetings.abanet.org/webupload/commupload/.../FinalVersionUCLA.pdf > .

¹⁷ Pauline Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce without Litigation* (2nd edn, American Bar Association 2008); Stuart Webb and Ron Ousky *The Collaborative Way to Divorce: The Revolutionary Method that Results in Less Stress, Lower Costs, and Happier Kids- Without Going to Court* (Penguin 2007); Nancy Cameron, *Collaborative Practice, Deepening the Dialogue*. (The Continuing Legal Education Society of British Columbia 2004).

agreement is an assurance given by both parties that they will be honest and open in their dealings with each other. They agree that they will provide full details of their up-to-date financial position and that they will focus on their respective interests, and the interests of their children, rather than adopting a positional stance.

All negotiations that take place within the process are confidential and cannot be referred to in any subsequent court proceedings. Generally, similar to mediation, nothing is agreed until everything is agreed and the terms of the agreement have been reduced to writing. An agenda is set by the clients in consultation with their respective lawyers prior to each four-way meeting. The four-way meetings are carefully controlled by the lawyers who support the parties and keep them focused.

During the four-way meetings however, the lawyers take a step back and allow the clients to negotiate directly and to set out clearly what their goals and concerns are. This ‘paradigm shift’¹⁸ which is required in the lawyer’s approach, moving from an adversarial mindset to a more facilitative outlook, may be the biggest challenge for the legal profession. The lawyer’s role becomes one of assisting the clients to reach their own solution, giving the parties more control over how their dispute is resolved. The process provides built in legal advice and a commitment from the parties and from their lawyers, to reaching an amicable settlement. While every effort is made to settle the case within the process, if settlement cannot be reached the parties may then proceed to take their case to court for determination by a judge.

III. The Disqualification Clause

A unique feature of collaborative law is the disqualification clause.¹⁹ The disqualification clause provides that, in the event that settlement is not reached within the process, the clients’ lawyers are disqualified from acting for them in any subsequent legal proceedings arising out of this issue or any

¹⁸ Tesler, (n 17).

¹⁹ Connie Healy, ‘American and Irish Perspectives on Collaborative Practice’ (2011) 4 *Irish Journal of Family Law* 98.

related matter. In addition, all lawyers in those particular lawyers' firms are also disqualified from acting for the client in this matter. This is known as "imputed disqualification." This aims to ensure that each client starts out afresh in the court process with new, unbiased representation.

Therefore, all parties have a vested interest in reaching settlement. For the client, s/he may have built up a relationship with a lawyer and will be acutely aware that failure of the process means starting afresh with new legal representation. In addition, the possibility of the extra costs of having to pay a second lawyer is a further motivating factor in keeping the parties at the negotiating table. Lawyers, likewise, are aware that unless they make every effort possible to assist their clients to reach agreement, they will lose their client. This ensures that they, too, are settlement focused from the outset rather than leaving issues to be addressed at the door of the court.

Pauline Tesler describes the disqualification clause as being the impetus for parties, so that when what appears to be an impasse is reached, rather than immediately moving forward with litigation, the collaborative lawyer will see it as a period when 'the sleeves get rolled up'²⁰. She refers to lawyers stepping back and instead of taking control and moving forward to litigation, letting the "silence" on their behalf assist the parties themselves to realise that they need to find a solution. Ver Steegh agrees and comments that '[t]he disqualification agreement adds teeth to the parties' commitment to settle in that they will both incur expense and delay if either seeks court involvement'.²¹

The disqualification provision (discussed in more detail later in this chapter) is also one of the most controversial aspects of the process. However, if one examines the research carried out by Schwab²² into the significance of the disqualification clause in influencing the parties to remain at the negotiating

²⁰ Pauline Tesler and Peggy Thompson, *Collaborative Divorce: The Revolutionary New Way to Restructure your Family, Resolve Legal Issues, and Move on with Your Life* (Harper Collins 2007) 91.

²¹ Nancy Ver Steegh, 'The Uniform Collaborative Law Act and Intimate Partner Violence: A Roadmap for Collaborative (and Non Collaborative) Lawyers' (2009) 38 *Hofstra Law Review* 699, 704.

²² Schwab (n 13), 379.

table, it is notable that he found that ‘[o]f the answers received 35% of **practitioners** said it was “very significant”, 43% said it was “somewhat significant”, and 22% said it was “not at all significant.”²³ Of the **clients** surveyed during the same research ‘54.5% said that it had not kept them at the table while 45.5% said it had’. While critics suggest that the disqualification clause puts pressure on the clients to settle, this would not seem to be strongly borne out in Schwab’s research.

Either party may also choose to terminate the process at any time. It is important to note that lawyers may also terminate the process if they believe that their client is not being forthcoming with information or co-operating with the “good faith” ethos of the process. Collaborative lawyers will highlight the issue of concern to their client and will point out how this issue is contrary to the ethos of collaborative law. If the client chooses to ignore the advice of his or her lawyer, the lawyer must terminate the process. This requirement can place a collaborative lawyer in an ethical dilemma in that by continuing to act, he or she is not acting in a collaborative manner, but yet by terminating the process he or she will lose their client. This is an issue which the collaborative lawyer must explain clearly to a client before the client agrees to engage in the process and is one of the key requirements in securing the client’s informed consent.

IV. Development of Collaborative Practice

As noted earlier, engaging in the collaborative process represents a significant change in practice for lawyers, who by virtue of their legal training, tend to take a positional approach to negotiation with their colleagues. Therefore, an important element in the development of the process was the formation of local “practice groups”. The role of the “practice group” is to provide a forum where collaborative lawyers in a particular locality meet on a regular basis to discuss and promote the

²³ Emphasis Added.

process, but more importantly to foster relationships and build trust amongst the collaborative lawyers themselves.

The research undertaken as part of this thesis into the development of collaborative practice in Ireland clearly indicates the importance of these groups, in that lawyers who were members of such groups were significantly more likely to deal with family law matters through the collaborative process and to successfully resolve issues for their clients within the process.²⁴

The collaborative model spread quickly throughout the US, Canada and indeed, worldwide. In Northern California in the early 1990s, Peggy Thompson²⁵ began to offer clients an interdisciplinary model where mental health coaches, child specialists and financial specialists were employed to assist couples through the emotional and financial as well as the legal aspects of the divorce. This model is referred to interchangeably as collaborative practice or collaborative divorce. Child specialists also provide assistance as necessary in helping any children of the relationship adapt to the new family arrangements and provide them with a forum to have their views considered. Clients may therefore choose either a lawyer-only approach or may opt for the interdisciplinary model in accordance with their needs.

A. Team model

The parties to a participation agreement may agree at the outset on the additional experts they require and then proceed on a “team” basis with the assistance of these experts at every stage of the process. Tesler describes the team model as ‘the most thought out and well-structured approach to

²⁴ Connie Healy, “On the plus side, I empathise more with my clients. On the negative side, I empathise more with my clients!” – Training as a Collaborative Lawyer: An Empirical Analysis’ (2013) (3) *Irish Journal of Family Law* 70. Comparing practice group membership between collaborative lawyers who have used the collaborative model and those that have not demonstrates that for lawyers who have used the process, 87% were members of practice groups. For lawyers that have not used the process only 35% were members of practice groups.

²⁵ Dr. Peggy Thompson, Psychologist. Co-founder of the IACP.

interdisciplinary professional collaboration...which allows clients economical access to communication skills, coaches, child-development specialists, and financial professionals trained in collaborative teamwork with the lawyers who provide the collaborative law representation.’²⁶ The team model aims to provide the most holistic approach to dealing with the various aspects of divorce. Each party may choose to have their own coach or they may both instruct one coach who will help them deal with communication and emotional issues. The parties generally meet with their own coach or coaches before the first meeting, giving them an opportunity to express any concerns they may have and to get appropriate advice from the coach as to how to deal with conflict during the meetings. The coaches will meet with the parties as required during the process.

B. Referral model

Sometimes however, parties may want some additional support but may not wish or may not be able, financially, to engage all the professionals from the outset. In such cases the parties can refer issues to outside professionals as required and might, for example, employ a child specialist to assist their children or a financial specialist as the need arises. This method is known as the referral method. Decisions as to which model to use can vary depending on the level of additional help required for the couple, their ability to pay fees to the various professionals involved and sometimes depending on where the couples reside, the availability of such experts in their area.

V. Uniform Collaborative Law Act and Rules 2009 (UCLA)

In examining the role and development of collaborative practice in the United States much attention has now to be placed on the enactment by the Uniform Law Commission of the Uniform Collaborative Law Act (UCLA)

²⁶ Pauline Tesler and Peggy Thompson, *Collaborative Divorce: The Revolutionary New Way to Restructure your Family, Resolve Legal Issues, and Move on with Your Life* (Harper Collins 2007) 8.

and Rules 2009.²⁷ The collaborative process was reviewed and examined extensively during the debates leading up to the finalisation of the Act.²⁸ Mosten notes that the passing of a uniform law ‘itself, provides legitimacy for new forms of legal practice’²⁹. As a result, the Act has become a model of best practice for Collaborative Practice throughout the US and internationally, to the extent that it was examined and referred to extensively by the Irish Law Reform Commission in their report entitled *Alternative Dispute Resolution: Mediation and Conciliation*³⁰ in 2010.

The Act, while acknowledging the need for flexibility within the process, specifies the essential requirements in a collaborative law participation agreement³¹ and sets out when the process is deemed to begin and terminate³². In addition it legislates for the more controversial issues of the disqualification issue,³³ the requirement for informed consent,³⁴ screening,³⁵ disclosure,³⁶ confidentiality³⁷ and privilege³⁸. The sections of the Act will be addressed in more detail throughout the chapter as each of these issues is discussed.

The Act also represents a valuable impetus for collaborative practitioners throughout the US, and indeed worldwide, to engage in discussion and

²⁷ Uniform Collaborative Law Act and Rules 2009. Available at <http://www.uniformlaws.org/Act.aspx?title=Collaborative%20Law%20Act> Once the Uniform Law Commission enact a Uniform Law on a specific area of law, it is then up to each State legislature across the US as to whether it will adopt the Act into its jurisdiction. The Uniform Collaborative Law Act has been amended to the Uniform Collaborative Law Act and Rules (2010). In this regard, States may choose to incorporate the provisions of the Act as rules of procedure rather than as an Act. As of 15 July 2013, the Act has been enacted in Washington State, Nevada, Utah, Texas, Hawaii, Ohio and Alabama. It has been introduced for discussion in Illinois, Massachusetts, New Mexico, Oklahoma and South Carolina.

²⁸ <http://www.uniformlaws.org/Committee.aspx?title=Collaborative%20Law%20Act>

²⁹ Forrest S. Mosten, ‘The Future of Collaborative Practice: A Vision for 2030’ (2011) 49 (2) *Family Court Review*, 282.

³⁰ Law Reform Commission, *Alternative Dispute Resolution: Mediation and Conciliation* (LRC 98 -2010) 119-120.

³¹ Section 4 of the Uniform Collaborative Law Act and Rules 2009. Available at <http://www.uniformlaws.org/Act.aspx?title=Collaborative%20Law%20Act>.

³² *ibid* s 5.

³³ *ibid* s 9.

³⁴ *ibid* s14.

³⁵ *ibid* s15.

³⁶ *ibid* s12.

³⁷ *ibid* s16.

³⁸ *ibid* s17-19.

debate as to the development of collaborative practice, thus working towards ensuring that clients enter into the collaborative process with full knowledge of what is involved, are appropriately screened as to their suitability and that their interests are protected.

VI. The Role of the Collaborative Lawyer

The so called dominant approach³⁹ to legal ethics ‘contends, in essence, that there is one uniform legal profession that must be guided by one uniform set of ethical rules and principles, and that those rules and principles must protect the ideal of the lawyer as adversarial advocate.’⁴⁰ Simon opines that under the dominant view ‘the only ethical duty distinctive to the lawyer’s role is loyalty to the client.’⁴¹ This model of legal ethics is based on a paternalistic attitude of the client being viewed as someone in need of the lawyer’s protection. However, this view fails to recognise the diversity in legal practice that has developed over the years, with new methods of dispute resolution developing outside of the courts’ system and changing client demands.

The American Academy of Matrimonial Lawyers, for example, acknowledge in their Code of Ethics, the Bounds of Advocacy⁴², that there is a need for what they term “constructive advocacy.”⁴³

The Preliminary Statement attached to the Bounds of Advocacy states that:

‘[e]ffective advocacy for a client means considering with the client what is in the client’s best interests and determining the most effective means to achieve that result. The client’s best interests include the well being of children, family peace, and economic

³⁹ William Simon, *The Practice of Justice* (Harvard University Press 1988).

⁴⁰ Scott Peppet, ‘Lawyers’ Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism’ (2004-2005) 90 *Iowa Law Review* 475, 479.

⁴¹ Simon, (n 39) 8.

⁴² American Academy of Matrimonial Lawyers. Preliminary Statement, Bounds of Advocacy available at <<http://www.aaml.org/library/publications/19/bounds-advocacy/preliminary-statement>>.

⁴³ *ibid.*

stability. Clients look to attorneys' words and deeds for how they should behave while involved with the legal system. Even when involved in a highly contested matter, divorce attorneys should strive to promote civility and good behavior by the client towards the parties, the lawyers and the court.'⁴⁴

It goes on to state that attorneys must be knowledgeable about all methods available to resolve conflict and must provide this information to clients and that, where possible, attempts should be made to resolve such conflict by agreement. They recommend that consideration should be given to alternative methods of dispute resolution.

Writers such as Peppet⁴⁵ have argued that, in general, there should be an option for lawyers to agree to a higher standard of ethics when bargaining. He proposes a contract model of legal ethics which would allow lawyers to predetermine the standards upon which they choose to conduct their negotiations. This model would not permit lawyers to have complete freedom with regard to their ethical standards; there would continue to be a minimum standard required of all parties but rather that they could "opt in" for a higher standard. His view was that 'if two negotiating parties can signal credibly a commitment to collaborate, they increase the odds of reaching a satisfactory negotiated outcome.'⁴⁶ This reflects what Webb was trying to achieve within the collaborative process. However, such approach requires a significant change in attitude for lawyers.

Tesler refers to collaborative lawyers 'unlearning adversarial behaviours and learning collaborative behaviours'⁴⁷ as 'making the paradigm shift', a shift in thinking from wanting to win and obtain as much as possible for the lawyer's own client to facilitating a 'win-win' situation for both clients. Rather than taking control of the case and taking full responsibility for the outcome, the lawyer focuses more deeply on what the *client* wants from the

⁴⁴ *ibid.*

⁴⁵ Peppet, (n 40) 475.

⁴⁶ *ibid.*, 478.

⁴⁷ Tesler, (n 17) 26.

process and examines what a successful outcome looks like to the client. Tesler describes this “paradigm shift” as having four dimensions: retooling the lawyer as a collaborative lawyer in the way they think and speak; retooling the client by listening carefully to what they have to say and encouraging them to concentrate on their goals for the process; retooling the lawyer’s relationship with the other party’s lawyer from a positional stance to one in which they work together; and, finally, retooling the negotiations to make them more about conflict resolution and effective management of the process, working effectively with other team members.⁴⁸

Arguably, combining this ‘whole family’ approach and fulfilling the obligation to fully represent one’s client requires somewhat of a balancing act for lawyers.⁴⁹ In addressing this dilemma, Tesler’s view is that a collaborative lawyer must remain ‘faithful in the representation of the client and zealously represent the client in pursuit of the client’s stated goals’. However, instead of doing this in an adversarial way that ‘[t]his faithful representation includes informing the client about the law and its application to the client’s matter on an ongoing basis, preserving confidential communications, and assisting the client to develop approaches, collaboratively with the other participants, to resolving the matter without judicial intervention.’⁵⁰ The retooling requires a different approach in the way the lawyer approaches his or her own client, the opposing lawyer and the process itself.

The collaborative process gives clients the option to aspire to higher standards of bargaining where they agree to provide information voluntarily and correct each other’s mistakes in the quest for a fair settlement that is the best solution possible for the parties involved. This empowers clients, giving them more control than they would have within the traditional court system and yet, within the collaborative process, clients continue to be

⁴⁸ *ibid* 34-46.

⁴⁹ Larry R. Spain, ‘Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation can be Ethically Incorporated into the Practice of Law’ (2004) 56 *1 Baylor Law Review* 141,153.

⁵⁰ Tesler, (n 17)136.

supported by their lawyers. Macfarlane in her research however, noted that lawyers maintain their ‘strong primary loyalty as being to their client, with whom they have a distinct and special relationship, no matter how committed they are to facilitating an agreement with the other side.’⁵¹

VII. The Interdisciplinary Model

The role of the courts and settlements reached through negotiations as part of the adversarial process focuses exclusively on the legal issues. Denham J in reaching her decision in the *Roche v Roche*⁵² stated:

‘This case is not about the wonder and mystery of human life. This is a court of law which has been requested to make a legal decision on the construction of an article of the Constitution of Ireland.’⁵³

As noted earlier, a distinguishing factor of the collaborative process is that it is the first process within a legal framework to acknowledge the need for a more holistic approach in addition to the strict legal issues. In contrast to both mediation and ordinary lawyer negotiation, it offers separating parties the opportunity to engage additional experts who are specifically trained to work with the legal framework of the process, experts that may add value to the overall settlement achieved in terms of the parties’ ability to rebuild a different relationship post separation or divorce.

A. The Mental Health Professional

In dealing with family law cases it is important for the professionals and indeed the separating parties themselves to understand the emotional

⁵¹ *ibid* 47.

⁵² *Roche v Roche* [2010] 2 ILRM 1 24 This case involved an application to the court by a mother who sought the court’s approval to allow her to use frozen embryos against her ex-husband’s wishes.

⁵³ *ibid* 24.

process involved. Berger⁵⁴ explains that there are five stages in relationship transformation post separation:

1. The first stage begins once the parties decide to separate. They must now move from being a couple to being individuals again, from “we” to “I”. This “disintegration” is difficult after perhaps many years of thinking as a couple. In most cases one party will have been the instigator of the separation and he or she may be reconciled with the separation but the other party may experience periods of “deep hurt or anger”.
2. The process then begins of “rebuilding separate selves” where each party tries to re-establish themselves as individuals and regain their own “sense of self and independence”. During this time it is essential that the parties give each other the space they need to develop their own lives and any interference by the other party can trigger a disproportionate response.
3. After a period of time, the parties may be able to move to the next stage where they can reconnect again with each other on “on a different level without the same emotional reactivity”.
4. If the parties have children together, they will need to try to “team-up as parents”, by putting their children’s needs first and being able to co-parent effectively.
5. Finally, over a longer period of time, the parties may become friends again.⁵⁵

Mayer also commented that ‘[e]motions are the energy that fuel conflict. If people could always stay perfectly rational and focused on how best to meet their needs and accommodate those of others, and if they could calmly work

⁵⁴ Yuval Berger, Yuval, Psychotherapist, Divorce Coach.

⁵⁵ Yuval Berger, ‘Relationship Transformation, in Search of a ‘Roadmap’ for Separating Couples’, Workshop given at the Third European Conference on Collaboration entitled ‘Challenging Conflict’ Bad Aibling, 11th June 2010.

to establish effective communications, then many conflicts would either never arise or would quickly deescalate.’⁵⁶ Whether it is anger, hurt, or sadness that the parties are feeling, it is important that the emotions are understood. It is therefore important that professionals dealing with the resolution of conflict are aware of the impact of emotions and the effect that they can have on parties’ abilities to make decisions at crucial points in the discussions, again emphasising the importance of capacity to negotiate.

The collaborative model provides a structure within which clients can also avail of “coaching” or assistance to deal with the emotional issues surrounding a relationship break down. The coaching within the collaborative process has been described as ‘brief, goal-orientated, systemic therapy.’⁵⁷ Brief in that it involves active assistance by the coach while the party is going through the actual separation/divorce. It does not extend to therapy after the divorce has been finalised. It is goal-orientated for the same reasons, in that it is specific to the goals that the parties wish to achieve during the divorce process and systemic in that the ‘therapist sees the client as one member of an inter-connected family system.’⁵⁸

The coaches used during the collaborative process are licensed mental health professionals who have also undergone training in the collaborative process and are therefore trained in the dynamics of the dispute resolution process. They can assist the parties to articulate their feelings, to understand how they react to comments that their ex-spouse may make and to assist them to develop ways to deal with such comments in a constructive way rather than reacting in a confrontational way. The coaches also assist in helping the parties to make the transition, as described earlier by Berger, from “we” to “I”. While many couples may have had individual therapy or counselling throughout the divorce, having a specific coach available at the negotiations, whose role is solely to assist them through the divorce process

⁵⁶ Bernard Mayer, *The Dynamics of Conflict Resolution* (Jossey-Bass 2000) 10.

⁵⁷ Peter Roussos, ‘It is Therapy’(2002) *The Collaborative Review, Journal of the International Academy of Collaborative Professionals* 5.

⁵⁸ Susan Gamache, ‘The Role of the Child Specialist’ in Nancy Cameron (ed), *Collaborative Practice, Deepening the Dialogue* (The Continuing Legal Education Society of British Columbia 2004) 190.

and their interactions at this time with their ex-partner, can, it is alleged, provide enormous assistance and support to the separating parties.⁵⁹

Lawyers who used the team model have expressed the view that it is better for the clients and for the process to have the coaches available from the outset rather than employing them as “fire fighters” when an issue arises.⁶⁰ The advantage of having the coaches present at the meetings is that they get to see firsthand the interaction between the couple and can then advise the parties how to deal with the acrimony that may exist between them in how they communicate. One collaborative lawyer interviewed for this research commented that ‘a client cannot design the model because they haven’t been here before and they aren’t emotionally placed to be able to deal with it.’⁶¹ Having such structure already in place makes the transition easier for the client.

B. The Financial Consultant

The financial specialist in a collaborative matter may be retained by both parties as an independent expert to assist them in assessing their financial position. He or she will examine their current financial position and will assist them to look at different options for their future. The financial specialist will ‘bring an unbiased, educational and facilitative role to the process.’⁶² This role involves assisting the parties to focus on how to budget for two households and how to plan their finances into the future. S/he will normally be an accountant who has undergone training in interdisciplinary collaborative practice so that s/he can ‘equip clients to make their own

⁵⁹ Two participants interviewed for the research undertaken as part of this thesis used mental health coaches. In one case it assisted the parties to reach settlement despite there being complicating issues regarding their spouse’s mental health. In the other case, the participant indicated that through this counselling she began to see things in her ex-husband that she had never seen before throughout her marriage and it provided her with a sense of empowerment.

⁶⁰ Interview with CL 5, May 2011.

⁶¹ Interview with CL 6, May 2011.

⁶² Cathy Daigle, ‘The Neutral Financial Professional: A Unique Opportunity, a Singular Responsibility’ (2005) 7 (1) *The Collaborative Review*.

decisions and achieve independence'.⁶³ In addition to assisting with the budgets and planning, the financial specialist will also help clients to focus on managing any existing debts, develop re-payment schedules and consolidate loans.

The financial specialist has been described as the one “true neutral”⁶⁴ in the process. Jointly instructing one financial expert can save the parties considerable time and money rather than seeking to obtain this information through protracted discovery and arms length negotiations. The report prepared by the financial consultant adds an element of realism to the process in that up until this report is prepared one or other of the parties may not have been fully aware as to how they stand financially. This realism may then assist the parties to negotiate the best possible outcome to ensure that they take advantage of any tax breaks, structure investments and confront rather than seek to avoid existing liabilities. By engaging a neutral professional clients also avoid some of the issues that arise in discovery, namely the refusal of one party to provide full disclosure. One collaborative lawyer interviewed noted that the engagement of a financial professional removes some of the distrust which can often arise when one party discovers that the other party has not been forthcoming during the course of formal discovery within the court process.⁶⁵ In practice, it appears that rather than the financial professional always being jointly instructed, in many cases one party may often engage a financial expert for independent advice if they feel that they are concerned or unsure of the long term financial implications of proposals being put forward.⁶⁶

Research carried out by the IACP⁶⁷ has also pointed to the advantages for children of their parents having reliable and accurate financial advice, as it is important for children to know that they have some security. Divorce or

⁶³ Doreen Gardner Brown, ‘The Role of the Financial Specialist’ in Nancy Cameron (ed), *Collaborative Practice, Deepening the Dialogue* (The Continuing Legal Education Society of British Columbia 2004) 224.

⁶⁴ *ibid* 223.

⁶⁵ Interview with CL3, April 2011.

⁶⁶ Three of the participants interviewed for the research undertaken as part of this thesis indicated that they engaged independent financial experts to advise them in relation to the settlements proposed.

⁶⁷ www.collaborativepractice.com

separation generally causes financial strain and it can be difficult for children to perhaps suddenly realise that the lifestyle to which they were accustomed may change. This was evident in the analysis of interviews carried out with young adults who participated in the research undertaken for this thesis. The young adults recall being drawn into the financial battles that took place between their parents and have clear memories of being worried about whether they were going to have enough money to survive.⁶⁸

C. The Child Specialist

Another important member of the collaborative team is the child specialist. This specialist's role is examined under the heading of the Voice of the Child within the Collaborative Process (see section XVI below, page 243-249).

VIII. Feminist Perspective

For feminists like Bryan⁶⁹ the difficulty associated with separation and divorce is ultimately the poor substantive outcomes that women and children achieve and often, they assert, has very little to do with the actual process used to finalise the divorce. Lack of financial support post divorce causes hardship for women and dependent children. In addition, lack of financial resources also impacts on the choices that women can make in terms of how to resolve any dispute that may arise. It is therefore a concern for Bryan that a process, like the collaborative process which is lawyer led, could add to this sense of exclusion due to the potential costs involved.

Bryan argues that women will routinely make compromises in relation to the financial issues in order to secure custody of their children. Many feminists argue that true autonomy in decision-making does not exist. The choices that people make are inextricably linked to, and embedded within,

⁶⁸ See chapter 5.

⁶⁹ Penelope Bryan, "Collaborative Divorce", Meaningful Reform or Another Quick Fix? (1999)5 4 *Psychology, Public Policy and Law* 1001.

their social context and relationships and therefore that autonomy itself is in fact relational.⁷⁰ Viewed from this perspective, autonomy is closely associated with gender, race, class and ethnicity.

Thus, some feminists are of the view that ‘the traditional legal system, ... seeks an end or termination of a significant interaction at divorce: a division, distribution, or allocation of the things acquired during marriage – an emancipator model - and with its “ending”, the permission for a “new life” for the participants and the withdrawal of active legal interference in their relationship’.⁷¹ Bryan argues that the collaborative process places too much emphasis on the emotions to the detriment of the financial issues.⁷² She therefore favours the court process over private settlement options and states that:

‘[h]owever imperfectly courts may apply them, divorce statutes reflect the considered social judgement that many wives and even more children need and deserve support, that wives deserve an equitable portion of the marital property, and that custody and visitation decisions should reflect the best interests of children.’⁷³

She goes on to say that ‘[p]erniciously, collaborative divorce retards meaningful reform, as did mediation, by allegedly offering a procedural cure.’⁷⁴ Others disagree. King, for example, notes that the adversarial system works on the basis that the ‘trial court judgement actually ends the case, and also the relationship between the disputants, when in fact it does neither.’⁷⁵

This reliance on the courts’ system for justice, however presupposes that women are unable to present their own cases and that their lawyers are not

⁷⁰ Caitriona Mackenzie, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (Oxford University Press 1999)

⁷¹ Martha Fineman, ‘Dominant Discourse, Professional Language and Legal Change in Child Custody Decision making’, (1988)101 *Harvard Law Review* 727, 756.

⁷² Bryan, (n 69),1014; Fineman, (n 71), 761.

⁷³ Bryan, (n 69) 1016.

⁷⁴ *ibid*1017.

⁷⁵ Carol King, ‘Burdening Access to Justice: The Cost of Divorce Mediation on the Cheap’ (1999) 73 *St John’s Law Review* 375,377.

going to represent their interests in the collaborative process. Engaging in a process such as collaborative does not mean that a person's lawyer no longer protects their interests or fights for the best deal for their client; the "procedural cure" is in the way these discussions are held but the law, as administered through the courts or in the collaborative process, remains the same.

Bryan also asserts that Tesler in her writings on the collaborative process does not address the issues of 'gender bias among collaborative lawyers'⁷⁶ and the effects that this bias may have on the eventual outcomes in collaborative cases. Unless allocated a lawyer under the legal aid scheme with no opportunity to change to a lawyer of the opposite gender, if requested, then this choice would appear to be that of the particular client herself.

IX. Critics of the Process

Many writers have been critical of collaborative practice. John Lande, for example, has highlighted concerns about collaborative lawyers imposing a "harmony ideology" on their clients⁷⁷. This issue was addressed by Macfarlane during the course of her research (see section on International Research p 204) and she cautioned that collaborative lawyers needed to be 'aware of their own biases toward post-divorce family outcomes...without imposing a set of beliefs or values on their clients.'⁷⁸ Lande raised other concerns including the issue of the disqualification provision placing excessive settlement pressure on clients, the issue of ethics and that collaborative lawyers are '[r]esisting choice and innovation'⁷⁹ by only presenting one option to their clients.

In addressing these issues, it is clear that having the disqualification provision in place does force clients to think more carefully before deciding

⁷⁶ Bryan, (n 69),1013.

⁷⁷ John Lande, 'The Promise and Perils of Collaborative Law' (2005-2006) 12 *Dispute Resolution Magazine*, 29.

⁷⁸ Macfarlane, (n 10) 35.

⁷⁹ *ibid* 30.

to end the collaborative process and take the matter to court. It is arguable, however, that clients who are faced with the prospect of settling their case on the steps of the courthouse are under similar pressure. Additional issues raised were that clients do not understand the process and that lawyers fail to advocate for their clients during the process, leaving the less dominant party open to abuse.

However, in her research Macfarlane concluded that there is no evidence that weaker parties do less well.⁸⁰ Examining these issues in the context of the research undertaken as part of this thesis, there was little evidence that the parties felt unrepresented or that they failed to understand the process. On the contrary, many had researched the process themselves and had contacted a number of collaborative lawyers before choosing who they wished to represent them.

While ethical issues remain subject to discussion, as they do in most processes, it is clear that experienced collaborative lawyers are being proactive, through the IACP, in developing ethical standards. Additionally, members of the IACP were instrumental in the enactment of the Uniform Collaborative Law Act. Lande and Mosten have acknowledged the efforts made by the IACP and note that Uniform Act ‘places substantial and sometimes challenging’⁸¹ obligations on collaborative lawyers to ensure informed consent and understanding of the collaborative process.

Also significant is the fact that ten State Bar Associations’ opinions support the process, as does the American Bar Association. The State Bar in Colorado raised concerns about lawyers signing the participation agreements as parties to the actual agreement, as they believed that in doing so, lawyers were taking on obligations to the party who was not their client. They qualified their opinion by saying that the process would not raise concerns if the lawyers did not sign the participation agreements as a party

⁸⁰ *ibid* 57.

⁸¹ Forrest S. Mosten and John Lande, ‘The Uniform Collaborative Law Act’s Contribution to Informed Client Decision Making in Choosing a Dispute Resolution Process’ (2009) 38 *Hofstra Law Review* 611, 629.

to the agreement but merely to confirm representation of their own client. Taking these concerns on board, Section 4 (5) of the Uniform Collaborative Law Act now provides that the participation agreement **identifies:**

‘(5)... the collaborative lawyer who represents each party in the process; and

(6) contains a statement by each collaborative lawyer confirming the lawyer’s representation of a party in the collaborative law process.’

X. Cooperative Law

In addition to collaborative practice, a small group has developed in the US offering cooperative law⁸². Cooperative law purports to follow many of the principles of collaborative practice, without the disqualification requirement. Lawyers and their clients make a commitment to settlement. Cooperative lawyers described their approach as a ‘reflection of dissatisfaction with certain aspects of both litigation-oriented and Collaborative Practice.’⁸³ However, it appears that the same efforts have not been made by the Cooperative Law movement to develop procedural frameworks or to ensure consistency of practice. Research carried out into cooperative law in Wisconsin⁸⁴ shows that while there is a similarly high settlement rate to collaborative practice, the lawyers are less focused on structure. The research indicates that in many cases there were no participation agreements signed, there were no four-way meetings held, and ‘there is a less onerous duty of disclosure.’⁸⁵ The lawyers interviewed as part of the survey carried out in Wisconsin indicated that ‘parties are substantially involved in making decisions, though this varies depending on

⁸² Started by the Divorce Cooperation Institute in Wisconsin in 2003. Also a number of lawyers in Boston have been offering the process since 2005.

⁸³ John Lande, ‘Practical Insights from an Empirical Study of Cooperative Lawyers in Wisconsin’ (2008) *Journal of Dispute Resolution* 203,206.

⁸⁴ *ibid* 203.

⁸⁵ *ibid* 246.

the clients' situations and preferences'.⁸⁶ They use 'litigation selectively when it seems appropriate' and '[m]ost say that using litigation usually does not prevent the parties from negotiating cooperatively.'⁸⁷ Having carried out the research, Lande concluded that 'lawyers and clients in Cooperative cases would benefit from clarification of norms and requirements for disclosure of information'.⁸⁸ Despite their dissatisfaction with collaborative practice, 'many of these lawyers said that they would withdraw from the representation if the parties fail to comply with their disclosure obligations.'⁸⁹ Lande concludes that 'clients are entitled to know this from the outset.'⁹⁰ He recommended that co-operative lawyers develop 'a clearly-identified process and clear information about it'⁹¹ and also recommends the formation of practice groups. However, he notes that the disqualification provision has been the 'barrier to the use of Collaborative Practice in non-family cases. Therefore, Cooperative Practice serves as a catalyst for spreading Collaborative *ideals* outside of the family law arena.'⁹²

While any process that results in positive outcomes for clients should be considered, it is submitted that there are dangers in either clients misunderstanding which process they are in, or more worryingly, clients being told that they are using the collaborative process and the negotiations being at best cooperative but more likely ordinary lawyer negotiation. This occurred for one of the participants interviewed for the research undertaken as part of this thesis.⁹³ He requested and was told that his case was being dealt with collaboratively but there were no four-way meetings and the lawyer continued to represent him in the subsequent court case. This client now has a particularly negative opinion of the process. Another concern in his case was that his spouse's lawyer was a trained collaborative practitioner. Questions therefore arise as to why this lawyer should have agreed to the case being dealt with in this way, or if, indeed, the other

⁸⁶ *ibid* 254.

⁸⁷ *ibid*.

⁸⁸ *ibid* 257.

⁸⁹ *ibid*.

⁹⁰ *ibid*.

⁹¹ *ibid* 258.

⁹² *ibid* 259.

⁹³ Interview with CA 3, June 2011.

lawyer was told that the client had requested collaborative practice. Behaviour such as this amongst practitioners has the greatest potential to undermine both processes.

Engaging in the collaborative process is cumbersome for lawyers, arranging four-way meetings, requiring them to change their approach to their clients and colleagues for possibly less fees and the additional risk of losing a client. However, in a climate where clients are seeking less adversarial means of resolving issues, raising these somewhat materialistic concerns may not serve the profession well. Gillers, therefore, has gone where others have feared to tread by suggesting that ‘financial reward is rarely, if ever, cited as the reason to oppose a rule. A proxy must be found, based in the interests of clients or the true ends of justice.’⁹⁴ Critics of the collaborative process have raised both of these issues and many have been quite dismissive of the process, but are these concerns borne out in international research?

XI. International Research

To date a number of empirical studies have been carried out into the development of collaborative practice internationally.⁹⁵ This section will focus on four main studies, namely the research undertaken by Julie Macfarlane in Canada, the IACP in the US, Resolution in England and Wales and more recently the Mapping the Paths to Family Justice⁹⁶ survey in the UK. The results of the research undertaken in Ireland are detailed in chapter 5. Of the other studies, Macfarlane used a case study approach. The research carried out by the IACP was quantitative in nature. Resolution’s study took a mixed method approach using questionnaires to obtain an overall perspective, focus groups with lawyers and semi-structured interviews with 12 persons that had used the process for a more in-depth

⁹⁴ Stephen Gillers, ‘How to Make Rules for Lawyers: The Professional Responsibility of the Legal Profession’ (2013) 40 *Pepperdine Law Review* 365, 377.

⁹⁵ See (n 13).

⁹⁶ Anne Barlow et al, ‘Mapping Paths to Family Justice: a national picture of findings on out of court family dispute resolution’ (March 2013) *Family Law* 306, 308.

analysis. The ‘Mapping the Paths to Family Justice’ project is again a mixed-method study which is ongoing.

A. Demographics

Comparing the demographics of participants across the various studies⁹⁷, those opting to use collaborative practice are, on average, in the 40-59 age group and have been in long marriages of at least ten years duration. Over 60% of the respondents in the US had at least a four year college degree. The income level of clients taking part in the process in the US was quite high with 41% of respondents having a personal annual income of \$100,000 or more and over 80% of respondents indicating that their household income was \$100,000 or more.

The average age group in the UK was slightly younger than the US with the typical client age being 35-54. Again, most clients were educated to a first degree level and were economically active. Collaborative practice is used mainly in the resolution of separation or divorce, rather than other family law issues that may arise.⁹⁸

The research therefore confirms that those using the process are generally well educated and have some level of financial security. This is not to say, however, that collaborative practice is only for the wealthy in that it is also available through legal aid services in certain jurisdictions.⁹⁹ In some cases, private solicitors have facilitated clients that wish to use the process by agreeing a payment schedule over a longer period of time or have helped clients secure legal aid to enable them to proceed before the courts when the process was unsuccessful.¹⁰⁰

⁹⁷ Macfarlane’s research was qualitative and not details are given regarding demographics.

⁹⁸Percentage cases relating to separation or divorce: US 97%, Ireland 100%, England/Wales 95% .

⁹⁹ The Legal Aid Board in Ireland was proactive in organising training for its lawyers and offer low income clients the option of availing of the service.

¹⁰⁰ Interview CC3, May 2010, interview with CC4, May 2010. This was also evident in the research carried out by Resolution where private solicitors took cases for low income clients at significantly lower rates. See Sefton (n 12) 31.

B. Settlement Rates

Settlement rates within the process are quite high and this is consistent across all the empirical studies. On occasion, parties have reconciled through the process. The Canadian research was carried out through a case study analysis on sixteen cases. At the conclusion of the study 19% of the cases were ongoing, 69% had settled (in one of these cases proceedings were issued subsequent to settlement), 6% reconciled and 6% had terminated.

Examining the research undertaken by the IACP, 90% settled in the collaborative process and 10% terminated prior to settlement of all issues. No clients reconciled with their spouse during the collaborative process in the US. In the UK 83% of cases settled, with 2% reconciling.¹⁰¹ In Ireland the picture was much the same with 86% of cases having settled by agreement and the parties having reconciled in 2% of the cases.¹⁰²

C. Reasons for choosing Collaborative Practice

Macfarlane concluded that clients had more pragmatic reasons for choosing collaborative than their lawyers. A number of clients in her study had chosen the process believing that it would be faster and cheaper and this was not always the case. Others had chosen the process because they wanted to take responsibility for role modelling, so that their children would be able to look back and see them as having dealt with the divorce in a responsible way, with a number seeing it as a means of personal growth leading to closure.

Proponents of collaborative practice indicate that clients choose the process to avoid the acrimony of the court process. This has been borne out in the research carried out to-date. Across all jurisdictions, there was a sense that going to court would raise the level of conflict and that it would be better if

¹⁰¹ 92% of the settled cases achieved settlement on all issues and 4% partial settlement.

¹⁰² In the quantitative research undertaken in Ireland for this thesis, 81% of cases settled and in one case the parties reconciled.

they ‘thrashed things out’ and avoided ‘arm’s length correspondence.’¹⁰³ For research participants in Ireland and England it was less about the issue of costs or time and more about the fact that the process could provide a better outcome, thus causing less damage to their children.¹⁰⁴

Macfarlane noted that participants were more in favour of collaborative practice than mediation. She questioned whether this was because collaborative lawyers may be dismissing mediation and promoting collaborative practice as an option. However, if one examines this across all studies, participants consistently chose collaborative practice over mediation because they felt that they needed the support of their lawyers through the process.¹⁰⁵ In an extensive study to assess national awareness of alternative dispute resolution processes in England, mediation was the most commonly recognised method outside of the courts’ system. However, ‘[w]hile solicitor negotiation and collaborative law were less well recognised as processes by the public than mediation, they both achieved higher satisfaction rates than mediation’ both in terms of the process and the outcome.’¹⁰⁶ This result is being tested in ongoing research being carried out in the UK, the results of which will not be known for some time.

Separating parties expressed the view that they ‘[n]eeded legal representation’¹⁰⁷ and:

‘The benefit (of collaborative) is that it is less costly, faster, and definitely more fair in that you have the professional support (financially, legally and mental health-wise) not provided in mediation. I felt my needs and concerns were heard and fought for, and that I came

¹⁰³ Sefton, (n12)

¹⁰⁴ 70% of Irish participants expressed this view. Majority of participants in Resolution’s study.

¹⁰⁵ Connie Healy, ‘Collaborative Practice: An Interdisciplinary Approach to the Resolution of Conflict in Family Law Matters’ in *Family Law and Culture in Europe, Developments, Challenges and Opportunities* Katharina Boele-Woelki and Nina Dethloff (eds) forthcoming (Intersentia 2014)

¹⁰⁶ Barlow et al, (n 96) 308.

¹⁰⁷ Wray, (n 11) 8.

out of the process feeling more whole and positive than a typical adversarial divorce would have been.’¹⁰⁸

‘I didn’t fancy it (mediation) at all because I felt as though I needed someone on my side. If it had just been one person who was like mediating between us, I knew that ... I wouldn’t stand a chance.’¹⁰⁹

D. Models used

Only two of the 16 cases studied in the Canadian research used the team approach, with 7 other cases using the referral model, i.e. instructing neutral experts as required.¹¹⁰ In contrast the team model was used in 40% of cases in the US. More than half the cases surveyed in the US used an interdisciplinary model. Of these, 59% engaged a financial consultant, 48% engaged at least one mental health professional, with 27% of cases involving two mental health professionals and 13% engaging three.

However, advocates of the team model speak of the importance for clients of having support from the other team members from the outset. The research indicated that both professions, the therapists and the lawyers, find it difficult to discuss clients’ cases with each other, each having been used to maintaining high standards in terms of protecting the confidentiality of matters discussed with their own clients. Other difficulties arise in convincing clients that they need these extra professionals.

However, Macfarlane concluded that ‘[t]he team model can offer a depth and range of client services that traditional legal practice cannot match, and for those clients who can afford it and who see the value of a comprehensive transition plan for their family in its new form, the team model offers enormous potential.’¹¹¹

¹⁰⁸ *ibid* 16.

¹⁰⁹ Sefton (n 12) 30

¹¹⁰ Macfarlane, (n 10) xi.

¹¹¹ *ibid* 78

E. Lawyer's motivations

Macfarlane's study examined the motivations for both lawyers and clients in engaging in the collaborative process. Lawyers, she found, appeared to have more idealistic views of the process. They cited motivations such as value re-alignment, seeing CFL (Collaborative Family Law) as 'a process of uncovering and embracing a new professional identity.'¹¹² Significantly, similar to the views expressed by clients, they saw collaborative law as less damaging than the court process but more complete than mediation because each party was separately represented by their lawyers.¹¹³

Lawyers in the UK also saw collaborative practice as a better way for clients and spoke of the benefits for themselves in 'feeling better about myself as a lawyer'.¹¹⁴ Macfarlane's research showed that there is a risk that collaborative practitioners, with the conviction that this is a better way, 'may sometimes be imposing their own motivations onto clients who are simply trying to get their divorce completed quickly and inexpensively.'¹¹⁵ She concluded that clients need to be aware that even though collaborative law may be better than court, it will still take time and 'hurt - both emotionally and financially.'¹¹⁶

An issue that was evident in all of the research was the importance of trust between lawyers. Because the process represents a fundamental change in the way lawyers approach family law cases, it is very important that each lawyer can rely on their colleagues to screen clients as to their suitability and to work constructively within the process to reach the best settlement for all of the parties.

¹¹² *ibid* 18.

¹¹³ Macfarlane, (n 10) 18.

¹¹⁴ Linda Wray, Susan Llyod & Ors, Report prepared by the IACP and Resolution, 'Research regarding Collaborative Practice: A Comparison of Findings from the International Academy of Collaborative Professionals and Resolution' (IACP 10th Annual Forum, Minnesota, October 2010) 23.

¹¹⁵ Macfarlane, (n 10) 26.

¹¹⁶ *ibid* 20.

F. Legal Advice

Macfarlane refers to three different approaches amongst collaborative lawyers when it comes to the issue of legal advice: the traditional lawyer who commits to cooperation; the lawyer as friend and healer and the lawyer as team player.¹¹⁷ The traditional lawyer approach focuses on clients being given full information about their legal rights and then helped to collaborate. The ‘lawyer as friend’ model, generally involves the lawyer giving less rights based information to clients and more general advice. Rather than acting as advocate they see their position as more of a supporting role. The final category is ‘lawyer as team player’. These lawyers’ emphasis is on the purity and integrity of the process and seeking to find a solution within the process.

Across all studies clients expressed differing levels of awareness of their legal rights. However, it appears that lawyers in Ireland and the UK take the more traditional but collaborative approach, where clients are advised of their rights and are then free to make decisions having had adequate legal advice. Resolution, in England and Wales, found that ‘legal norms were still important in providing a framework for clients in negotiations’¹¹⁸ and that few lawyers had difficulty in acknowledging that their ‘primary responsibility’¹¹⁹ was to the client. However, lawyers strive against giving clients information in a way that encourages them to take a positional stance. Resolution noted that the information given to clients at the initial meeting was key in determining their expectations for the process and that it was better not to be too specific in giving information that sets the parties up as adversaries.¹²⁰

Most clients, in Resolution’s research, were of the view that they got the legal advice they needed during the process. Two participants indicated that they were unsure of where they stood legally.¹²¹ This corresponds with the

¹¹⁷ *ibid* viii

¹¹⁸ Sefton, (n 12) viii

¹¹⁹ *ibid* 34.

¹²⁰ *ibid* 36.

¹²¹ *ibid* 38.

experience of Irish clients as detailed in chapter 5 (see page 292). It is important that clients discuss the issue of legal advice with their collaborative lawyer at the outset so that they know the approach s/he takes in terms of providing specific legal advice. Questions arise as to whether such advice will be given in private meetings with the client or given in general terms during the course of the joint meetings? This is important for the client to know.

G. Outcomes

A question that was raised during the course of the research was whether the outcomes in the cases varied much from outcomes in court. It was found that the substance of the outcomes was no different overall than that which may have been achieved in the traditional legal litigation/negotiation process. The difference seems to be in the way the parties got to this settlement. More importantly Macfarlane found no evidence that weaker parties do less well or that wealthy parties succeeded in using the process to hide assets.¹²² Additionally, Macfarlane noted that in some cases using the collaborative process resulted in what she termed “value added”¹²³ in the form of additional flexibility and creativity in the way outcomes were reached and in the substance of the agreements.

Clients’ satisfaction with outcomes seems high across all studies. In Resolution’s research only one client indicated that they were not happy with the outcome. In the research undertaken for this thesis, one participant indicated that she knows she would have got more financially from a judge, but that her motivation was to have a good working relationship with her ex-husband and she achieved that during the collaborative process.¹²⁴

H. Disqualification Provision

Do clients understand the significance of the disqualification provision and does it put extra pressure on them to settle within the process? What was

¹²² *ibid* 57.

¹²³ Macfarlane (n 10) 58.

¹²⁴ See Chapter 5

evident across the studies was that clients did not engage in the process lightly. Both client and lawyers expressed the view that they were committed to the process and therefore this provision has no real impact.

In the research carried out by Resolution, all but two of the 12 clients interviewed understood the implications of this provision. Comments made in the research carried out by Resolution included:

‘... not because of that rule, it’s not that. although that would have been pretty distressing for me, I must say... I think I’d understood that, this was something that if you embarked on, you committed to it.’

‘made me all the more determined to make sure that it worked. it’s a good discipline to have behind you’.¹²⁵

This view was also expressed by participants interviewed for the research undertaken as part of this thesis. Again, participants confirmed their commitment to the process and two referred to the fact that the disqualification provision was a positive aspect to the process in that it focused them on what needed to be resolved in order to move on.¹²⁶

Macfarlane notes that ‘[c]lients are sometimes mystified by the lengths to which their lawyers believe they must go to remove the possibility of litigation, and wonder why counsel could not simply be trusted to use their best judgment in this eventuality.’¹²⁷ However, on concluding her research she commented that:

‘data gathered by this study, where every case had a DA [disqualification agreement] suggest the collaborative process fosters a spirit of openness, cooperation and commitment to finding a solution that is qualitatively different, at least in many cases, from

¹²⁵ Sefton, (n 12) 33.

¹²⁶ See Chapter 5.

¹²⁷ Macfarlane, (n 10) 39

the atmosphere created by conventional lawyer-to-lawyer negotiations - even those undertaken with a cooperative spirit.’¹²⁸

I. Satisfaction with the process

Of the participants who took part in the research undertaken by the IACP 79% indicated that they were satisfied, of whom 37% were extremely satisfied and 42% were somewhat satisfied. Particular aspects of the process which the participants found helpful were that meetings could be scheduled to accommodate client needs, that the process gave them an opportunity to address concerns directly and freely with the other participant in the process and that the process was respectful.¹²⁹

Resolution’s research indicated that most participants were satisfied with the process and outcome. Of the 12 clients who were interviewed for Resolution, 11 expressed satisfaction with the process. Some clients said that they found it difficult emotionally. The overall result of the research was that clients felt that their divorce had been as amicable as they had hoped it would be and that as a result, it had been less damaging to their children.

J. Concerns

Among the concerns raised by clients with regard to the collaborative process were issues in relation to timing, indicating that in some cases more could have been done to move the process forward and to improve scheduling of meetings. The issue of informed consent was raised in that some clients indicated that they could have been given ‘a more thorough explanation of what to expect and how much it would cost’.¹³⁰

All of the research undertaken to date has pointed to the importance of screening, both because the vulnerable need to be protected and also the fact

¹²⁸ *ibid* 78.

¹²⁹ Linda Wray, “The International Academy of Collaborative Professionals Research Regarding Client Experience” presented by Linda Wray at the IACP 11th Annual Forum, Washington, October 2010 14.

¹³⁰ *ibid* 17.

that whether cases settled or not very much depended on the actual individuals involved. Clients expressed the view that the process should not be used where there were issues of domestic violence, personality disorders or where there were parties who were just not willing to be honest in their negotiations or unwilling to move from entrenched positions. Where there were instances of bullying or unequal bargaining power, it was found that mental health professionals were better able than lawyers to assess the case.¹³¹ However, as noted earlier, mental health professionals are not routinely used in all cases and this points to the need for lawyers engaging in this process to undergo additional training with regard to screening.

K. Costs

Costs, the research revealed (US, England and Wales), were not necessarily lower than going to court and therefore the collaborative process should not be perceived as a cheaper option. It was found that clients' main motives for using collaborative law were 'to avoid the stress of an acrimonious divorce - and to avoid a process which might either create acrimony where it did not currently exist, or raise existing levels.'¹³² Clients also expressed the desire for a fair process for themselves and their families which could perhaps help them to be better able to parent in the future. In the US 81% of the parties surveyed considered the attorney's fees that were charged for their own lawyer as very reasonable or somewhat reasonable.¹³³ Resolution's research indicated that in 29% of these cases, clients saved both time and money. For 34% of cases the timing was quicker and the costs were about the same. However 13% of respondents thought there was no difference in timescales or costs and 13% thought that the process was more expensive.

It is against this international background that the capacity or potential of the process to address the voice of the child must be addressed. At a local level, the more recent development of the collaborative process in Ireland

¹³¹ Sefton (n 12)

¹³² Wray, Llyod & Ors, (n 114) 24.

¹³³ *ibid.*

will inform the inquiry into the suitability of the process to encompass the voice of the child in the Irish legal and ADR culture.

XII. Development in Ireland

Collaborative practice has been available in Ireland since 2004. At present, unlike the position with mediation¹³⁴, there is no statutory obligation on lawyers to notify clients in relation to the availability of the collaborative process as a possible option for the resolution of conflict. Often, a party's decision to use the process may depend on whether the particular lawyer they consult has been trained as a collaborative practitioner.¹³⁵ At present there are approximately 450 lawyers who have undergone training in collaborative practice and there are eleven active practice groups throughout the country.

The Association of Collaborative Practitioners (ACP) is the umbrella group for collaborative professionals in Ireland. Their membership consists of trained collaborative lawyers, mental health professionals, referred to in Ireland as Personal and Family Consultants, and financial experts. The ACP describes its aims as:

- 'To promote Collaborative Practice as a mechanism for settling disputes
- To support practitioners by providing documentation and ethical guidelines for the practice of collaboration.
- To provide training and peer review structures for collaborative Practitioners.'¹³⁶

¹³⁴Solicitors in Ireland are obliged to notify separating parties of the availability of reconciliation and mediation and are required to furnish a certification to the court to confirm that clients have been so advised under s 5 & 6 of the Judicial Separation and Family Law Reform Act 1989 and s 6 & 7 of the Family Law (Divorce) Act 1996.

¹³⁵ The IACP organise training in collaborative practice at regular intervals. Normally basic training takes place over a three day period. There are also a number of more advanced collaborative trainings dealing with specific issues like how to integrate the various experts into the team model, how to deal with issues of domestic violence, etc.

¹³⁶ The Association of Collaborative Practitioners See www.acp.ie

The results of both quantitative and qualitative research undertaken for this thesis, which provides a snapshot of the development of collaborative practice in Ireland, shall be outlined in chapter 5. The Law Reform Commission (LRC) addressed the development of the process in Ireland in its report on *Alternative Dispute Resolution: Mediation and Conciliation* in 2010. The LRC described collaborative practice as ‘an emerging method’ of dispute resolution which provides separating parties with another forum within which to resolve their dispute for the benefit of the family and society as a whole.¹³⁷ Having reviewed and referred to the provisions of the UCLA as a model of best practice, the LRC did not recommend the enactment of a Collaborative Law Act in Ireland, but recommended that collaborative lawyers in Ireland develop and adhere to Ethical Standards based on the standards set by the IACP. Therefore, the process continues to be structured around the participation agreement drawn up by the collaborative lawyers in each case.

Under section 6 of the UCLA in the US, parties who have already issued court proceedings can apply to court to put these proceedings on hold while they attempt to resolve matters within the collaborative process. It was recommended by the LRC that this would not be appropriate in Ireland because, if settlement was not reached, the disqualification clause would prevent the lawyer from acting in the court proceedings.¹³⁸ While administratively this would obviously cause difficulty, it is arguable that taking this view limits the opportunities for clients to engage in less adversarial means of resolving conflict. It also highlights the importance for clients of being given full information on all processes before committing to one particular method.

A. The Participation Agreement

Examining the standard participation agreement recommended by the ACP in Ireland it is notable, firstly, that solicitors continue to sign the contract as

¹³⁷ Law Reform Commission, *Alternative Dispute Resolution: Mediation and Conciliation* (LRC 98 -2010) para [6.77] 121.

¹³⁸ *ibid* para [6.75] 121.

parties to the agreement. However, the agreement clearly states that each solicitor represents only his or her own client and has no obligations to the other party. All parties agree to be open and honest and to provide full disclosure, referring specifically to financial disclosure only. However, in noting the grounds upon which the process terminates, the agreement states that the solicitors shall withdraw in the event that either party has ‘acted so as to undermine or take unfair advantage of the Collaborative Family Process’ and it lists ‘failing to participate in the ‘spirit’ of the process’ as one of those grounds. Again, questions remain as to what is considered appropriate with regard to the “spirit” of the process. Some guidance on this would be of benefit to the lawyers and to the clients.

The participation agreement refers to all discussions within the process being confidential and relies on S.9 of the Family Law (Divorce) Act 1996 to claim privilege. Section 9 provides:

‘Any oral or written communication between either of the spouses concerned and a third party for the purpose of seeking assistance to effect a reconciliation or to reach settlement between them on some or all of the terms of a separation or a divorce (whether or not made in the presence or with the knowledge of the other spouse), and any record of such a communication, made or caused to be made by either of the spouses concerned or such a third party, shall not be admissible as evidence in any court.’

The agreement also provides that the solicitor’s representation of the client is limited to ‘services within the Collaborative Law process’ and that the parties agree not to call the lawyers ‘to give evidence in Court, nor will they seek to have any of their notes brought into evidence’. To date, there has been no case to challenge this issue before the courts in Ireland. Therefore, it remains to be seen if the Irish courts would take the same view as that of the Supreme Court of British Columbia in *Banerjee v Bisset*,¹³⁹ (see page 231), that the parties by agreeing to engage in collaborative practice had agreed to a different set of rules.

¹³⁹ 2009 B.C.L.R. 2d. 1808

B. Ethical Issues

The core values of the solicitor's profession in Ireland as set out in the Guide to Good Professional Conduct are 'honesty, integrity, independence, confidentiality and the avoidance of situations of conflict of interest.'¹⁴⁰ Lawyers, therefore, in expressing this independence should 'advise their clients fearlessly and objectively' and should not 'allow themselves' to be restricted in their actions on behalf of clients or restricted by clients in relation to their other professional duties.'¹⁴¹ Does collaborative practice then allow clients to restrict their solicitors in the performance of their professional duties? Arguably it does, in that the solicitors are restricted from taking the case before the court. Is it likely to be interpreted that way? This has not been addressed in Ireland. If one looks to the US for guidance, as noted earlier, this issue was raised by the Colorado Bar Association. They were of the opinion:

'that the practice of Collaborative Law violates Rule 1.7(b) of Colorado Rules of Professional Conduct insofar as a lawyer participating in the process enters into a contractual agreement with the opposing party requiring the lawyer to withdraw in the event that the process is unsuccessful. The Committee further concluded that pursuant to Colorado Rules of Professional Conduct 1.7(c) the client's consent to waive this conflict cannot be validly obtained'.

For those States that did raise any ethical issues, reliance has been placed on Model Rule 1.2(c) which states that:

¹⁴⁰ *A Guide to Good Professional Conduct for Solicitors* (3rd edn, Law Society of Ireland 2013)<https://www.lawsociety.ie/Documents/committees/conduct-guide.pdf> i.

¹⁴¹ *ibid*

‘[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.’¹⁴²

In August 2007, the American Bar Association issued a formal opinion on collaborative practice¹⁴³. They endorsed the practice, again relying on Model Rule 1.2 (c) as outline above, deciding that there is nothing to prevent clients entering into limited representation contracts provided clients are fully informed of the various risks and benefits before taking part.¹⁴⁴

The Guide to Good Professional Conduct of Solicitors in Ireland also states that a solicitor must:

‘5.1. (a) promote and protect fearlessly by all proper means the client’s best interests and to do so without regard to his or her interests or to any consequences to himself or any other person.’¹⁴⁵

However, it also states that:

‘A solicitor is under no duty to undo the consequences of the court being misled by the prosecution or by the opposing party, otherwise than on a point of law...’¹⁴⁶

Noting the fact that there is ‘no duty to undo the consequences of the court being misled,’ lawyers, by engaging in the collaborative process, are as Peppet commented, agreeing to a higher code of ethics. The Law Society

¹⁴² Model Rules of Professional Conduct 1.2 (c) (2003)

¹⁴³ Formal Opinion 07-477. Available at <http://collaborativelaw.us/articles/Ethics_Opinion_ABA.pdf> accessed 20 July 2013.

¹⁴⁴ Formal Opinion 07-447 August 9, 2007. Ethical Considerations in Collaborative Law Practice

Before representing a client in a collaborative law process, a lawyer must advise the client of the benefits and risks of participation in the process. If the client has given his or her informed consent, the lawyer may represent the client in the collaborative law process. A lawyer who engages in collaborative resolution processes still is bound by the rules of professional conduct, including the duties of competence and diligence.

¹⁴⁵ *A Guide to Good Professional Conduct for Solicitors* (n 140) 37.

¹⁴⁶ *ibid*

has a separate Family Law in Ireland Code of Practice. This code refers to the fact that solicitors should ‘deal with matters in a way designed to preserve people’s dignity and to encourage them to reach settlement.’¹⁴⁷ It states that:

‘As a representative of clients, the solicitor performs various functions. As an adviser, the solicitor provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications. As an advocate, the solicitor forthrightly asserts the client’s position under the rules of the adversarial system. As a negotiator, the solicitor seeks a result advantageous to the client but consistent with the requirement of honest dealings with others.’¹⁴⁸

Collaborative practice would not appear to interfere with these functions as the solicitor remains an adviser, an advocate and a negotiator. One issue that is of concern in the interdisciplinary or team model of collaborative practice is the strict restrictions on lawyers sharing confidential information about the client. The Code notes that: ‘A solicitor must not disclose the contents of a family law file which is subject to this rule (the *in camera* rule) to any third party even if he has his own client’s consent.’¹⁴⁹ Solicitors therefore will need to be careful as to how such experts are briefed and how the team model is managed.

The Family Law Code notes the importance of taking a less adversarial approach to family law matters and of stressing to clients the importance of the “best interests” of their children. It provides that solicitors should advise clients about alternative methods of dispute resolution such as mediation and collaborative law. What is interesting though is that the guidelines go so far as to state that ‘[k]eeping the code is not a sign of weakness and will not

¹⁴⁷ Law Society of Ireland, *A Guide to Good Professional Conduct for Solicitors* (3rd edn, Law Society of Ireland 2013) <https://www.lawsociety.ie/Documents/committees/conduct-guide.pdf> Appendix 4 *Family Law in Ireland Code of Practice* 2008 149.

¹⁴⁸ *ibid* 149.

¹⁴⁹ *ibid* 35

expose the client to disadvantage.’¹⁵⁰ The fact that the Law Society felt it necessary to say this perhaps indicates the difficulty that lawyers have with taking a less traditional adversarial approach. Also, the fact that the Family Law Code points to alternative methods of dispute resolution in the context of lawyers stressing to clients the importance of the “best interests” of their children, displays a belief that these processes have the capacity to facilitate that aim.

C. Criticism of the process

Similar to the US, however, collaborative practice has received criticism from Irish lawyers and members of the judiciary. Issues raised include how efficient the process may be, with Davy, for example, commenting that:

‘[c]ollaborative practice cases are likely to be far more expensive **and far more time consuming (and also less profitable for solicitors)** than those cases which can be settled amicably and at an early stage in the context of the traditional approach.’¹⁵¹

From an Irish perspective there is the additional issue of the impact of the process on family law barristers. The view has been expressed that ‘much reliance has been placed on the advices of counsel by those solicitors who have rather less experience’ and ‘[a]n adherence to collaborative law ideology should not mean that clients whose interests are paramount, should be deprived of this resource’¹⁵². To date, a number of barristers have trained in the process. It is envisaged that counsel would be jointly briefed if an opinion on a specific issue was required during a collaborative case. Also, change is imminent within the legal profession as a result of the Legal Services Regulation Bill 2011¹⁵³ which may alter the roles of solicitors and barristers in the provision of legal services and advice. However, as the

¹⁵⁰ *ibid* 110.

¹⁵¹ Davy, (n 9) 16. Emphasis added.

¹⁵² Catherine McGuinness, ‘Collaborative Practice: Comment’ 1 (2009) *Judicial Studies Institute Journal* 30, 36.

¹⁵³ Legal Services Regulation Bill 2011

<<http://www.oireachtas.ie/documents/bills28/bills/2011/5811/document2.pdf>>

profession is structured at the moment, it is clear that if collaborative practice was successful in entering the mainstream dispute resolution field in family law matters, it would impact significantly on the income of the family law Bar.

XIII. Questions and Concerns in addressing the Effectiveness of Collaborative Practice

Having outlined the nature of the process and the role of collaborative law, questions arise in addressing the research question as to the effectiveness of the process as a dispute resolution mechanism in family law, as to whether collaborative practice provides “access to justice” for those who use it. Does it ensure that the parties’ rights to a fair procedure are upheld? How does it meet the needs of couples who use it in the Irish Family law system and does it protect their dependent children’s statutory and Constitutional rights to ‘proper provision’¹⁵⁴ and ensure the protection of their ‘welfare’?¹⁵⁵ Specifically, in the context of this thesis, does engaging in the collaborative process provide a role for children and an avenue for their voices to be heard?

A. Access to Justice

In determining access to justice, factors often considered are whether a process is affordable, fair, easy to access and understandable and whether the outcomes achieved are equitable.

In examining the constituent elements of the collaborative process, firstly, to engage in the process separating parties must be represented by lawyers. Where parties cannot afford legal representation, much will depend on the availability of legal aid. Without such support many clients who wish to use the process may be prevented from doing so. This restricts their choice of

¹⁵⁴ Section 3(2)(a) of the Judicial Separation and Family Law Reform Act 1989

¹⁵⁵ Article 41.3.2 of the Irish Constitution; Family Law (Divorce) Act 1996 s. 5.

process, but does not restrict their access to other means of justice, perhaps through mediation or the courts.

In signing the participation agreement, parties agree not to go to court. They also agree to their legal representation, by any particular lawyer, being limited to the duration of the process. This agreement lasts for as long as they choose to remain in the process. Does this cause parties to reconsider leaving the process or perhaps to stay in the process longer than they may have without these terms? Research has shown that, on occasion, it does.¹⁵⁶ A key issue in access to justice is access to information. Once parties are fully informed as to what a particular process involves, they can make a choice as to what best meets their needs. Perhaps they view justice as being obtained in a process where they agree terms in an amicable manner, perhaps they perceive justice as a ruling by a judge. These are decisions that the client has to make.

Earlier sections of this chapter have addressed the outcomes in collaborative practice as evidenced by international research. This section will therefore examine the procedural issues in collaborative practice. It examines the extent to which the process protects the vulnerable, ensures that they are properly advised, and that the process operates within an ethical framework with appropriate safeguards in place.

XIV. Procedural Issues

A. Screening for capacity –Protecting the Vulnerable

1. Informed Consent

The collaborative process operates on the premise that the parties engaging in the process enter into “good faith” negotiations. Carrying through this theme of participation as outlined in chapter one, a key issue in the success or otherwise of the collaborative process is the ability of the separating parties to negotiate and to participate in the process.

¹⁵⁶ See chapter 5.

The first meeting between the collaborative lawyer and the potential client is therefore very important. To ensure that parties choose a dispute resolution process that best fits their particular needs, it is essential that they are fully informed about all of the various methods available to resolve the matter and that they are fully informed as to the advantages and disadvantages of each method to enable them make an informed decision.

It is essential that the collaborative lawyer explains the ethos of the process to the client and sets out what will be expected in terms of openness and honesty. The client needs to understand that they will be expected to provide full financial disclosure. Tesler sets out examples of behaviour that is considered contrary to the spirit of the process as:

‘the secret disposition of marital, quasi-marital, or nonmarital (sic) property, failure to disclose the existence of the true nature of assets and/or obligations, ongoing emotional or physical abuse by either party, secret preparation to engage in litigation while appearing to participate in a Collaborative Divorce process, or withholding a secret plan to leave the jurisdiction of the court with their children.’¹⁵⁷

More difficult perhaps, is the expectation that the client will also be forthright in terms of disclosing issues like new relationships, future career plans or other issues not normally discoverable in a court situation. These issues are considered relevant in the collaborative law context in that they may impact on issues like access arrangements and the availability of finances. Explaining these requirements to the client is an essential part of obtaining their informed consent to engaging in the process. However, there do not appear to be any guidelines or uniformity of practice as to what exactly these obligations cover, when they cease and the extent to which a client is entitled to keep certain matters private.

¹⁵⁷ Tesler (n 17) 253.

Section 14 of the UCLA in the US provides that clients must be fully advised in relation to the voluntary nature of the process, the limited nature of the representation, the requirements in relation to discovery and the implications of the disqualification clause. The Uniform Law Commission in the prefatory note accompanying the Uniform Collaborative Law Act 2009 state:

‘The act thus envisions the lawyer as an educator of a prospective party about the appropriate factors to consider in deciding whether to participate in a collaborative law process. It also contemplates a process of discussion between lawyer and prospective party that asks that the lawyer do more than lecture a prospective party or provide written information about collaborative law and other options.’¹⁵⁸

Lawyers must effect/achieve a balance between explaining the processes and giving clients the benefit of their experience. Professionals should be able to assist the parties in their choice of process by asking relevant questions or raising concerns but the final decision should always be made by the client and, in the view of Friedman and Himmelstein, ‘lawyers become part of the problem if they put one process against the other’¹⁵⁹.

This section of the UCLA raised some objection from collaborative lawyers during the drafting process. The lawyers argued that this section placed statutory obligations on them to do something which they believed would be part of their job anyway and would be done in every case as part of their ethical obligations. However, the Uniform Law Commission felt strongly about the importance of the client being in a position to make an informed decision and included such a provision as a statutory obligation under the Act.

¹⁵⁸ Prefatory Note to the Uniform Collaborative Law Act 30.

¹⁵⁹ Gary Friedman and Jack Himmelstein (Third IACP European Conference, Bad Aibling, Germany on June 12, 2010).

2. Domestic Violence as a barrier to participation

Some collaborative lawyers are of the belief that any indication of domestic violence in a relationship precludes the parties from entering into such a process because of the fear of threats or intimidation. Other collaborative lawyers are of the view that each case must be assessed individually rather than imposing an outright ban.

This issue was addressed during the enactment of the UCLA in the US in 2009. After the discussions held between the Uniform Law Commissioners and the American Bar Association Domestic Violence Commission the consensus was that, with appropriate support, clients may avail of the process if the parties themselves request it and the lawyer feels that the safety of the party can be protected during the process.¹⁶⁰ If the party is adamant that they want to proceed, the lawyer should suggest that the client engage a mental health professional to assist throughout the process. Having such assistance may arguably help both the alleged perpetrator and the victim address the issues and move on. In a situation such as this, the collaborative lawyer must also be confident that he or she is competent to deal with what may potentially be a high conflict case and if he or she has any concerns in this regard, he or she should seek guidance and advice from a mentor who is more experienced in the area.

In Keet's study of collaborative practice, 6 out of 8 of the participants indicated that there were underlying power imbalances between them and their ex-spouse. Four of these had experienced some form of violence. For one of the participants, the process helped her reach a settlement that she was happy with and which she felt improved her relationship with her ex-spouse. For the other 3 participants who had experienced violence, they felt that it was not adequately dealt with. One of the difficulties in detecting or dealing with issues of domestic violence is that there can often be a reluctance on behalf of some participants to admit or acknowledge it.¹⁶¹

¹⁶⁰ Section 15 of the Uniform Collaborative Law Act 2009.

¹⁶¹ Michaela Keet, Wanda Wiegers, & Melanie Morrision, 'Client Engagement Inside Collaborative Law' (2008) 24 *Canadian Journal of Family Law* 145, 186-189.

Lawyers, as noted above, need to be sufficiently trained and competent to deal with the issues that arise in these types of cases.

Statutory obligations are now placed on collaborative lawyers in the US to make “reasonable inquiry” into whether the prospective party has a history of a coercive or violent relationship with another prospective party and the lawyer must continuously assess this throughout the case.¹⁶² The IACP has also developed additional procedures, including a “Relationship Questionnaire” that they recommend completing with prospective clients to determine whether there are issues to be concerned about. If issues arise during the initial assessment or during the questionnaire, they also recommend that a prospective party should be referred to a mental health professional to assess the matter further before proceeding with the case.

It is submitted that there is a significant difference for parties with a history of domestic violence between engaging in mediation and engaging in collaborative practice. In mediation, the parties attend on their own and are far more exposed to bullying and intimidation than in a process like collaborative practice where both parties have their lawyers present at all times. In addition, during the collaborative process there are two lawyers who are screening for issues such as this, giving an extra layer of protection, whereas in mediation the responsibility lies with one mediator.

While it would be naive to think that such intimidation would never occur within the collaborative process, it is submitted that a model where appropriate mental health experts were routinely engaged throughout the collaborative process in cases such as this, may, in fact, assist the parties ‘reverse what may have been many years of dominance and control.’¹⁶³ Whether the interdisciplinary model would become commonplace for cases involving domestic violence will largely depend on the costs involved and the willingness of the parties to address the underlying issues.

¹⁶² Section 15 of the Uniform Collaborative Law Act 2009. This will only apply in States that have adopted the Uniform Act.

¹⁶³ Women’s Aid —*Submission to the Family Law Reporting Committee* (January 2009) 5. Available at: www.womensaid.ie.

Similarly, it has to be acknowledged that while training is preferable for collaborative practitioners, it has to be noted that no training in this area is provided to trial lawyers where the stress of appearing in court can add to an already volatile situation and the challenges of reversing the “years of dominance and control” are routinely ignored.

3. Other factors affecting capacity

Identified factors which may affect parties’ ability to negotiate within the process are, for example, issues such as whether the parties have reduced capacity due to alcohol or drug addiction, mental health issues or if there is a history of, or ongoing, domestic abuse. In some instances, these issues may render the process unsuitable. However, with a “scaffolding”¹⁶⁴ mechanism in place (as noted in chapter 1), to assist these parties overcome these issues, the collaborative process may be appropriate. Ten parties that used the collaborative process in the resolution of their family law issues were interviewed as part of the empirical research undertaken for this thesis. In one case, the participant’s husband had mental health issues. The participant and her husband chose to use the interdisciplinary model and therefore her husband had the assistance of his psychiatrist as well as his lawyer throughout the process. The participant was of the view that this enabled her husband to cope with the separation and that it was significantly less traumatic for him than engaging in the court process.¹⁶⁵

Less easy to identify or assess are issues like the potential clients’ willingness to put the needs of their family before their own individual needs, the ability to listen to what the other party is saying and, if needs be, to reach a compromise. Additional factors which were identified by collaborative lawyers in the course of the research undertaken for this thesis, were emotional maturity, which was the most frequently cited factor,

¹⁶⁴ David Wood, Jerome S. Brenner and Gail Ross, ‘The role of tutoring in problem solving’ (1976) 17 (2) *Journal of Child Psychology and Psychiatry and Allied Disciplines* 89.

¹⁶⁵ Interview with CC2, May 2011. See Chapter 5.

followed by ability to negotiate and understanding. Other matters raised were the level of conflict in the relationship, the extent to which parties were able to prioritise their children, trust and the ability to communicate.¹⁶⁶ The capacity of parents to understand the needs of their children at a time of family transition will also affect their ability to ensure that their children's welfare and best interests are addressed. This capacity will also impact on their willingness to engage a child specialist and to hear the voice of their children.

Tesler also refers to the importance for lawyers in not dealing with what she calls the "shadow client", the shadow client being the client that is perhaps too emotional at the time to give clear instructions or to act in a logical manner. 'The shadow client', she asserts, 'is the one most often being represented by conventional divorce lawyers in the slide towards the courthouse'¹⁶⁷. She refers to clients as being 'gripped by a shadow-state emotion, with biochemically diminished ability to weigh options'¹⁶⁸. She refers to these clients being "flooded" when they are overcome with this emotion and that both the collaborative lawyer and the client need to recognise when this is happening. They must, she asserts, take time to overcome this "flooding" so that the lawyer does not take instructions from a client who is in that state but that he or she waits until the client has returned to their 'highest-functioning self'¹⁶⁹ before proceeding. She points to the importance of recognising instances of when this "shadow client" may appear, perhaps during the four-way meetings or at other times in the process and that the client should always be given time to overcome this emotional state before any further action is taken or decisions made.

4. Capacity in mediation *versus* capacity in the collaborative process

¹⁶⁶ These factors were established through an analysis of questionnaires sent to collaborative lawyers in Ireland See chapter 5 p.272.

¹⁶⁷ Tesler, (n 17) 83.

¹⁶⁸ *ibid* 30.

¹⁶⁹ *ibid* 29.

An important factor in this pre-collaborative screening and assessing capacity to participate is the co-operation of the other collaborative lawyer in the case. It is essential that there is trust between the lawyers so that if a colleague believes that their client is not suitable for the process or does not have the capacity to participate, that this is flagged at the outset. It has already been noted that it is not in the interests of the parties themselves or their lawyers to engage in the process if there are reasons to believe that it is not going to be successful. Prior to the first four way meeting, the collaborative lawyers will also contact each other to discuss the case, point out any issues that are of particular concern for their respective clients and plan how these issues will be dealt with through the process. This step must not be overlooked. Having undertaken research with parties that used the process and with collaborative lawyers for the purpose of this thesis, it is evident that such preparation by the lawyers is central to the success of the process and is what ultimately distinguishes collaborative from ordinary lawyer negotiation.¹⁷⁰

A collaborative lawyer's duty to screen and assess capacity is similar to the duty imposed on mediators. However, as noted above in relation to domestic violence, collaborative lawyers have the reassurance of knowing that the participants are also being screened by a second lawyer, thus reducing the burden compared to that of a mediator.

B. Disclosure

The ethos of the process is that both parties will be honest and upfront in relation to the financial issues. Tesler notes that most clients will have 'a fairly clear sense of their partner's fundamental fiscal honesty'¹⁷¹. However, Cameron has cautioned that '[i]f your client does not know the extent of the family assets and has concerns that the other spouse will not fully disclose

¹⁷⁰ Interview with CL6, May 2011.

¹⁷¹ Tesler, (n 17) 211.

all family assets, then the case should be screened out of Collaborative Practice'.¹⁷²

Again, when compared to the role of a mediator, a collaborative lawyer, in a case where there is the required trust between the lawyers, has the reassurance of the fact that the other collaborative lawyer is also scrutinising the clients' financial records. However, in contrast to mediation, there are additional disclosure requirements in collaborative. Lawyers are obliged to disclose what Menkel-Meadow has referred to as the "settlement facts" as distinct from legal facts. These settlement facts may be issues 'which either go to the underlying needs, interests, and objectives of the parties—why they want what they want in a dispute—or such sensitive information as financial information, insurance coverage, trade secrets, future business plans that may affect the possible range of settlements or solutions but which would not necessarily be discoverable in litigation'.¹⁷³ How far does the need for candour extend? And is clarifying this at the outset both possible, and indeed a requirement of ensuring informed consent?

Separating couples engaging in the collaborative process need to be aware that they will not have access to the courts to seek Orders for Discovery or maintenance during the course of the process. However, in examining the process in Ireland, Affidavits of Means are exchanged and it is agreed that these affidavits will withstand the breakdown of the process and will be used in the event that the matter goes before the court. This helps to ensure that clients are forthcoming with the required information. Also, as noted earlier, separating parties have the option of engaging an independent financial expert to prepare a report.

On discussing the issue of discovery within the court process, one of the lawyers who contributed to the research undertaken by Resolution questioned whether lawyers were seeking extensive and court ordered

¹⁷² Cameron, (n 6) 152.

¹⁷³ Carrie Menkel-Meadow, 'Ethics in Alternative Dispute Resolution: New Issues, No Answers From The Adversary Conception of Lawyers' Responsibilities,' (1997) 38 S. *Texas Law Review* 407.

discovery in cases for ‘the client’s benefit or to cover our own backs’.¹⁷⁴ For lawyers, there is a certain element of security in knowing that an order has been made by the Court. The onus is then on the party furnishing the documentation to comply. Once this information has been received, nothing further may be gained from the client’s perspective but the lawyer feels they have been thorough in their preparation.

C. Legal advice

In practice, what appears to vary within the process is the extent of the actual legal advice given to clients at the initial meeting. As noted earlier, some collaborative lawyers are of the view that the client should not be unduly influenced by what may happen in the event that the case is taken before the court. Others, as is evidenced by the research undertaken for this thesis, clearly believe that it is important that the client know their legal entitlements prior to making any concessions within the process and that this is part of ensuring informed consent.

In the context of the research undertaken for the purpose of this thesis, four out of the ten Irish participants interviewed, who used the process to resolve their family law issues, expressed the view that they were uncertain about their legal entitlements, with one indicating that she was probably advised but that such advice should be in writing¹⁷⁵. While acknowledging that “flexibility” is heralded as a fundamental part of the process, it would appear that such discrepancies in the way the process is dealt with by lawyers may result in quite different experiences for clients. This built in legal advice would appear to be the element that distinguishes negotiations within the collaborative process from those undertaken by separating parties who opt for mediation and it has been referred to by the Association of Collaborative Practitioners¹⁷⁶ as ‘an integral part of the process.’¹⁷⁷

¹⁷⁴ Sefton, (n 12) 39.

¹⁷⁵ Interview with CC10, August 2011.

¹⁷⁶ The national body for collaborative lawyers in Ireland

D. Confidentiality & Privilege

Concerns had been raised by critics of the collaborative process as to the extent to which discussions held were protected by the terms of the contract entered into between the lawyers and the clients and the participation agreements that form part of the process¹⁷⁸. The Supreme Court of British Columbia has ruled on this issue, and held that parties on entering the process agree to abide by a different set of rules. In the case of *Banerjee v Bisset*¹⁷⁹ the parties had signed a participation agreement and attended one four-way meeting at which certain issues were discussed. However, Ms. Bisset terminated the process after the first four-way meeting. Mr. Banjeree brought an action seeking a declaration that the agreement they had entered into at the four-way meeting was a binding agreement. In his action he sought to use notes taken, including his lawyer's notes, from the four-way meeting.

The court, having considered the matter, held that in signing the participation agreements:

‘... the parties agreed to have a confidential process; they agreed to forgo access to the court unless either or both of them withdrew from the collaborative law process; and they agreed that no agreements would be enforceable unless they were agreements in writing. They also, necessarily, agreed to forgo disclosing negotiations which stopped short of a written agreement for the purpose of trying to prove that an oral agreement was made and should be enforced. In other words, they agreed to a different set of rules than apply to normal litigation.’¹⁸⁰

In the US the issue of confidentiality and privilege have been provided for by statute under sections 16 and 17 of the Uniform Collaborative Law Act.

¹⁷⁷ The Association of Collaborative Practitioners <www.acp.ie>

¹⁷⁸ Christopher M. Fairman, ‘A Proposed Model Rule for Collaborative Law’ (2005) 21 *Ohio State Journal on Dispute Resolution* 73, 84.

¹⁷⁹ 2009 B.C.L.R. 2d. 1808

¹⁸⁰ *ibid* para. 19.

Section 18 of the Act provides that this privilege does not extend to evidence or information that would otherwise have been discoverable outside of the collaborative case, for example tax returns which were in existence prior to the collaborative process taking place are not subsequently privileged because they are used during the process. The privilege will not apply where there are any threats made to commit a crime or engage in any criminal activity, abuse or abandonment of children or in cases where it is being used to prove or disprove claims of professional negligence. Further protection is provided under section 17 (c) which provides that if a court, after a hearing held *in camera* finds that the “ need for the evidence substantially outweighs the interests in protecting confidentiality...”¹⁸¹, then issues may be disclosed.

As noted earlier, at present, there is no specific Act in Ireland which provides for confidentiality or privilege within the collaborative process and the LRC have not recommended a Collaborative Law Act. Collaborative lawyers are thus relying on section 9 of the Family Law (Divorce) Act 1996 as already outlined.

E. Safeguards and Legal Certainty

Parties to a participation agreement may choose to terminate the process at any time, without explanation, and proceed through the court process. In this way, the collaborative process is similar to mediation. In certain collaborative cases, the parties may have agreed in advance, that should the process not be successful, reports prepared by any additional experts may be used in subsequent court proceedings. This would require the consent of both parties and the relevant expert.

However, terminating the collaborative process has the additional effect of disqualifying the lawyers. It has been alleged that a client may engage in the process and terminate simply to cause a particular lawyer to be disqualified. In any case, be it a collaborative case or a case which is intended to proceed before the court, if a client wishes to disqualify a particular lawyer from

¹⁸¹ S 17(c) of The Uniform Collaborative Law Act and Rules 2009.

acting for their ex-spouse all that is required is that they seek advice from this lawyer thus creating a conflict of interest. If parties are intent therefore on removing a particular lawyer, this would seem to be a more straightforward way of ensuring they cannot act, rather than engaging in the collaborative process.

Is it a case, however, that a client may enter into the process merely to find out certain information? Arguably, information obtained cannot be used in any subsequent court proceedings; however, a particular client may be able to get an insight into the way his or her ex-spouse or partner is going to approach a case. This, again, highlights the importance of both collaborative lawyers screening the clients as to their suitability for the process and the client's own knowledge of how honest their ex-spouse is likely to be in the process. Once a lawyer has clearly explained everything to a client, it is the client's decision as to whether they feel comfortable to engage in the process.

Unlike mediation, once an agreement is reached in the collaborative process, the clients' lawyers are on hand to incorporate the terms into a legally binding Deed of Separation or proceedings can be issued on consent to rule the agreement as part of a consent Judicial Separation or Divorce. This provides legal certainty in that everything is finalised pending approval by the court.

F. Low income clients

In the US, under the UCLA, exceptions are made to the "imputed disqualification" for low income clients in that another lawyer within the law firm can represent them if the process fails. This ensures that they are not left without representation. The Legal Aid Board in Ireland offers clients collaborative practice as an option when they are seeking to resolve their issues. The Board does not appear to have a specific policy on what happens if the process breaks down, but it is expected that either another law centre would represent the client or that, similar to the US, an exception would be made to allow another solicitor within the same law centre to represent

them, provided matters from the first collaboration were kept strictly confidential between the first solicitor and the client. As noted earlier, in a number of cases, private solicitors have agreed to take on collaborative cases for clients at a reduced fee or have entered into agreements where fees can be paid over a period of time.

However, it is not possible to engage in the process without being represented by a lawyer and thus many people may not be able to afford to separate this way. In today's financial climate, many parties are self-represented and are therefore relying on the Judge to ensure that their agreements are fair and that proper provision is made.

G. Proactive approach to Ethical Standards

While the collaborative process has faced much criticism and concerns have been raised regarding the ethical issues surrounding the process, Schneyer comments that the collaborative law movement has 'quickly developed an infrastructure or "private legal system" to govern the negotiation process that is promising and surpasses anything the mainstream bar has produced'¹⁸². He is of the view that the 'mainstream consensus that CL practice is not unethical *per se* is a bow in the direction of client autonomy.'¹⁸³

The IACP, the umbrella body for collaborative lawyers, first developed Ethical Standards for collaborative practice in 2005. Since then they have continued to address the issue of ethics in collaborative practice and have appointed a Standards Committee to keep this matter under review. The ethical guidelines which they set down, following extensive consultation with experienced collaborative practitioners from across the disciplines of

¹⁸² Ted Schneyer, 'The Organized Bar and the Collaborative Law Movement: A Study in Professional Change' (2008) 50 *Arizona law Review* 289, 334.

¹⁸³ *ibid.*

law, mental health and financial services, are intended to act as a reference guide for collaborative practitioners. These guidelines are voluntary guidelines and the IACP is not in a position to police collaborative practitioners or to impose sanctions for failure to comply. However, as noted by Dr. Macfarlane in her research, collaborative practitioners in local groups monitor the actions of members in that group and a practitioner who is not acting in a collaborative fashion will be expelled from the group.

The IACP acknowledge that the '[e]thical Standards do not preempt (sic) the ethical standards of various disciplines; rather, they supplement them by addressing unique challenges posed by Collaborative Practice'. They invite collaborative practitioners to use 'these Standards intelligently as part of practice group membership expectations, thereby contributing in a particularly effective way toward fostering a consistent, shared understanding of what it means to be a competent Collaborative practitioner'¹⁸⁴.

The standards address issues of competence of collaborative practitioners, and acknowledge the need on occasion for collaborative practitioners to seek assistance for their clients from other professionals, as required. They also deal with issues of confidentiality, conflict of interest and the scope of the advocacy provided within the process so that clients can make an informed decision, having been advised of all methods available to resolve their dispute. They provide that collaborative lawyers 'shall assist the client in establishing realistic expectations in the Collaborative process and shall respect the client's self determination; understanding that ultimately the client(s) is/are responsible for making decisions that resolve their issues.'¹⁸⁵

The issues of the disclosure requirements, the minimum elements of a participation agreement, the specific obligation to obtain consent to share information with other professionals if and as required and the terms upon which the process may terminate or under which the parties may choose to

¹⁸⁴ The most updated version of the IACP Ethical Standards set down for collaborative practitioners is available on their website www.collaborativepractice.com.

¹⁸⁵ Section 5. Scope of Advocacy. The most updated version of the Ethical Standards set down for collaborative practitioners is available on their website www.collaborativepractice.com.

withdraw are also addressed. The standards also go further in specifying the ethical standards that apply to neutrals within the process, the coaches and child specialists.

The issue of ethics during the collaborative law process was also addressed under section 13 of the Uniform Collaborative Law Act and Rules 2009¹⁸⁶. Section 13 provides that nothing in the Act alters the professional obligations and responsibilities that the lawyers would already be subject to by reason of being licensed to practice law. This section also confirms that both the lawyers and any other professionals involved in the collaborative process are still under obligation to report any issues of ‘abuse or neglect, abandonment, or exploitation of a child or adult under the law of this state’¹⁸⁷.

XV. Recognition of the limitations of the collaborative model

Macfarlane in her research noted that collaborative lawyers need to be aware of the limitations of the process. They need to be alert to the fact that not every client is suitable. Additionally, not every lawyer that undergoes collaborative training will practise as a collaborative lawyer. Some will continue to take a positional approach.

Lawyers need to be aware of their obligations to manage the process for clients. The lawyers need to develop relationships with the coaches and to learn to work with them in a way that best benefits the clients. However, it has been acknowledged throughout the research that the lawyers need to remain in control of the process and to ensure that negotiations move at an appropriate pace.

The research has shown that as lawyers become more experienced in the use of the collaborative process, they become more skilled at screening cases. It is necessary for lawyers to continue to up-skill and to attend additional training courses to keep up with developments in the process.

¹⁸⁶ Uniform Collaborative Law Act and Rules 2009.

¹⁸⁷ Section 13 (2) of the UCLA 2009.

XVI. Voice of the Child within the Collaborative Process

A. The Role of the Child Specialist

In addressing the research question as to the role that children play within the collaborative process and the extent to which their rights under article 12 of the UNCRC are facilitated, it is notable that the collaborative process provides a unique opportunity for the separating parties to put the needs and wishes of their children at the centre of the divorce/separation process by engaging a child specialist. Gamache, a leading child specialist, notes that ‘[r]esearch indicates that the fact that a child has parents who are divorced tells us very little about the well-being of the child. In sharp contrast, knowing that a child has been exposed to prolonged conflict and/or parental depression tells us a lot’¹⁸⁸.

The child specialist is a licensed mental health professional with particular training and experience in family systems, child development, and the needs of children during and after a divorce.¹⁸⁹ His or her role within the collaborative process is very different from a psychologist/ social worker employed as part of the court process. In a court situation these professionals are employed to gather evidence and to prepare a report that will assist a judge in making a decision based on “the interests of the children”. In contrast, the child specialist employed as part of the collaborative process is “a neutral advocate for the children who gives a voice to the children’s interests.”¹⁹⁰ He or she talks to the children in an age appropriate manner, ascertains their views and, with their consent, brings any issues that the children would like addressed to the attention of their parents in a neutral way. The input from the child specialist is short-term

¹⁸⁸ Gamache, (n 58) 194.

¹⁸⁹ Pauline Tesler and Peggy Thompson *Collaborative Divorce: The revolutionary new way to restructure your family, resolve legal issues and move on with your life* (Harper Collins 2007) 48.

¹⁹⁰ Gamache, (n 58) 213.

and focused with a view to “scaffolding” the child through the separation/divorce process.

Children whose parents are separating can experience the need to maintain a sense of loyalty to each parent.¹⁹¹ A child specialist provides the children with an avenue to express their concerns. This was a common theme expressed by the young adults interviewed for this thesis – a fear of upsetting either parent or of being disloyal such that they frequently had no one to talk to about what was happening. Wolke comments that ‘[t]he child specialist can provide a safe place for the children to share their story, ask questions and discuss their concerns.’¹⁹²

As a general rule, child specialists are not engaged in every case involving children and may only be brought into the process when the coaches or lawyers become aware of issues that are of concern or where the parties are perhaps at an impasse in relation to issues of concern to the children. At this point the lawyers and/or the coaches will speak to the parents about the role of the child specialist and, if both parents agree, the child specialist is brought on board. The difficulty for children, once again, therefore, is that there has to be an awareness of their needs by their parents; parents remain the gatekeepers and the same paternalistic approach is evident.

While the procedure may vary, in general the child specialist is contacted by the parents’ lawyers. S/he will normally meet with the parents on their own first and establish what they perceive to be the issues. Wolke,¹⁹³ a child specialist, has indicated that she can often pick up on additional issues from listening to the parents describe the relationships within the family. In general, the children are seen together. She assesses the dynamics within the family, how the children are dealing with the conflict, what the relationship is like with each parent and with their siblings, their coping mechanisms, etc. She uses toys, playing cards with questions, emotion cards, etc., to help the children express their feelings. Wolke will then speak to the children individually as sometimes they may not wish to say things in front of

¹⁹¹ *ibid* 214.

¹⁹² Gamache, (n 58) 214.

¹⁹³ Dr. Gertrud Wolke, Psychologist, Child Specialist, Saaldorf, Germany.

another sibling. At the end she will ask them if there are things they would like her to tell Mom and Dad for them.

At the end of the consultation, the therapist takes notes for her own records but does not prepare a formal written report. S/he will normally speak to the coaches and/or the lawyers first to let them know if there are any issues of concern and it is they who then decide on how best to discuss this with the parents. The child specialist will then attend the next meeting and relay the information to both parents at the same time so that there can be no misinterpretation of what is said from one to the other.

Comparing the role of the child specialist and the section 47 reporter frequently employed as part of the court process, the child specialist role is as an advocate for the child, not to assist the court with determining best interests, nor to provide a forum for the parents to convince a court or judge that they are the most worthy parent. Additionally, the fact that formal reports are not prepared avoids the delays and costs normally incurred where written reports are prepared and '[h]aving only one conversation minimizes the likelihood of misunderstanding.'¹⁹⁴

Gamache says that hearing this feedback from their children can raise parents' awareness and help them to understand that '[f]amilies are dynamic systems of interrelated relationships. Parents can learn how they contribute to the very conflicts by which they feel victimized. When both parents become aware of their contributions to this conflict, they can begin to change the system so as to reduce it'¹⁹⁵. The child specialist is a neutral advocate for the child. This neutrality is important. It is essential to convey the child specialist's independent nature to parents who may be afraid of elements of bias and also for the children to be aware of this independence, as the child specialist has to be their voice.

During the research carried out by Resolution in the UK, one lawyer commented that engaging in collaborative practice:

¹⁹⁴ Gamache, (n 58) 218.

¹⁹⁵ Susan Gamache, 'Collaborative Practice: A New Opportunity to Address Children's Best Interest in Divorce' (2005) 65 4 *Louisiana Law Review* 1455, 1484.

‘... has made me think a bit harder about the voice of the child. And to what extent the parents are actually listening to what the child **isn’t** saying. It’s made me think a bit harder about involving a child specialist. Because often it is covered up.’¹⁹⁶

By hearing issues which the children have raised, the parents may then begin to address these issues, in so far as is possible, to assist their children through the separation process. However, as with any intervention on the part of children, parents need to be willing to listen and where possible and appropriate, to change in certain aspects the way they are dealing with the conflict so as to improve the situation for their children.

Research into the frequency with which client specialists are engaged was undertaken by the IACP. The results revealed that, compared to what may be expected, child specialists were more likely to be engaged by clients with lower income levels. This is not supporting the common view that only wealthy clients can afford additional experts. Instead, a willingness to recognise the need for such expert may be a more useful barometer than a client’s financial standing.¹⁹⁷

Fifteen young adults whose parents separated when they were children were interviewed as part of the research undertaken for this thesis. The role of the child specialist in collaborative practice was outlined to them and they were asked if they thought that having such an expert would have been beneficial to them during the course of their parents’ separation. The overwhelming view was that it would have been beneficial to have someone to talk to; however, 27% indicated that they did not think that their parents would have agreed to engage a child specialist.¹⁹⁸

B. The Child Specialist and Adult children

While there has been much discussion about the role of children and concerns raised about hearing their voices in matters that concern them, the

¹⁹⁶ Sefton, (n 12) 49. (Emphasis added).

¹⁹⁷ Connie Healy, ‘The Child Specialist’ *The Collaborative Review* (2012) 22, 23.

¹⁹⁸ See chapter 5.

debate has generally centred on children up to the age of 18 years of age. In practice lawyers have a tendency to be of the view that children of a certain age, perhaps from 15 upwards, will often decide for themselves as to where they want to live and the emphasis tends to be on making arrangements for the younger siblings. However, the research undertaken with young adults for this thesis clearly indicates their desire for structure. Even in their teenage years they want their parents to make the decisions and many were of the belief that, without this element of structure, they tended to choose the perceived “easier option” of perhaps spending more time with the parent who imposed less discipline or of not making the effort to see the non-resident parent. These young adults pointed to difficulties that this caused for them. For some, they dropped out of school; others sought refuge in drugs and alcohol and as a result they often lost their relationship with one, if not both, parents. Particularly because of societal changes, in that older, even adult, children are now living at home for longer than they may have done in the past, it is important that they are considered and included in decisions which will impact on them.

Additionally, for children who have turned 18, there is nowhere to turn if problems continue. What was evident throughout the research undertaken with young adults as part of this thesis was that they still considered themselves very much a child of their parent, consistently referring to the fact that they were “just a child”, with the expectation being that regardless of their chronological age, even when over the age of 18, they expected their parents to protect the family unit¹⁹⁹. Therefore, it is submitted that although it has been questioned as to whether such specialist should continue to be referred to as a “child specialist”, the term is correct in defining the relationship rather than the pure chronological age and such specialists are addressing the issues within a family context.

¹⁹⁹ Berry Mayall, ‘Negotiating Childhoods’ (Economic and Social Research Council, 2005) Programme (ref. No. L129 25 1032) Available at <http://www.esrc.ac.uk/my-esrc/grants/L129251032/read>.

This issue was addressed by child specialists Bell and Behram²⁰⁰ at a workshop held during the IACP annual forum in Washington, October 2010. They outlined the many issues that may be of concern to these children: loss of a family unit; loss of the family's role in the community; loss of the parental unit; loss of parent as parent; loss of family home; and loss of a feeling of security, in that this breakdown in their family challenges what they believed to be reality and this in turn causes insecurity in their own intimate relationships. Older children who may be away at college may be torn between a desire to stay away, a sense perhaps of denial and a need to be there for younger siblings who may be still living in the midst of the conflict in the family home.

The child specialists also referred to the boundary issues that may arise when one parent tends to rely on the older children as confidants and the fact that there may be a tendency for parents to overburden older children with their own emotional issues. Many times parents will be totally unaware that they are even doing this. By facilitating a process whereby these older children also get to speak to a child/family therapist, these children are given an opportunity to voice their concerns from issues about the younger children to issues such as their own emotional reaction to the breakdown. Will they be able to remain in college, will there be sufficient money to pay fees, where will they spend Christmas? In general, children, even at that age, want their parents to take control and make decisions such as what is to happen at Christmas, rather than them feeling that they have to choose. They pointed to the fact that, in general, as children get older they begin to see their parents differently, as adults with faults. This process normally happens over a period of time but in a break-up situation, this happens overnight causing insecurity for the children involved.

The opportunity to engage a child specialist for these young adults is a means of providing support for families at a crisis point. Parents have a unique opportunity, through this process, to think about the impact of what

²⁰⁰ Allison Bell and Lauren Behram²⁰⁰ Workshop held during the IACP annual forum in Washington, October 2010.

is happening to them on their adult children. Chances are that no one will have had this discussion with them.

Other reasons may also emerge during the collaborative process as to why it may be necessary to speak to adult children. If parents are older when separating, these children may have genuine concerns about how their parents are going to cope, perhaps living alone after many years of marriage. Children may also have financial worries for their parents. All of these issues can be addressed in an organised manner by the child specialist.

XVII. Conclusions

In concluding the examination of the effectiveness of collaborative practice as a dispute resolution process, a number of questions have been answered. Firstly, why do clients want to engage in the process? Secondly, what is in it for the lawyers and finally has it been of any benefit to children?

Empirical research carried out internationally provides evidence that clients who have used the process are, for the most part, happy with both the process and the outcome. Concerns raised in relation to the disqualification clause do not appear to be borne out. Significantly, there is no evidence that weaker parties do less well. Importantly, many parties have noted the positive effects of learning to communicate in a different way. Opinion on the process has confirmed that in many respects it provides a bridge between mediation and the court process/ordinary lawyer negotiation where clients participate and have more control and yet are supported in relation to their legal rights.

Concerns continue about screening for domestic violence. Arguably, there is a reassurance in the fact that there are two lawyers carrying out this screening rather than one mediator. The difference, however, is that a mediator will have received training in this skill and the lawyers may not. If collaborative practice is to be undertaken by lawyers, particularly in cases where they do not have the additional support of mental health experts, then

they need proper training in screening and also in dealing with the emotional issues that may arise for clients.

Why would the lawyers want to engage in the process? The answer to that question may be less clear. Lawyers are trained to be adversarial. They are trained to concentrate strictly on the legal issues and arguments involved. Within the courts' system they can practise as they have always done, and in many cases with the support of counsel. It is, as commented on by Davy, both more straightforward and more profitable for lawyers to "cut to the chase" with the traditional system. It appears, however, that those who choose to practise in this way do it because they see it as a better way for the client. This issue will be addressed further in the context of the research undertaken for this thesis, as outlined in chapter 5.

Finally, are there benefits for the children of the relationship? It appears that there are still some barriers to children's participation, again because of the fact that the "system", i.e. their parents and perhaps the collaborative lawyers, remain the gatekeepers on whether they should be included or not. Research into the use of the process in the US was quantitative in nature and therefore did not give any insights into the differences, or not, that having a child specialist can make for the children. Further research is needed into this aspect of collaborative practice as the process develops and these children begin to develop their own relationships. In the meantime, it is hoped that the reduced conflict in their parents' relationship may help to make a difference.

CHAPTER 5: Exploring the Development of Collaborative Practice in Ireland

I. Introduction

Having outlined the collaborative process, its origins and development and the research carried out internationally¹ into the process in family law matters in chapter 4, this chapter will give an insight into the process in an Irish context. In addressing the research question as to the effectiveness of collaborative practice as a dispute resolution process in family law matters, this chapter will present the results of empirical research undertaken as part of this thesis, one of the aims of which was to assess the development of and effectiveness of collaborative practice in an Irish context. It also address the extent to which children participated in the process as evidenced through this empirical research (See Section IX. Voice of the Child within the Collaborative Process).

In view of the fact that it was not possible to source young adults whose parents had used the collaborative process, additional empirical research was carried out with a sample of young adults whose parents had separated when they were children. This was undertaken to address, more deeply, the views of young adults as to what they perceived of importance to them in terms of ‘participation’ and having a ‘voice’ in the decisions made by their parents at separation/divorce. These views are set out in Chapter 6.

As there is very little literature and no existing research into collaborative practice in a family law context in Ireland, this was an exploratory study

¹ Julie Macfarlane, ‘The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Case Study’ (Department of Justice Canada 2005) Available at www.justice.gc.ca; Mark Sefton, ‘Collaborative Family Law, A Report for Resolution’ (Resolution 2009); Linda Wray, ‘The International Academy of Collaborative Professionals Research Regarding Client Experience’ (IACP 11th Annual Forum, Washington, October 2010); Linda Wray, Susan Llyod & Ors, Report prepared by the IACP and Resolution, ‘Research regarding Collaborative Practice: A Comparison of Findings from the International Academy of Collaborative Professionals and Resolution’ (IACP 10th Annual Forum, Minnesota, October 2010)

aimed at beginning a discussion and laying the groundwork for future research.

The chapter will outline the questions addressed through empirical research and the methodology used in this empirical study. It will present the findings of both quantitative research (with collaborative lawyers and members of the judiciary) and qualitative research examining the collaborative process from the perspectives of key stakeholders in the family law arena, namely, the ultimate service users - clients that used the process in the resolution of their disputes, collaborative lawyers and litigators. For the purpose of this thesis, litigators are defined as solicitors and barristers who practise exclusively within the courts' system and do not engage in alternative methods of dispute resolution.

The chapter will also present the views of a number of parties who used the court process to resolve their disputes. However, this is not undertaken in a comparative manner as, with the exception of one participant whose case did not settle within the collaborative process and who later finalised matters in court, none of the parties had used both processes.

II. Questions addressed through Empirical Research

Inspired by assertions that collaborative practice provides a better, more “family friendly”² way of resolving conflict, this empirical research aims to explore these claims in an Irish family law context. It will address the extent to which the collaborative process has been used by separating couples in Ireland and their satisfaction or otherwise with the process. Questions addressed included whether outcomes achieved through the collaborative process are different from those determined within the court process and if so, in what way? Is there a need for such a process or whether cases can be settled as effectively by solicitors/barristers negotiating for clients within the

² Stuart Webb and Ron Ousky, *The Collaborative Way to Divorce: The Revolutionary Method that Results in Less Stress, Lower Costs, and Happier Kids- Without Going to Court* (Penguin 2007) 12.

adversarial process? To what extent were the views of the participants' children taken into account and were these children given an opportunity to participate directly? This empirical research also sought to address issues raised by critics of the collaborative process as detailed in earlier chapters, namely, that it denies clients the right of access to justice, that it is effectively only suitable for wealthy clients and that the disqualification clause places too much pressure on clients to settle their cases.

Additional questions addressed as part of the empirical research undertaken for this thesis focused on ascertaining the views of young adults whose parents had separated when they were children. Did they understand what it meant to participate? Did they wish to participate or express their views on the decisions being made? To what extent were they given an opportunity to participate? How, in their view, should participation be facilitated? To what extent did they think their parents were aware of the impact of the separation on them? What if any support services or assistance did they receive? The results of this aspect of the empirical research are detailed in chapter 6.

III. Methodology

Having examined the literature on research methodologies,³ it was decided that a mixed-method approach was the most appropriate way to answer the questions posed for analysis through empirical research.

A qualitative approach allows for an exploration of an in-depth perspective.⁴ Having examined qualitative designs to include ethnography which studies issues from a cultural perspective and ethnomethodology which focuses on the 'rules' that govern daily interactions – how individuals make sense of

³ Zina O'Leary, *The Essential Guide to Doing your Research Project* (Sage 2010); Jonathan Smith, Paul Flowers and Michael Larkin, *Interpretative Phenomenological Analysis, Theory, Method and Research* (London 2010); Catherine Marshall and Gretchen Rossman, *Designing Qualitative Research* (5edn, Sage 2011); Steinar Kvale, *InterViews: An Introduction to Qualitative Research Interviewing* (Sage 1996)

⁴ O'Leary, (n 6) 114.

everyday life⁵, it was determined that a phenomenological approach would be the most appropriate design because it allows a ‘detailed examination of human lived experience.’⁶

Each party’s experience of separation or divorce is unique in many ways and this research technique allows for these philosophical, and idiographic aspects of the participants’ experience to be interpreted by the researcher. Additionally, a phenomenological approach is a suitable technique when examining a small sample in each category of participants. Typically, researchers will interview between five and ten participants, as larger samples would not allow for in-depth analysis. This approach allows common themes to be identified across the sample by eliciting areas of convergence and divergence.⁷

O’Leary notes that the ‘product of phenomenological studies is phenomenological descriptions’ and that the ‘process of generating such descriptions generally involves sourcing people who have experienced a particular phenomenon’ through in-depth interviews until “‘saturation’ is achieved i.e. additional interviews no longer add new perspective.”⁸ In depth interviews were chosen as they provide, as described by Kvale, a ‘construction site of knowledge’.⁹ Specifically, semi-structured interviews were chosen as this method allows ‘the participant’s perspective on the phenomenon of interest ... (to) unfold as the participant views it (the emic perspective), not as the researcher views it (the etic perspective).’¹⁰

A specific topic guide containing both closed and open ended questions was designed, using social science research methods, for each category of participant. Pilot interviews were carried out to test the topic guides and changes were made accordingly. For example, the initial topic guide addressed demographic issues at the outset. On testing, it was decided that it

⁵ *ibid* 113-126.

⁶ Smith, Flowers and Larkin, (n 6) 32.

⁷ *ibid*

⁸ O’Leary, (n 3) 121.

⁹ Kvale, (n 3) 2.

¹⁰ Marshall and Rossman, (n 3)144.

was better to build rapport with participants before asking profiling questions. In designing these topic guides, efforts were also made to avoid ambiguous or leading questions and to recognise and bracket any potential subjective opinions affecting the data. (See Appendix A)

In all categories, full details of the research were given to the participants in advance of the interviews. All interviewees were volunteers and they were assured that they could choose to end the interview at any time. Consent forms were signed in advance of the interview (See Appendix B), either in person or consent was given by e-mail. All interviews were recorded and were transcribed. Interviews typically took from 30 minutes to one hour.

To gain an understanding of the development of collaborative practice nationally, quantitative methods were also used. Again, pilot studies were carried out and advice sought from experts in social science research methodologies prior to distributing the questionnaires and surveys. The questionnaires and surveys included both closed and open ended questions. Thus the quantitative research was undertaken from what O'Leary describes as a 'qualitative perspective with an acceptance of quantitative data'. This approach added breadth to the study and allowed for its representativeness to be tested through triangulation with similar research carried out internationally.¹¹

The results of the quantitative data will be outlined first, followed by a more in-depth analysis of the process as established through semi-structured interviews.

A. Quantitative Research

The quantitative research undertaken, designed using social science research methods, involved:

¹¹ O'Leary (n 3)129

1. An initial survey carried out at the Law Society Annual Family Law Conference (2009)¹² (See Appendix C)

Objective: To gain an overview of the use of collaborative practice amongst family lawyers generally.¹³

2. Questionnaires sent to all collaborative lawyers registered with the Association of Collaborative Practitioners (2010) and to all solicitors employed by the Legal Aid Board (2010)¹⁴ (See Appendix D)

Objective: The questionnaire, which was distributed nationally and which was more detailed, sought to elicit further, more in-depth information on the development of the process. This questionnaire was divided into two parts. Part A sought general information on the respondents' profiles. Part B addressed their use of and views on collaborative practice. For ease of analysis, participants were asked to complete different questions depending on whether they had used the process or not. This provided a basis from which to analyse replies as to the differences or similarities between those that had used the process in practice and those who had not.

3. A survey sent to a sample¹⁵ of members of the judiciary (2013)¹⁶ (See Appendix E)

¹² Permission was sought and obtained from the Law Society of Ireland.

¹³ This survey was undertaken without any prior knowledge of the extent to which any of these family law solicitors had trained in the collaborative process. Its aim was to assess the extent to which a random group of family lawyers were aware of, had trained in and had used the process.

¹⁴ With the permission of the Board of the Association of Collaborative Practitioners, questionnaires were sent in April/ May 2011 to all trained collaborative lawyers who are registered as members of the Association of Collaborative Practitioners in Ireland in order to obtain a broad nationwide perspective. In addition, permission was also sought from the Legal Aid Board to send this questionnaire to all solicitors employed by the Legal Aid Board in recognition of the volume of family law matters which they deal with on a daily basis. This research therefore presents a snapshot of collaborative practice in Ireland in 2011 as indicated by those who choose to respond.

¹⁵ Full details are outlined in the "Sampling" section on page 257-260

¹⁶ This survey was sent with the permission of the Presidents of the District Court, Circuit Court and High Court. The President of the District court selected 10 judges for the District Court sample. Unfortunately, the President did not indicate her reasons for selecting these

Objective: Self completing surveys were sent to a sample of judges seeking their views on mediation, collaborative practice and the extent to which the voice of the child is heard through the court process at present. Again, some questions were closed questions targeting specific issues and other questions were open ended giving respondents an opportunity to elaborate on their views of the process.

B. Qualitative Research (Semi-Structured Interviews)

In determining the effectiveness of any service, a key source of information has to be the service users themselves. Semi-structured interviews were therefore carried out with ten clients that used the collaborative process in the resolution of their disputes and with collaborative lawyers to get their perspective on the process and what changes, if any, using the process has meant for them in the way they practise. Because this process has faced criticism from the mainstream bar/legal profession, the research plan also necessitated interviewing litigators, previously defined as solicitors and barristers who practise within the adversarial system and who would not generally engage in any non-court based methods of dispute resolution, to establish their views.

In addition, as noted earlier, interviews were also undertaken with fifteen young adults whose parents separated when they were children (see chapter 6) and with a small sample of litigants, defined as parties who used the court process to resolve the issues in dispute.

In total, 51 interviews were carried out: ten with collaborative clients, eight with collaborative practitioners, eight with solicitors and barristers who use

particular ten judges. A random sample of 10 Circuit and 10 High Court judges were chosen.

the courts system, three with lawyers from the Legal Aid Board, five with litigants, fifteen with young adults and two with section 47 reporters¹⁷.

IV. Sampling

A. Quantitative Research

1. The survey taken at the Law Society of Ireland's Annual Family Law Conference was distributed to all of the delegates attending (2009).¹⁸
2. In constructing a sampling frame for a nationwide questionnaire, the target population were lawyers trained in the collaborative process. The only way of identifying this group was to seek permission from the Association of Collaborative Practitioners (ACP), the umbrella group for collaborative lawyers in Ireland. Permission was kindly obtained from the ACP to send the questionnaire to all collaborative lawyers who are registered as members of the Association. When the collaborative process first became available in Ireland, the Legal Aid Board were proactive in organising training for their own solicitors and for private solicitors who wished to avail of training. In view of the volume of family law undertaken by the Board's solicitors, permission was also obtained from the Board to send this questionnaire to all of the Board's solicitors.
3. As already outlined, a survey was also sent to a sample of members of the judiciary.¹⁹

¹⁷ The interviews with the section 47 reporters were not analysed through Nvivo (See section on analysis) but were used to provide background and insight for my earlier chapter on children in the courts' system.

¹⁸ Permission was obtained from the Law Society, in advance, to include a copy of the survey in each delegate's conference materials.

¹⁹ See (n 16)

B. Qualitative Research

The first category of interviewees was participants who had used the process and therefore this was a purposive sample.²⁰ In February 2010, I attended the Annual General Meeting of the Association of Collaborative Practitioners in Ireland and spoke to key informants within the Association in order to secure their cooperation. I addressed the meeting, outlined the framework of the research and sought assistance from all collaborative lawyers who were in attendance in an effort to secure a broad based sample. I requested that collaborative lawyers consider speaking to clients who had used the collaborative process about participating in the research. The importance of a balanced view was explained and thus the need to speak to clients who had resolved matters through the process and also to clients for whom the process did not work. At this meeting I also made contact with a representative from the Legal Aid Board who indicated that they would secure the co-operation of the Board to enable me to seek their solicitors' views.²¹

Subsequent to the Association of Collaborative Practitioners AGM, five collaborative lawyers reverted with names and contact details of clients who were willing to participate. These participants were contacted by telephone. Further information in relation to the research was sent to them by e-mail. Interviews were arranged with ten participants at their convenience. Some of the interviews were carried out face to face and other participants, because of their schedules, preferred to speak over the phone.

The second category of participant, collaborative lawyers, was again a purposive sample²² in that they were interviewed because of their experience in using the process. Some of these practitioners were known to me, as experts in the field, prior to my attendance at the AGM and others I met on the day of the AGM. Eight collaborative lawyers were interviewed.

²⁰ Purposive sampling is employed when non-random samples are chosen with participants being selected because of their experience of a particular phenomenon.

²¹ Permission was confirmed by Mr. Frank Caffrey of the Legal Aid Board.

²² See (n 20). These collaborative lawyers were chosen because of their experience of using the process in practice.

These ranged from practitioners who had only used the process in one case, to practitioners who had up to 30 collaborative cases. All interviews were carried out face to face.

The third category of participants was solicitors and barristers that typically practise within the court system. This was a handpicked sample based on my own knowledge of the key family law practitioners. O’Leary notes that “‘experts’ or ‘insiders’ (are often)...precisely the right people to help to answer your research questions.”²³ Three solicitors and five barristers were interviewed. All interviews were carried out face to face.

The fourth category of participants was young adults whose parents had separated when they were children (outlined in chapter 6).²⁴ These young adults were volunteers recruited through an e-mail sent to all registered students over the age of 18 at the National University of Ireland, Galway with the approval of my thesis supervisor, Ms. Marie McGonagle and the consent of Dr. Pat Morgan, Dean of Graduate Studies. While sending students a self-completing survey was discussed initially, it was decided that it was more appropriate to ask students to undergo a semi-structured interview to gain a more in-depth perspective. On receipt of an e-mail from a student indicating a willingness to participate, I rang the participant to give a more detailed explanation of the focus of the research. Interviews were then arranged at a time and location convenient to the students.

The final category of participant was litigants, defined as separating parties that used the court system in the resolution of their family law issues. These litigants were sourced through a mixture of volunteers and also through snowball sampling, where one participant referred another. Five litigants were interviewed. Again, some of the interviews were carried out face to face and others preferred, because of their schedules, to speak over the phone.

²³ O’Leary, (n 3) 169.

²⁴ It was decided to interview young adults, over the age of 18 because of the difficulties in obtaining participants who are under 18. These difficulties had been encountered by previous researchers namely Diane Hogan, Ann Marie Halpenny and Shelia Greene, ‘Children’s Experiences of Parental Separation’. Children’s Research Centre, Trinity College Dublin, 2002 who described their experiences as “protracted and complex”. This they attributed to the private nature of such issues 17.

V. Analysis

The interviews were recorded, transcribed and were analysed using Nvivo Version 10. All interviews were analysed through the lens of Interpretative Phenomenological Analysis (IPA). As noted earlier, phenomenology was chosen because it allows a detailed examination of human lived experience.²⁵

The analysis involved a thorough seven step process beginning with open coding of the themes in each interview and assigning clear labels. Phase 2 involved reordering these codes into categories of codes for each participant group. In phase 3, these codes were coded on into sub codes so as to better understand the meanings embedded therein; for example, where the participant refers to a general theme of participation, what does participation actually mean to that interviewee? Does this differ from another interviewee's interpretation of participation? In phase 4, the themes identified were then divided into topic guide themes – detailing issues that the participants were specifically asked about in order to address the key research questions and emergent themes; themes that emerged as important to the participants themselves during the course of the interviews. This was carried out in order to minimise the risks often associated with qualitative research of arguably predictable findings being categorised as emergent themes. Background profiling information was compiled for each participant so that topic guide themes and emerging themes could be assessed across factors such as gender, age, and socio-economic and socio-cultural backgrounds. These themes were then examined through the lens of the theoretical framework underpinning the research, for example the existing literature on “participation” or “dispute resolution” (see chapter 1). The final phase involved validating the data once again to ensure that the findings were a true account of the participants' contribution to the research based on the hermeneutic circle, working back and forth looking at particular comments made, individually, and then examining these comments in the context of the interview as a whole.

²⁵ Smith, Flowers and Larkin, (n 3) 32.

The quantitative data was analysed through Excel. The data was examined through reflexive analysis noting issues of cause and effect through dependent and independent variables. Inferential statistics were used to draw conclusions between differential variables, for example, the impact of mediation training on the lawyer's use of the collaborative process, the importance of practice group membership etc. The results of the quantitative analysis were used to question and highlight areas of convergence and divergence between this data and the information obtained through qualitative methods. Responses to open ended questions in the nationwide questionnaire (qualitative) were analysed through Nvivo coding for themes as per the same seven step process for qualitative analysis outlined above. Finally, the validated themes and statistical analysis were synthesised into a cohesive and coherent findings chapter.

VI. Limitations

Before examining the results, it is necessary to acknowledge the limitations of the empirical study. As noted above, because there is no register of parties who have separated and no record of the process used, it was not possible to select a random sample. I had to rely on referrals from collaborative practitioners, other participants and my own personal knowledge of key family lawyers. Therefore, it has to be acknowledged that clients' experiences may vary depending on the lawyer used. In addition there may have been an element of selection bias in the clients that the lawyers contacted. However, of the ten participants interviewed that used the collaborative process, eight settled within the process. Though not being presented as being representative, the settlement rate within the sample interviewed is similar to the settlement rate within the process as borne out by research internationally.²⁶ All of the parties taking part in the interviews had been married and used the process to resolve the conflict associated with marital breakdown.

²⁶ Macfarlane, Sefton, IACP (n 1)

While it was envisaged that the research would include the views of young adults whose parents used the collaborative process and/or who had had been provided with the services of a child specialist, it was not possible to source such participants.²⁷ However, in an effort to address this, the role of the child specialist was explained to all the young adults interviewed and their views sought as to whether they felt that having such assistance would have been beneficial or not (See chapter 6).

As noted earlier, the findings of this research are being presented as representing the views of the particular participants interviewed and are not being held out as being representative of all clients who used either the collaborative process, mediation or the court process or of all young adults, nor is it being presented as being representative of the views of all the professionals in any particular category.

VII. An Overview of the Development of Collaborative Practice in Ireland: Quantitative Analysis

1. Survey taken at the Annual Family Law Conference

Collaborative practice first became available as an option for separating couples in 2004. The results of the initial survey held at the Law Society of Ireland²⁸, revealed that 48% of the solicitors that chose to reply had undergone collaborative training but only one respondent had used the process. Thirty one per cent of those that had trained were members of collaborative practice groups. No collaborative lawyers had used the interdisciplinary model. One respondent mentioned difficulties arising due to the lack of trained specialists in their area. This brief survey also revealed

²⁷ As there is no external register of cases which were settled through the collaborative process, collaborative lawyers were the gatekeepers in terms of accessing participants. Though a few collaborative lawyers indicated that they had used child specialists, it was not possible, despite repeated requests to speak to participants that had used a child specialist or to young adults who had the benefit of such assistance.

²⁸ In 2009 permission was obtained from the Law Society. There were 106 delegates at the conference and 27 chose to reply to the survey.

that it was the most experienced family lawyers who had undergone collaborative training.²⁹ This is consistent with the results of the more extensive quantitative research undertaken as part of this study and with research internationally.

2. Nationwide Questionnaire

The results presented in this section are based on an analysis of forty one questionnaires received from collaborative lawyers nationwide, detailing the profile of lawyers who have trained in the process, what distinguishes those who have been successful in encouraging clients to engage in the process from those that have not and how practitioners address important elements of the process, for example, screening for suitability, the disqualification clause, costs and over-all satisfaction with the process.³⁰

A. Profile of Collaborative Lawyers

Firstly, examining the profile of the respondents to this questionnaire, it is notable that the practitioners who have trained in the process are experienced family lawyers.³¹ On average, approximately 54% of these practitioners' workload is in the area of family law. This figure, however, was influenced by the fact that 13 of the respondents were employed by the Legal Aid Board and their workload frequently consists of up to 95% family law. Adjusting for this influence, the average family law caseload amongst private collaborative lawyers was 40%. Three quarters of the respondents were female.³²

The majority of the respondents (32%) had undergone collaborative training in 2008. The International Academy of Collaborative Practitioners (IACP),

²⁹ Qualified on average for 17 years.

³⁰ The results from this aspect of the quantitative research have been published. See Connie Healy, "On the plus side, I empathise more with my clients. On the negative side, I empathise more with my clients!" – Training as a Collaborative Lawyer: An Empirical Analysis' (2013) (3) *Irish Journal of Family Law* 70.

³¹ On average the respondents had been qualified for 18 years. The most recently qualified solicitor that responded having been qualified for just 2 years and the respondent that was the longest qualified having practised for 35 years.

³² Healy (n 30) 72

acknowledging the benefits of mediation, recommends that all collaborative lawyers undergo 60 hours of mediation training. Examining this from an Irish perspective, it is notable that 49% of those that replied had trained in mediation³³. Of all those that replied, on average, 54% were also members of local collaborative practice groups.

B. Public Awareness of the Process

The overwhelming view of almost all collaborative law practitioners who responded to the questionnaire was that the public are not aware of the process when attending their first consultation in a family law matter.³⁴ This contrasts with the views expressed by the collaborative lawyers who were interviewed.³⁵ However, those interviewed acknowledged that their views may be influenced by the fact that many separating parties consult them, specifically because they have a reputation for being an expert in the area, or for taking a less adversarial approach in family law matters.

C. Number of cases

Thirty seven per cent of the practitioners that replied had dealt with a case through the collaborative process. Thirty five percent of those collaborative lawyers had settled three or more cases.

The number of cases has increased steadily over the years with respondents recording 4 cases in 2006, 9 in 2007, 14 in 2008, 20 in 2009, 32 in 2010 and 30 ongoing in 2011. However, it is clear when examining these figures as a percentage of the number of applications made to the Circuit Court alone in 2012 (3,462 applications³⁶), that the numbers opting for the process are very low. For those that had used the process, the average number of cases per

³³ 53% of those who trained in mediation doing so in 2009 and 21% training in mediation in 2010.

³⁴ Only one practitioner was of the view that 50 % of the public were familiar with the process. Interviews carried out with clients that used the process however contradicts this in that percentage had

³⁵ Collaborative lawyers interviewed were of the belief that 50% of clients had heard about the process.

³⁶ Statistics supplied on the Courts Service website. Available at <http://www.courts.ie/courts.ie/library3.nsf/66d7c83325e8568b80256ffe00466ca0/4cd67510257107bd80257a76002bfade?OpenDocument>

practitioner was 8, with the least busy collaborative lawyer recording having used the process in one case and the most busy having recorded 30 cases.

The average number of four-way meetings in each case recorded was four per case. Seven was the highest number of four-way meetings recorded and two respondents indicated that they had completed cases with two four-way meetings. There was general consensus amongst the practitioners who replied that an easy case would take 6 months or less to complete, with a difficult case taking up to 12 months and the more difficult cases taking up to two years³⁷. For the parties who used the court process, their cases took on average two years. One litigant who took her case before the courts expressed frustration at the fact that the case took so long despite the fact that the only issue in the case was the family home. However, this delay may have been due to the actions of the ex-spouse rather than delays in the courts' system.³⁸

D. Settlement Rates

Respondents indicated that of the cases that were completed, 81 % settled and 19 % had terminated. In one case the parties reconciled through the process.³⁹ Sixty per cent indicated that they had used the interdisciplinary model⁴⁰. The most commonly employed expert was the financial expert, with 67% of practitioners who used the interdisciplinary model indicating that they employed a financial expert. Forty four per cent indicated that they had used child specialists and 22% indicated that they used mental health experts. Twenty two per cent advised that they used all three experts and two respondents, while indicating that they used the interdisciplinary model, did not advise as to the experts they used.⁴¹

³⁷ This is in line with the research carried out by the IACP.

³⁸ Healy (n 30) 73

³⁹ This is slightly lower than the settlement rate recorded in the research carried out in the UK.

⁴⁰ It is not possible to determine from the replies received, whether this was both parties instructing specific experts jointly or whether it was, as was evident from my qualitative research, one party seeking the advices of a specific expert to clarify matters of concern to them. This question should have been more clearly stated in my questionnaire.

⁴¹ Healy (n 30) 72

E. Case Outcomes from the process

When asked if the outcomes achieved within the collaborative process were different from those achieved within the adversarial process, 57% of the practitioners who used the collaborative process felt that the outcomes achieved were different, 7% indicated that outcomes were ‘more considered’, 7% said that they were ‘significantly different’, 7% said that outcomes were ‘not hugely’ different and two respondents did not specify. Comments made included that being involved in the settlement allowed the separating parties to ‘grow in to the separation as opposed to being married one day and declared separated another’, that the process allows settlements to be ‘custom made’ for the families involved and that settlements are more considered. One practitioner commented that ‘[m]y client and spouse got back together as a result of the process. If the matter had gone to Court, that could not have happened.’⁴²

F. Reasons for termination of cases

Practitioners that had used the process were asked to specify the reasons for termination in cases that had not been settled within the process. One respondent indicated that one of their cases had terminated for medical reasons and three other cases had terminated because of ‘client difficulties outside the process.’ Other reasons given by respondents included lack of agreement on issues; bad faith; lack of trust and honesty; emotional issues, high levels of conflict, with one practitioner indicating that ‘the parties were not suited to the process’. This raises the question of how practising collaborative lawyers screen parties as to their suitability for the process.

⁴² *ibid* 73

G. Screening

An analysis of the questionnaire replies indicates that most screening is done through an in-depth interview with the client.⁴³ During this interview, the process is explained to clients, practitioners ensure that clients are fully aware of the implications of the disqualification clause and they assess the client's suitability for the process. Two practitioners also mentioned using a standard questionnaire and indicated that they have a checklist of issues that they look out for. One practitioner that uses the interdisciplinary process advised that the lawyer would carry out the initial screening and a more extensive screening would be undertaken by the coach/ personal and family consultant.⁴⁴

Factors taken into account in determining clients' suitability for the process included emotional maturity,⁴⁵ which was the most frequently cited factor, followed by ability to negotiate, understanding and willingness to compromise as the next rated indicators⁴⁶. Additional factors mentioned were the level of conflict in the relationship, the extent to which parties were able to prioritise their children, trust and the ability to communicate. The impact that a third party relationship can have on the parties' ability to engage in such a face to face process was also raised and the fact that this often makes negotiations more difficult. Trust between the lawyers was also a factor to be taken into account, in that one respondent indicated that 'who is representing the other side' is a relevant consideration. The issue of the presence of domestic violence was only mentioned by two practitioners who had used the process and only one mentioned the need to determine where the power lay in the relationship.⁴⁷

⁴³ 57 %.

⁴⁴ Healy (n 30) 72

⁴⁵ 36 %.

⁴⁶ 29 %.

⁴⁷ Healy (n 30) 72

H. Disqualification Clause

The unique and often criticised feature of the collaborative process is the fact that lawyers acting during the process are disqualified from representing those clients in any subsequent court proceedings. When asked about the significance of the disqualification clause in keeping clients at the negotiation table, 50% of the practitioners said it was significant, 43% said it was very significant and one respondent did not comment. Two respondents who indicated that it was significant commented further by indicating it was:

‘Significant in bringing the parties to the table...’

And one indicated that it was:

‘Significant but not overly - when parties are really upset or unreasonable it is no deterrent.’

Two respondents to the questionnaire indicated that they had had clients who chose not to use the process because of the implications of the disqualification clause. One respondent mentioned their fear that the disqualification clause would be abused to take a solicitor off a case.⁴⁸

I. Costs

An issue frequently raised in commentary on collaborative practice is that of the costs involved. All practitioners were asked if, in their opinion, the costs in collaborative cases were higher, lower or much the same as a litigation case. Forty three per cent of collaborative lawyers that used the lawyer only process indicated that they felt that the costs in a collaborative case would

⁴⁸ The fear was that a solicitor or client would engage in the process with a view to withdrawing and therefore disqualifying the other party’s solicitor from acting in a subsequent court case. However, in doing this, they are also disqualifying their own lawyer and incurring costs. This risk of a client seeking advice from a particular lawyer with the aim of thereby creating a conflict of interest such that his or her ex-spouse could not then instruct this solicitor has been prevalent within the adversarial process for many years. Arguably, it is easier to do this within the adversarial process as it merely takes one consultation, rather than engage in the structure of the collaborative process.

be lower than those incurred in a court case⁴⁹, with one indicating that they would be the same ‘because we have kept low, but need to be higher to compensate for the time/expertise which we commit in collaborative cases’. With regard to the interdisciplinary model, 36% said that the fees would be higher, with 28% of the view that the fees would be lower and 36% indicating that they did not know or not answering.

J. Interdisciplinary Model

For those practitioners that used the interdisciplinary model, the most commonly cited benefit of using the model was that it provided clients with skills that lawyers do not have in terms of assisting them with the emotional issues surrounding a divorce or separation. Only two of the respondents commented on the fact that having the emotional issues dealt with by someone else frees up the lawyers to get on with the legal issues. One of these two respondents commented that ‘it can allow the lawyers and clients park certain heated emotive issues which could have otherwise hampered progress of resolution’. Other advantages noted were:

- ‘It’s essential to have relevant expertise to contain the emotional elements, which are allowed to come out in the collaborative process.’
- ‘It aids the finalisation of robust durable solutions.’
- ‘It has its advantages. However, the biggest challenge facing all separating couples at the moment is lack of financial resources. Unfortunately they do not have the money to pay for mental health experts.’
- ‘[It is] [m]ore client centred. [It] [c]aters for emotional upheaval and enables parties move on with their lives.’

⁴⁹ 10 clients who used the process were interviewed. 8 said that the process was cheaper.

- ‘I think the interdisciplinary model is absolutely crucial. There are huge emotions involved in the bereavement of separation and divorce.’⁵⁰

Practitioners that had not used the collaborative process also saw potential benefits in the interdisciplinary model. Comments they made on this aspect of the process included:

- ‘I think most of the reason that people end up in court is lack of proper communication and also people do not know how to confront issues in a constructive way. Often there are deeper issues. Having a trained mental health professional involved seems extremely beneficial.’
- ‘It removes the emotions from the process and helps the individuals find a satisfactory resolution that they can live with.’
- ‘From my experience on the course, I can see that assistance from mental health experts would be very beneficial. From my practice as a solicitor in family law, I feel that some of the issues that need to be addressed by the parties (particularly regarding children) could be far better addressed by mental health professionals. However until it is an established practice country wide (or people are forced to do it), I cannot see me being able to convince clients of its worth.’
- ‘It could be of great benefit, although it can be difficult to persuade the client in circumstances where monies are tight that paying for a third professional is worthwhile.’
- ‘I think it would help the parties to cope with the trauma and assist them in making important decisions during a very stressful time of their life.’⁵¹

⁵⁰ Healy (n 30) 74

⁵¹ *ibid*

K. Barriers to the interdisciplinary model

Practitioners who used the process were asked what they perceived as the barriers to the interdisciplinary model. The most commonly cited issue was that of the costs⁵² involved, followed by the availability of trained experts. Some respondents indicated that there is still a social stigma attached and a perception that ‘I don’t need counselling’. Other respondents felt that there was a lack of understanding on the part of the lawyers of the potential benefits for clients of receiving help with the emotional issues involved and also a ‘lethargy’ on the part of lawyers to engage with the interdisciplinary model.

Similarly, almost half of the practitioners who had not used the collaborative process cited the issue of the costs involved in an interdisciplinary case as a barrier to its use.⁵³ The next most commonly cited reason amongst these practitioners was, again, lack of trained professionals⁵⁴, with lack of interest from the profession also being rated.⁵⁵ Other issues raised were lack of education and knowledge. Again, the stigma involved in seeking counselling was raised as an issue and the fact that clients are ‘hostile and unwilling to deal openly with the matter’.

L. Concerns with the process overall

Interestingly, the most commonly expressed concern amongst both practitioners that had used the process and those that had not, was that of other lawyers’ commitment. Twenty per cent said that many lawyers remain in an adversarial frame of mind and may undertake collaborative training simply to bring clients into the practice. Two respondents raised the issue of costs should the process fail and one was concerned about the emotional awareness of clients. Comments made included:

⁵² 3 out of 15.

⁵³ 12 out of 25.

⁵⁴ 6 out of 25.

⁵⁵ 4 out of 25.

- ‘The court still tends to interfere and impose extra terms which may imbalance the fairness and consent of the heads of settlement.’
- ‘[My] [m]ain one [concern] is level of skills: the two day basic training is inadequate and if solicitors do not engage in other relevant training, the outcome for the clients will be doubtful.’⁵⁶

Other concerns raised by practitioners were wide and varied. Some respondents were concerned about clients’ lack of interest and level of understanding of the process, and clients’ ability to trust in ‘its effectiveness and enforceability’. Others raised queries about disclosure, the ability of the “Irish psyche” to engage in collaboration and the fact that in some cases it is:

‘considered more efficient by solicitors to deal with settlements ...by way of negotiating a separation agreement rather than trying to organise 4 way meetings based on a contract signed by parties, which seems more cumbersome in cases where there is not much really to fight over anyway and can usually be settled in a less cumbersome manner once the matter is listed for court’.⁵⁷

One respondent in particular was concerned about clients ‘not wasting our time’. Another practitioner indicated that they felt that ‘[c]ollaboration requires too sophisticated a participation’ and that they ‘don’t see any place for it in an Irish family law context’. This practitioner does see a place for mediation ‘but with solicitors for each side attending the mediation process.’⁵⁸

These concerns regarding the “efficiency” of collaborative practice appear to have been one of the main objections raised by critics of the process in Ireland. Davy, for example, commented that ‘[c]ollaborative practice cases are likely to be far more expensive and far more time consuming (**and also**

⁵⁶ Healy (n 30)

⁵⁷ ibid

⁵⁸ ibid

less profitable for solicitors) than those cases which can be settled amicably and at an early stage in the context of the traditional approach'⁵⁹. From a solicitor's point of view, taking a traditional approach to negotiations, the facts can be summarised quite quickly and a settlement reached once a case is listed for hearing. This, does not generally involve a large time commitment from lawyers or structured, client centred negotiations such as are necessary within the collaborative process.⁶⁰

Other issues raised among practitioners who had not used the process, included how, as a lawyer, one can advocate for one's client while at the same time seek a resolution that benefits all parties and whether the prospect of losing a client if the case did not settle would 'ever cloud a practitioner's judgment.' An important concern raised by one of the respondents was the issue of privilege within the process and whether 'notwithstanding the participation agreement. If the collaborative process is unsuccessful, can we as solicitors be called to give evidence if our former clients waive privilege?'⁶¹

This is a concern for parties engaging in mediation and collaborative practice in Ireland. There is no Act governing either process which specifically provides for privilege, nor has this matter being tested before the Irish courts.⁶² In the absence of such legislation, as noted in chapter 4,

⁵⁹ Eugene Davy, 'Problems Associated with Collaborative Practice'1 (2009) *Judicial Studies Institute Journal* 14,16 (Emphasis Added)

⁶⁰ Healy (n 30)

⁶¹ *ibid* 76

⁶² The model participation agreement drafted by the ACP relies on Section 9 of the Family Law (Divorce) Act 1996 with respect to privilege. Section 9 of the Act provides '- An oral or written communication between either of the spouses concerned and a third party for the purpose of seeking assistance to effect a reconciliation or to reach agreement between them on some or all of the terms of a separation or a divorce (whether or not made in the presence or with the knowledge of the other spouse), and any record of such a communication, made or caused to be made by either of the spouses concerned or such a third party, shall not be admissible as evidence in any court'. The issue of the confidentiality of negotiations was challenged in the Supreme Court of British Columbia in the case of *Banerjee v Bisset* 2009 B.C.L.R. 2d. 1808 at para 19 – 'The court, having considered the matter, held that in signing the participation agreements "... the parties agreed to have a confidential process; they agreed to forgo access to the court unless either or both of them withdrew from the collaborative law process; and they agreed that no agreements would be enforceable unless they were agreements in writing. They also, necessarily, agreed to forgo disclosing negotiations which stopped short of a written agreement for the purpose of trying to prove that an oral agreement was made and should

the participation agreement recommended by the Association of Collaborative Practitioners relies on section 9 of the Family Law (Divorce) Act 1996.

Despite these concerns, many of these practitioners who had not used the process remained convinced of the benefits of the collaborative approach, with 31% of the respondents indicating that they thought the process had ‘potential’ and 12 % indicating that it had potential where there were children involved. Others indicated that they thought it provided ‘an excellent way of resolving family law matters’ with 12% indicating that they felt it would be a less traumatic way for separating parties to deal with issues. Twelve per cent indicated that they felt that its potential was limited to big money cases. One practitioner noted that while they were ‘initially very optimistic about the potential of collaborative practice’ they have encountered resistance from clients who do not wish to dispense with their services if the process breaks down.

M. Legal Aid Board Lawyers

The Legal Aid Board has taken a very proactive approach to collaborative practice and has arranged collaborative trainings for the majority of its solicitors and indeed, provided subsidised training for private practitioners. However, it appears that collaborative practice has not been as readily embraced by its solicitors in their everyday practice within their law centres.

Questionnaires were sent to the solicitors employed by the Legal Aid Board to ascertain their views on the process. A separate analysis was carried out to examine their views in detail. Of the 13 legal aid board lawyers that replied to the questionnaire, two, while expressing an interest in collaborative practice, being new to the Board, had not actually undergone training. Of those that had been trained, one had used the process and 10 had not. Twenty three percent of the legal aid board lawyers that replied had

be enforced. In other words, they agreed to a different set of rules than apply to normal litigation’.

undergone mediation training and 15% were members of collaborative practice groups.⁶³

Therefore, this research highlights the similarities between private family lawyers and legal aid lawyers who have not been successful in using the process; that being failure to supplement the collaborative training with mediation training and lack of engagement with local collaborative practice groups. In general legal aid board lawyers had some reservations about collaborative practice, commenting that clients will often not address the issues until closer to a hearing when legal teams have already been put in place and that collaborative practice is perhaps more suitable for high money cases. Issues were again raised regarding the lack of trained collaborative lawyers and lawyers' commitment to the process.⁶⁴

Concerns were also raised amongst legal aid board lawyers about the lack of trained experts (personal and family consultants), the standards of the experts available and the costs involved. Time was also an issue for some legal aid board lawyers. In general, legal aid board lawyers are under pressure to ensure that cases are taken off the waiting list in order to comply with the Board's requirements. Also, difficulties arise regarding scheduling four-way meetings when these lawyers are frequently called to court, at short notice, to deal with emergency issues.⁶⁵

Examining their responses to the question as to the impact of the disqualification provision at keeping the parties at the negotiating table, only two respondents chose to reply. One indicated that the disqualification provision was "significant" and one was of the view that it was "very significant". When asked about the concerns they may have with the collaborative process, none of the respondents from the legal aid board mentioned the disqualification provision as a concern.⁶⁶

Again, the issue of indifference from lawyers was raised, with one legal aid board lawyer commenting that '[e]ven if I am enthusiastic (sic) about it,

⁶³ Healy (n 30)75

⁶⁴ ibid

⁶⁵ ibid

⁶⁶ ibid 75

few of my local colleagues appear to be.’⁶⁷ Another commented that there is reluctance amongst private practitioners to get involved and that ‘no solicitor wants to hand over a case given the times we are presently living in’. In addition, the issue of knowledge and understanding amongst the profession and the judiciary were raised, with one practitioner in particular commenting:

‘... I had an example of a client who requested a barring order because she and the children kept walking into the house to a husband with a noose around his neck in the back garden threatening to kill himself. The Judge and his solicitor insisted to her that she should try collaborative which was in my view totally unsuitable in the circumstances. On that basis my concern is that Judges may not appreciate when it is appropriate.’

It is surprising, then, that over half of the legal aid board lawyers who replied can see ‘huge benefits’ in the interdisciplinary mode. Their comments included that clients would be ‘better able to give instruction; deal objectively with issues; less time (would be) taken up by lawyers and (clients would be) supported through the process’ and that such ‘intervention is crucial and could help move cases along in a much more constructive manner’. There was a recognition that difficulties could surface in negotiations ‘where parties are at different stages... in terms of their emotional acceptance of the situation. This leads to inabilities in giving instructions to form proper basis of settlement’ and that ‘[n]on legal, professional help would be useful in this regard’. Only one legal aid board lawyer was of the opinion that ‘[v]ery few of my clients have emotional issues that would require mental health professionals. The majority of my clients have financial issues.’

Interestingly, though, as with private practitioners, legal aid board solicitors that believe in the benefits of the process, do not view using the process within the system established by the Legal Aid Board as posing challenges.

⁶⁷ *ibid* 75

Two legal aid board lawyers in particular acknowledged that it all balances out in the long run, as, even though collaborative cases require more time up front, time is ultimately saved in terms of not having to file pleadings and wait for a court hearing. One legal aid board lawyer commented:

‘They are clients and you deal with them. Their wait on the waiting list is the same and once their turn comes up, you deal with them whatever way is appropriate and whatever way they chose’.

This practitioner referred to the process as a ‘short, sharp, shock rather than dragging [a case] on for years’.

Two legal aid board lawyers expressed a preference for mediation with one indicating that mediation was already established and that the clients perceive a mediator as being objective and may not feel this way about collaborative lawyers. Another indicated that they did not feel that the collaborative training was of any benefit, but that the mediation training had been helpful.⁶⁸

The Legal Aid Board Corporate Plan 2012-2014⁶⁹ confirms its commitment to alternative methods of dispute resolution, however since the Board has now taken over the Family Mediation Service, its emphasis is to ‘[d]evelop synergies through the integration of the family mediation service into the Board’s structures and services to further exploit the potential for resolving family disputes through mediation as an alternative to litigation’. This will, more than likely, result in the Board promoting mediation rather than collaborative practice.

⁶⁸ *ibid* 75

⁶⁹

[http://www.legalaidboard.ie/lab/publishing.nsf/650f3eec0dfb990fca25692100069854/0e5df69967fb9f82802579d1004ca041/\\$FILE/Corporate%20Plan%20March%202012.pdf](http://www.legalaidboard.ie/lab/publishing.nsf/650f3eec0dfb990fca25692100069854/0e5df69967fb9f82802579d1004ca041/$FILE/Corporate%20Plan%20March%202012.pdf)

VIII. Factors Identified by this research as being of importance to the development of Collaborative Practice

Further analysis was carried out to assess the similarities or differences between the lawyers trained in the process that had been successful in assisting clients to resolve their issues through the process and those that had not, in order to try to establish what the most important factors were in the development of the process. These results are presented below.

Firstly, this research highlights the importance of membership of a collaborative law practice group in developing the process. As a group, 87% of those who were successful in using the process were members of local practice groups. This is much higher than the overall average of 54% and significantly higher than membership amongst those who had not used the process which was 35%. Another important factor was having undergone mediation training. Seventy three per cent of the respondents that had used the process had undergone mediation training, compared to the overall average of 49 %. Again this was significantly higher than those who had not used the process, where again, only 35% had engaged in mediation training.

Secondly, difficulties can arise when one client attends a lawyer who is trained in the process and his or her ex-partner consults a lawyer who is not. The lack of trained collaborative lawyers appears to present difficulties for those who have not been successful in using the process⁷⁰, this being the most frequently cited reason, with a lack of interest from clients⁷¹ and no suitable cases⁷² being the next most frequently rated factors.

In this regard, the recommendations made by the Law Reform Commission in their report on *Alternative Dispute Resolution: Conciliation and Mediation*⁷³, that all parties to a family law dispute attend a mandatory

⁷⁰ 6 out of 26. Lack of trained practitioners was cited by 20 % as causing difficulty for the development of collaborative practice

⁷¹ 5 out of 26.

⁷² 5 out of 26.

⁷³ Law Reform Commission, *Alternative Dispute Resolution: Mediation and Conciliation* (LRC 98 -2010).

information session at which all options, including collaborative practice, is explained to them would increase both public awareness of the process and also encourage more lawyers to train as collaborative lawyers. The quantitative research undertaken indicates that collaborative lawyers are of the view that the public is not aware of the process when they attend their first consultation. Perhaps with this independent information provided through these information sessions, clients will then be in a position to make an informed decision about which process they wish to use. The independence of this advice would be a benefit in that one collaborative lawyer indicated that in their experience, on occasions clients are suspicious when this option is presented, wondering what is in it for the lawyer rather than whether it can be of any benefit to the client themselves.

This however, may also pose difficulties, in that some lawyers may only train to “tick the box”, as it were, and proceed to negotiate as they have always done. This was highlighted in the fact that the main concern raised by collaborative lawyers, both those that have been successful in using the process and those that have not, was that of genuine commitment from lawyers. It was evident from the qualitative research undertaken for this thesis that, on occasion, clients are told by their lawyers that they are using the collaborative approach; yet, negotiations are not held during four-way meetings and the lawyer continues to act in subsequent court proceedings. This has the potential to undermine the process.

IX. Impact on Approach to Practice

Examining the overall picture of collaborative practice as presented through these questionnaires, it is evident that just under 40% of those that trained in the process have dealt with collaborative cases. Some of the main reasons, as set out previously, are lack of trained experts, lack of interest from clients and lack of commitment from other lawyers. However, it is interesting to note that those that have been successful in using the process were the lawyers that had undergone mediation training and who take the time to be

involved in local collaborative practice groups. There was general agreement that outcomes achieved within the process did not differ in financial terms but that they were more structured and tailored to the clients' individual needs.

A significant finding is that, regardless of whether they had used the process or not, the majority of all respondents (96%) said that the collaborative training had had an impact on their approach to practice. Only two per cent indicated that the collaborative training did not change their approach while a further two per cent felt that the collaborative training had no impact but that mediation training had been 'useful'. One collaborative lawyer that had used the process commented that it helped them to be a 'positive influence for the client which was not really possible up until this', with another commenting that they were 'more creative in the solutions I suggest'.

In contrast, comments made by practitioners that had not used the process tended to focus less on issues like creativity but on the fact that their approach was less adversarial:

- 'It also taught me that long letters (particularly of a negative nature) hinder rather than help the process.'
- 'Yes, I have developed a tendency against briefing counsel and going into contentious litigation in favour of the ADR approach for family law.'
- 'It has changed my approach to the initial consultation in that my focus is more on where the client wants to be in say 2/5/10 years' time.'
- 'You are more likely to see the family as a whole rather than take a positional approach.'
- 'I am more amenable to resolution outside the court model, be it through negotiating separation agreements or through mediation.'

- ‘The approach to family cases is joint resolution of problems in as far as possible, to enable the parties move on, but that should also seek to enable/equip the parties to resolve future matters jointly in a non-adversarial manner.’
- ‘Made me more aware of the necessity to avoid zero/sum⁷⁴ resolution which merely stokes up resentment for future conflict.’
- ‘I am more frustrated with opposition who insist on “blame game”.’
- ‘I’m very aware that misunderstandings can occur when communication is through legal representatives only and I ensure that I get very clear instructions before penning a letter.’
- ‘It has given me a more focussed approach to alternative means of resolution.’
- ‘It greatly affected my practice. On the plus side I empathise more with my clients. On the negative side I empathise more with my clients! Generally it has highlighted the limitations of the adversarial process in family law cases.’⁷⁵

Only one collaborative lawyer specifically mentioned the benefits of the process for children:

- ‘Emphasis on conciliation and putting children and parties’ future at top of priority list.’

This single reference to children arguably displays a lack of appreciation or understanding of the impact of separation and divorce on children, even

⁷⁴ See chapter 1.

⁷⁵ Healy (n 30) 76.

amongst trained collaborative lawyers who purport to take a more holistic, whole family approach. This highlights the need to raise awareness of children's concerns amongst lawyers.

X. Qualitative Research into Collaborative Practice

A. Introduction

With the information gleaned from the quantitative research reflecting the more broad based view of collaborative practitioners, qualitative research was undertaken to obtain more in-depth views from the users of the process as the ultimate determinants of whether the process works in practice. This section will begin by outlining the demographics of the parties interviewed, how they heard about the process and why they decided to choose it, in an effort to give context to the study.

In reviewing the process, the views of these clients will be explored together with the views of collaborative practitioners, litigants that used the court process and the views of solicitors and barristers who practise in the main within the traditional court model, be that in presenting cases before the courts or in settling matters for clients within the adversarial system.

B. The Views of Clients that used the collaborative process

1. Demographics

In examining the demographics of the clients that used the collaborative process in this particular sample, it is notable that 8 of the participants were between the ages of 40 and 59⁷⁶. The majority of the participants⁷⁷ had been married for over ten years, with 4 having been married for over 21 years.

⁷⁶ This is consistent with the age profile of parties that have used the collaborative process across the US and the UK.

⁷⁷ 90% had been married for over 10 years.

All participants interviewed had children, with the majority having children who were under the age of 18⁷⁸. Four of participants described themselves as home-makers with 6 of participants working outside the home. The majority of participants indicated that their household income was in excess of €50,000.⁷⁹ Six of the participants were women and 7 of the participants had third level education. Of the participants interviewed, 6 were the applicants in the case and 4 were the respondents.

The demographics of these participants are largely consistent with those that used the process in other jurisdictions and to an extent confirm that to-date, the process has been chosen most frequently by those who are educated and economically active. However, with the exception of one participant, none of the participants interviewed would consider themselves as being wealthy and in one case, the participant worked out a payment schedule with their lawyer under which fees are being paid in instalments. In another case, where the process failed, the participant's collaborative lawyer was instrumental in assisting them secure representation through the legal aid board for finalising their case before the court.

2. How did they hear about Collaborative Practice?

In examining how participants heard about the process, there was no one clear referral source. Three heard about collaborative practice from their own solicitors, three heard about it through their spouse's solicitor, three heard about the process through friends, and one learned about the process on the internet. This is consistent with the research carried out in the US. However, of those that heard about it through friends, all of these participants had also researched the process themselves before deciding whether to use it. One participant, having decided to use the process,

⁷⁸ 70% of participants had children who were under the age of 18.

⁷⁹ 80% of participants' household income was over €50,000, with 20% indicating that their household income was over €100,000.

interviewed three collaborative lawyers before deciding which solicitor she felt most comfortable with.⁸⁰

3. Why did they choose collaborative practice?

Participants in the collaborative process were asked specifically if they considered mediation or the court process as methods of resolving their issues and the reasons they decided to opt for the collaborative process.

Firstly, in relation to mediation, 6 of the collaborative clients interviewed had actually attended some form of mediation before engaging in the collaborative process, with the majority having done so through the Family Mediation Service.⁸¹ However, there still appears to be a misconception that mediation is akin to counselling or is a means of trying to assist the parties to reconcile. One participant commented that for mediation there has to be ‘some glimmer of hope of reviving the marriage’ and another that ‘going to the mediation makes you feel like you did everything you can to stay, to make it work out, this is the only reason I would say it is good’.

Collaborative practice was chosen over mediation by one participant because ‘at the end of the day I would still have to do it legally anyway’ (referring to the fact that a mediated agreement is not legally binding) and another participant commented that:

‘I didn’t find the mediation process helpful at all. I would be reluctant to go down the mediation route a second time. I think a lot depends on the skill of the mediator. They need to be prepared to be fair and have enough insight to know when to intervene. They need to have a protective role, maintain neutrality and yet be fair. Having the support of my solicitor in the collaborative process made a great difference.’

⁸⁰ This is in line with the research carried out by the IACP which indicated that there is no clear referral source. See (n 1).

⁸¹ The State-run mediation service, which is now under the auspices of the Legal Aid Board.

The issue of timing in respect of the two processes was raised by one participant who noted that:

‘From my own point of view, the difference between the mediation and that (collaborative practice) was, it was 8 years on, I suppose the hurt was gone. I had moved on and I was able to look at things from a much more practical, unemotional way. Obviously when your marriage is breaking down around you, it is an awful place to be, no matter how much you want it, your dreams are still gone out the window so I did find the divorce coaching or counselling in the collaboration beneficial.’

In Canada, Macfarlane⁸² had questioned whether clients’ somewhat negative views on the mediation process were influenced by what they had been told by their collaborative lawyers. However, this would not appear to be a concern amongst the Irish participants, due to the fact that the majority of them had actually engaged in some form of mediation and were therefore speaking from personal experience rather than relying, specifically, on the views of their collaborative lawyers. The fact that 6 of these participants had tried mediation may indicate that they were more receptive to alternative methods of dispute resolution, in that, previous research carried out by Conneely⁸³ (1999) and Coulter⁸⁴ (2007) indicated that the up-take on mediation in an Irish family law context overall was much lower at approximately 3%. However, this may also be due to the increased focus on alternative methods in recent times.

For some participants, there was a fear of the court process. Collaborative participants routinely referred to bad experiences that friends or colleagues had, where the experience was acrimonious and expensive. Their view was that going to court ‘wouldn’t be fair or equal’⁸⁵ and ‘it would be very black

⁸² Macfarlane (n 1)72.

⁸³ Sinead Conneely, *Family Mediation in Ireland* (Ashgate 2002)

⁸⁴ Carol Coulter, Family Law Reporting, Pilot Project Available at [http://www.courts.ie/Courts.ie/library3.nsf/\(WebFiles\)/C4FA6C02C7B13A428025738400521CE9/\\$FILE/Report%20to%20the%20Board%20of%20the%20Courts%20Service.pdf](http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/C4FA6C02C7B13A428025738400521CE9/$FILE/Report%20to%20the%20Board%20of%20the%20Courts%20Service.pdf) 40.

⁸⁵ Participant 1.

and white and the whole family unit would not come into it'⁸⁶. Another commented that:

'I have friend who got divorced through a court order and I knew I didn't want that. They have no relationship with each other. I think there are no winners in that situation. I think it is bad for the kids and the separating couple.'

For one collaborative participant, however, the court process emerged as a more attractive option. While they had '... loved the idea of it (collaborative practice) – being part of the arrangement...' they felt that 'it allows parties who don't want to negotiate to get away with murder'⁸⁷. With court, this participant felt that separating parties have 'a finite point and you cannot go beyond it....' Additionally, this participant felt 'that there was a huge burden (within the collaborative process) to do it right for the kids' and that the court process 'allows you detach yourself.'⁸⁸

4. Duration of case and format of the Joint Meetings

Based on the collaborative participants interviewed, cases were taking on average one year to complete, with more difficult cases taking up to two years. Two participants engaged mental health experts and two others engaged financial experts. Where mental health experts were engaged they sat in on, on average, four meetings. While two participants took advice from financial experts, none of these financial experts attended any of the meetings.

In relation to the format of the joint meetings, most participants indicated that the solicitors did the most talking at the beginning of the process with one participant commenting: '[i]n the early stages it was mainly the solicitors and we sat back a little as we were quite nervous. Once we felt a bit safer in the process then we began to speak ourselves and at the end I

⁸⁶ Participant 2.

⁸⁷ Participant 10.

⁸⁸ Participant 10.

would say that it was 25% for each of us'. At the end there was a 'much warmer atmosphere'. Another participant commented that for them 'it was definitely the right way of doing things and if I had to do it again I would do the same thing again'⁸⁹.

For those that used mental health experts, one participant felt that perhaps the solicitors could have been more in control as the counsellors seemed to take over. This issue of the solicitors needing to be in control also became important when examining the pace of the process.

5. Pace

Three participants were concerned about the pace of the process, with one indicating that there should be clearly defined goals set in a letter of engagement at the beginning and two others expressing the view that the lawyers need to be in control, to keep the process moving along or to call an end to the process if things are not progressing. An issue raised by one participant was that they felt that their case was moved down the list of priorities for the solicitors if something more urgent came in and they found this frustrating. This issue of the pace of the process has been raised and discussed by collaborative lawyers and by the IACP and is no doubt a difficult issue as one party may not be able, emotionally or financially to deal with issues as quickly as another. This may also be influenced by the fact that, one party may have decided some time ago that for them the marriage was over and they are now ready to move on, whereas for the other party this realisation may either be a total shock or even, in some cases, if they are aware that there are difficulties, they may have been willing to continue in the relationship rather than end it.⁹⁰

6. Settlement Rates

Eight of the parties interviewed in this sample, settled their cases through the collaborative process, with another one stating that the agreement

⁸⁹ Participant 1

⁹⁰ Four female participants indicated that their husbands would have continued with the marriage.

reached during the collaborative process formed the ‘foundation of what we took into court two years later’⁹¹. This is broadly in line with the findings of the research carried out by the IACP⁹² which, while using a far larger sample, found the settlement rate to be 90%.

7. Outcomes in particular cases

When one looks at the results of my quantitative and qualitative research and you compare it to existing research in the US, Canada and the UK – there is widespread agreement that case outcomes, in monetary terms, are not significantly different to those achieved through settlement within the court process. This may help to allay fears often expressed that the perceived weaker party does less well in collaborative practice. Two of the participants interviewed did not settle their cases within the process and proceeded to court. One case had not been heard or settled by the time that this research was concluded. The other case subsequently settled on the steps of the courthouse and was approved by the judge without there being any further increase in maintenance than what which had been agreed in the collaborative process two years earlier. The only difference in the overall settlement was that the father agreed to pay €20 per week pocket money to the eldest child who was a teenager by the time the case was eventually finalised.

8. Impact of the Disqualification provision

The most controversial aspect of collaborative practice has been the disqualification provision. Critics of the process argue that it puts too much pressure on the parties to settle because of the financial implications of having to engage a second lawyer, should the process not result in settlement. When questioned about the disqualification provision, the interviewees that took part in this research indicated that they were fully

⁹¹ Participant 3. This settlement rate is broadly in line with the figures established through the quantitative research referred to earlier where the settlement rate was 81%. It is also in line with the research carried out by the IACP in the US and Resolution in the UK.

⁹² Available at www.collaborativepractice.com See (n 11).

aware of the implications of not reaching settlement within the process. One participant commented:

‘I was clear at the outset that that would happen and at one point it looked like we weren’t going to get the information we needed, but I always wanted to keep in the collaborative process. I never wanted to go away from that.’

A common theme which emerged amongst those interviewed was a sense of commitment to the process. Many clients had researched collaborative practice themselves, independently, prior to being told about the process by their own lawyers or by their spouse’s lawyers and having chosen the process, were committed to it. Only one participant expressed the view that the disqualification clause was the ‘biggest clincher’ and the ‘biggest stumbling block’ in deciding to use the process, interestingly not solely because of the cost implications but because of the possibility of losing their lawyer.

Two participants said that they had initial concerns at the thought of losing their lawyers but did not have sufficient concerns to prevent them using the process. In both cases they forgot about this issue once the process started.⁹³ Seven participants overall said that it did not have any bearing on their decision about whether to choose the process, with three of those indicating that it had no influence as they were committed to the process from the beginning. Interestingly, for two participants the disqualification clause was a positive aspect to the process. One participant commented ‘it makes you grasp the nettle and move on’. And another:

‘...the fact that the solicitors were in a position as well to walk away and not just us, you kind of have more respect for each other if you know what I mean, you think more. It wasn’t an effect of keeping me there, as in blocked me by keeping me there, it kept me there out of respect for the other three people involved in it.’

⁹³ Participants 6 and 7.

This comment in many ways embodies the ethos of collaborative practice that Stuart Webb had in mind when developing the process, parties working together committed to finding the best solution for the entire family, rather than each party taking a positional stance.

9. Support/Legal Advice

Another issue often expressed by critics of the collaborative process is the extent to which collaborative lawyers can advocate for their clients in a process which is designed to focus, in many respects, on the interests of the family as a whole. Interviewees were therefore asked if they felt that their lawyers were on their side and if they felt supported through the process. Without exception, all collaborative clients interviewed felt that they had the support and loyalty of their lawyers throughout the process. Many were keen to stress the importance of their relationship with their collaborative lawyer and the prospect of losing their collaborative lawyer in the event of non-settlement was, as noted above, a greater concern for them than the additional costs involved:

‘... definitely as each meeting went on it was much easier and I think my solicitor ... always made it plain to me, look you can break this when you want and go out She was very good at taking up the vibe if I was having difficulties, she would jump in and help me or... (I) always felt that my solicitor had my best interests at heart and she always said to me, I won’t let you agree on anything and beforehand we would really have flogged out the best and worst case scenarios for everything.’ Other comments made included:

‘I had that understanding in my heart that she was there to support this separation and anything that would arise from it, you know.’

‘Yes. I felt that his loyalty was to me. But I have to repeat that divorce is a difficult undertaking but certainly from what I have heard, collaborative was very good.’

One participant, though happy with the overall settlement, in that ‘mentally it worked out better for me. We are still talking and the kids are happy’, felt that at times they were ‘very unsure whether I was doing the right thing as regards the house and the estate and things. I didn’t know if that was the right amount, I was never really sure if I was giving too much to too little or whether (the other party) was giving nothing at all ...’. Some collaborative practitioners are of the view that it is better not to focus too much on rights or entitlements but to let the parties reach their own agreement. While this approach may have advantages, it is also extremely important that clients know where they stand, so that if they decide to concede on one issue or perhaps continue to argue for something else, they are doing so with full knowledge of where they would stand if this issue was to go before the court.

Most participants interviewed, however, felt that they were aware where they stood legally and that they felt supported by their lawyers. Four participants felt that they were unsure in this regard. One participant said that they felt that ‘X or Y (the solicitors) came up with the figure and I just said that’s fine if that’s what you think the law says but they never said, well look the last two cases that went to court, this is how it worked out and this is what we have decided would be the best thing’. One of those three who were unsure as to where they stood commented that they ‘didn’t clearly know my rights – this does not mean that it wasn’t explained to me, but you need things on paper’. This participant is now in the courts’ system and similarly feels that within the adversarial system their entitlements are ‘still not very clear – depends on the judge on the day - and that this creates a lot of fear as you are unsure about where you are going’.

Two parties who had used the court process however felt that it did not provide them with the “finite” point in the separation or relationship. Commenting on this, they said:

‘Following the separation the divorce was even worse. I think I had 4 divorce hearings and in the end the Judge in his kindness and his wisdom awarded me a divorce... because he was fed up seeing me come to court with nobody else.’

Another litigant indicated that the case took two years, even though the only issue between them was the family home:

‘He (her ex-husband) dragged it out but I think the courts could have done more because he was working for a company. He didn’t have accounts, so all he had to do was provide a P60. It wasn’t as if he had a massive portfolio. It cost me nearly 700 just for the adjournments.’⁹⁴

Parties that separated through the court process were also asked about the extent to which they felt supported by their solicitors and barristers. One participant commented that she had difficulties initially but built up a good relationship with her lawyer as the case progressed. She felt that the hearing she got in court was fair but this she equates to the fact that she went in with a proposal and felt that ‘[i]f other women went in there and weren’t as savvy and they had the same opposition as I had, they could end up with a fairly detrimental settlement’.

Another participant commented that she had no complaints about her solicitor. Her solicitor had tried to negotiate with her husband’s solicitor before the court hearing but her husband would not agree to anything.

Some of the participants interviewed who chose this route were happy to hand control of their case to their solicitor. However, in some cases, these participants did not feel reassured that their solicitors were in control. One participant in particular indicated that she had to keep pushing her solicitor

⁹⁴ In this case the solicitors had been trying to agree that the wife and child stay in the family home until the child was older. The wife’s solicitor was seeking to the age of 23, the husband’s to 18 and they had compromised prior to going into court at 21. However the judge decided to make an order allowing the wife and child remain in the family home until the child was 23. So going into court worked out better for this client than the potential settlement negotiated.

to ensure that the case progressed and another who did hand over his case to his solicitor now believes that it was a case of:

‘You don’t really know how this works, leave it to me – you trust me.’ So I unfortunately with hindsight I realise that I just basically gave up any sort of impetus in my own future and handed it all over to a solicitor who was, as it turned out, extremely incompetent.

After the judicial separation ... I said I was never, ever, going to go near a solicitor again and I started representing myself, which would probably be to my own detriment in the long run but at least I can say that I’ve had my say’.

10. Interdisciplinary model

Two of the participants interviewed had used coaches or mental health experts as part of the process. Each party had their own coach and the separating parties, their coaches and their solicitors met approximately four times during the course of the case. One participant acknowledged that they were somewhat sceptical when the solicitor explained the model to them initially and thought that it ‘sounded like a money racket’. However, when they engaged in the process they felt that it was beneficial to have the counsellors on board. They commented that at the:

‘initial meeting, number one, we were back in a counselling situation for the first time in years, probably the first time we sat down in a room together without solicitors and I suppose bringing up all the old stuff again, kind of. But the coaches were good and they were really tuned into us straight away, (clicks her fingers) what was happening and they were in control... I felt that it put everybody together because I mean you have the law side of it obviously and the coaches doing the emotional side of it so it was it was just nice to put it all together.’

The other participant who used coaches commented that ‘the whole thing was kind of brilliantly done’.

Other participants who had not used coaches were asked for their views. One participant indicated that they were not offered this as part of the process, commenting that perhaps it was not part of the model then, but thinks that had it been offered they would have availed ‘of everything that was going’. Two participants indicated that they would have resisted it had it been offered to them at the time but that ‘looking back that I was a total maniac and ... your emotions are heightened and that I was all over the shop’. Cost, however, would have been a factor also for this participant in that they would not have been able to afford it.

In contrast, one participant indicated that they and their children went to counselling **prior** to entering the collaborative process and found it to be “detrimental.”⁹⁵ They said that they are ‘very cautious about counselling in general’ and that they ‘don’t think that the standards of training are particularly high’. They went on to say that ‘from talking to other people, there was a general feeling that it could do more harm than good’. They believed that in situations where people are breaking up counsellors ‘need an awful lot of training to do it well’ and expressed concerns about the standards of training in Ireland. Another participant was similarly sceptical about the benefits of counselling believing that children will have problems as they grow up ‘whether this is because of the separation or whether the child would have had these problems anyway’.

The issue of seeking help for the emotional issues attached to separation and divorce was also raised with the participants who used the court process. One participant commented as follows:

⁹⁵ It is relevant to note that counsellors were not trained coaches or family and personal consultants. Coaches or personal and family consultants briefed as part of the collaborative process would, in contrast, have received specific training so that they understand their role within the process and how they can best assist the parties with the emotional issues associated with separation or divorce through the legal process.

‘...anybody who comes through a marriage breakdown and does not admit to having emotional problems is in total denial. Because no matter how stoic you are, it can’t but affect you at some level and, although you may go through the process without admitting it or showing it, it would come against you later.’

11. Costs

Six of the interviewees said that the collaborative process was a lot cheaper than going to court. Two said that they would not consider it a cheaper option and two said that they did not know how the costs would compare if they had used the court process. Three participants, all of whom were men, indicated that one of the factors they considered when deciding to use the process was that the collaborative process would be a cheaper option:

- ‘We were told that we could save costs and this was a factor for me. I felt that I was ... and that I saved a good few bob.’
- ‘I felt that the process would be less acrimonious and that it would probably cost less than going down the legal route...’
- ‘No, for me the only other option was court and that would have been more aggressive. I didn’t want to raise conflict or go into an aggressive process. It was all fairly agreeable and I didn’t want to incur mad legal bills.’

Examining further the two participants that did not consider the collaborative process a cheaper option, it is notable that these were cases that did not settle within the process and ended up going to court. In terms of placing these cases in context, one was a ‘lawyer only’ case where the participant interviewed felt that they were not making progress within the process. This couple had tried mediation prior to engaging in collaborative practice and the other party had also walked out of the mediation process. In the other case, the couple used the interdisciplinary model and again the

process failed because one party was refusing to engage. In both cases, the participants interviewed expressed the view that they felt that the collaborative lawyers could have taken more control within the process to try to bring the recalcitrant party to a settlement.

12. Satisfaction with the process

All of the participants who had chosen collaborative practice were asked if they were satisfied with the process overall. While the majority of participants were satisfied with the overall outcome, this did not always equate with getting the majority of the assets. Satisfaction is obviously very subjective and was a very personal issue for many of the participants in that they reached a conclusion that suited their particular needs. Only one participant indicated that they were sure that they would have done better financially in court but that their motivation in staying in or using the process was to maintain ‘a working relationship’ with the other party. Therefore they were happy with the outcome because they have a good relationship now:

‘I can ring X at any minute of the day if I wanted to and I can talk to him. I wouldn’t rush to do it, but I know I can. If he drops the kids back, he comes in and has a cup of coffee around the table which we wouldn’t be doing if I had gone the other way.’

Eight out of the ten participants indicated that they have a good relationship now and this they attribute mainly to using the collaborative process. All participants indicated that they were nervous before the first joint meeting, with a few participants noting that this nervousness eased as the process progressed and others indicating that all meetings were difficult.

13. Recommend the collaborative process to a friend

A key test, in many ways, of any new product or process is often whether someone would recommend the process to a friend. All of the interviewees said that they would recommend the process to a friend and some participants have already recommended it; however, approximately half qualified this with statements such as, it would depend on ‘where the parties were at’ and ‘how well they were able to communicate’. Another commented that:

‘If you are out for everything you can get, I don’t think it would work for someone. I think it is great if the two of you want to come to a conclusion, especially if you have children, they are not going to be stuck in the middle. I think it is fantastic for people with children but I do think you would have to be very open and that you would have to get on together.’

One of the parties interviewed, while recommending the process, would only recommend it for ‘the long term separated who had an arrangement that they wanted to legalise, if it is a mutual decision’.

14. Concerns about the process

Three collaborative participants mentioned the need for the lawyers to remain in control of the process – both in terms of ensuring that matters progressed at a reasonable pace and also in terms of being aware of when the process was not working or perhaps one of the parties was not suitable. For two of these three participants settlement was not reached within the process. This they attributed to either their own solicitor or the solicitor on the other side not being in control. One commented: ‘I feel that there should be some way of identifying that somebody is not suitable – that they are not emotionally or intellectually prepared. That needs to be recognised sooner’.

Another concern is that four participants felt that they were not clear about their legal entitlements during the process. One indicated that they were probably told but that she did not take it in and another referred to the fact that it was all ‘murky waters’ as to what you may get in a court situation. In one case the participant felt like the solicitors had come up with the figures and she just went along with it and that, in her view, there should have been more flexibility in the figures negotiated. It is clear that different collaborative practitioners take different approaches.

XI. The Collaborative Lawyer’s Perspective

A. Introduction

Building on the information gleaned from the quantitative research, further insight into the collaborative lawyer’s view of the process was obtained during the course of the semi-structured interviews. Eight collaborative lawyers were interviewed⁹⁶. Five were women and three were men. All were experienced family lawyers. All were members of practice groups and 88 % had undergone mediation training⁹⁷.

B. Benefits of the Process

Collaborative lawyers interviewed saw the benefits of the process as being two-fold. Firstly, it allowed them as lawyers to provide a more client focused service that was tailored to their clients’ needs. Through the process they had developed an increased awareness of the need to actually listen more carefully to the client and to help them to reach more creative solutions than may be available through the court process. Secondly, dealing with a case through the collaborative process they felt was a more dignified way for their clients, which empowered the clients to learn to

⁹⁶ Only one of these eight participants had also taken part in the quantitative research.

⁹⁷ Fifty per cent of those interviewed came from the Dublin/ Wicklow area with 38 % from Cork and 12 % from Galway. Fifty per cent trained as collaborative lawyers in 2004/2005 and again, similar to the results of the quantitative research, 2009 was the most popular year for practitioners to undergo mediation training.

manage their relationships more effectively and thereby gave them the tools required to build a new type of relationship with each other, which would be for the benefit of themselves and of the children they would continue to co-parent.

In this regard, practitioners commented that even when settlement negotiations go well and matters are agreed amicably through traditional court negotiations that ‘still that was us (the two solicitors) getting on constructively, the two clients were in two separate rooms both feeling anxious and unhappy and uncomfortable and reliant on their lawyer’. Another commented on the difficulties that can arise when solicitors and barristers are the ones negotiating because, from the clients’ point of view, there may be no transparency in that the clients are not privy to the discussions being held.⁹⁸ One experienced family law solicitor commented that they explain the difference between collaborative practice and court negotiations as follows, with court negotiations:

‘... you tell me and I tell the barrister and he tells the barrister on the other side and he tells your husband your husband goes back to his – who knows what the message is! People like that they feel more in control [in the collaborative process] when they sort of hear what is going on even if it is something that they don’t want to hear, than hearing this sort of Chinese whispers...’.

There was general agreement that practising the collaborative way was in fact more challenging for the lawyers. One collaborative lawyer commented that:

‘The lazy solicitor packs it off to the barrister, the barrister drafts the papers, you wait your turn, you sit in the court, the solicitor really can take a very detached view of the thing, doesn’t have to be

⁹⁸ This issue of accountability, of clients knowing exactly what happened during the negotiations and during their case was raised by separating parties that had used the court process and also by young adults whose parents had used the court process who likewise expressed frustration with the legal process specifically for this reason.

proactive at all. It can be a very lazy approach to it...’

Another commented that ‘[s]ometimes it (collaborative practice) can be (more difficult) because we know our way around the courts so well’.

C. Domestic Violence & Screening

There is a view that processes such as mediation or collaborative practice are not suitable in any situation where there has been domestic violence.⁹⁹ All collaborative lawyers interviewed acknowledged the difficulties that such a history may present within the process. However, practitioners were divided on whether they would consider such a history a complete bar to using collaborative practice. One practitioner was of the view that collaborative would be more suitable than mediation because ‘there is nobody at your back in the mediation process.’ All practitioners indicated that there would have to be an acknowledgment of what had happened and an agreed willingness to proceed before they would consider using collaborative, with one commenting that:

‘knowing the way that domestic violence is dealt with in court – with the best will in the world and I think judges try and do their best – but it’s a blunt instrument and it doesn’t really solve any of the bigger issues that are there with this family. And so, knowing that, you can’t say you’re better off going to court, because you know that that’s not true. You have to say to them that it has to be done in a certain way and unless you’re agreeable to that, then you can’t do it.’

This also raised the issue of screening and the importance of being able to trust your colleague as to whether the other party is suitable for the process. All practitioners felt that, with experience, a lawyer will generally have a good feeling as to whether their own client is suitable or not – that they need to be coming from a place of ‘I want to do what is best, you can tell from

⁹⁹ Women’s Aid —*Submission to the Family Law Reporting Committee* (January 2009) 5. Available at: www.womensaid.ie.

the tone'. It was also accepted that the lawyer needs to be able to assist the client to choose the most suitable process for them and that there is an onus, particularly on collaborative practitioners, because of the implications of the disqualification clause to ensure, in so far as possible, that the client understands what is expected of them within the process and the commitment that is required from them. Collaborative lawyers, by encouraging clients that are not suited to the process to engage, are doing a disservice to their clients and to the process. One collaborative lawyer recounted that she had:

‘... one case where I was talking to the husband about collaboration and he was actually walking around the room saying, ‘This is what I’m looking for, do I get to speak to her and I’ll tell her and I’ll tell her’ and I am thinking to myself, this guy would no more collaborate than the man in the moon. So if I was asked honestly by a colleague, do you think Mr. X is suitable for collaboration, I would have to say well he thinks it is wonderful but I don’t think he understands the word.’

Two collaborative lawyers acknowledged that the stress and pressure of a separation may cause parties to do something which may be out of character and in that situation once there is, again, an acceptance and acknowledgement of this, the parties may be able to engage. However, there was consensus that if there was a history and ongoing pattern of domestic violence, with no acknowledgment of the behaviour, the collaborative process would not be suitable.

D. Outcomes

Again, in accordance with the quantitative research, the majority of collaborative lawyers interviewed agreed that the outcomes are not significantly different in pure monetary terms, with one practitioner indicating that:

‘no, not significantly no – maybe on an issue by issue basis if you broke it down... finance wise we would have come out probably the

same from court but if you took the children and the access and custody issue wise, we could have got anything under the sun from the court whereas through the collaborative process, the parties were able to craft their own workable agreements in relation to these issues. So I think, in general, it is a similar outcome but it is much more finely crafted and the issues that are of importance are given, I suppose, are given more emphasis.’

Another collaborative lawyer commented that, while the process is often used by clients with more financial resources, the process is:

‘...enormously more creative and when you have limited resources you have to be creative. The courts have a very limited time to be creative. In collaboration and particularly the team model, because you have so many people working together, ideas generate. It’s just with that synchronicity, ideas will generate.’

E. Disqualification Clause

The collaborative lawyers interviewed, all of whom had used the process, similarly indicated that the disqualification provision was less of an issue in practice. This can be contrasted to the views of collaborative lawyers expressed as part of the quantitative research, during which 50% viewed the implications of the disqualification provision as significant with 43% viewing it as a very significant factor in the process. Perhaps, however, this discrepancy is addressed in the comment of one collaborative lawyer who advised that:

‘I have found however that where you explain to the client that the disqualification provision is ultimately an incentive for everybody to make sure that it works and to avoid litigating, that they do come around to that, on reflection. ... In fact, I have had no client saying ‘no’ to collaborative on the grounds of the disqualification clause. I

think it is more a problem for solicitors who don't practise in the area.

Another experienced collaborative lawyer interviewed indicated that they had 'never, ever lost a collaboration because of the disqualification clause. No-one has ever said to me that they couldn't possibly do that because of the disqualification clause. No-one has ever said that'. One collaborative lawyer noted the benefit of the disqualification clause in helping clients 'think again – that they don't, at the first little hiccup, say right we'll see you again –because they've spent too much money in it' and 'if that wasn't there a lot of cases would fall more easily'. Whereas for another collaborative lawyer they felt that clients viewed the restriction as being on the lawyers, not on them:

'They are aware certainly that it keeps us in the process and that we can't do anything else. They are well aware of that. They are aware that they can go and do other things. If they choose to, they can quit out of it if they want... It is your choice. I can do this for you, if you think you can do better elsewhere off you go.... I think what happens is that they have put time effort and energy into it and the system is up and running, they have a communication process, it mightn't be working at this point in time, but that is the challenge to make it work.'

It appears that in some cases, that the disqualification provision is a bigger concern for lawyers than for their clients¹⁰⁰. This may be as one collaborative lawyer commented because '[t]he professionals, I think, focus too much on the process whereas the clients simply want solutions'¹⁰¹.

Cross-referencing to the results of the quantitative research for comments from collaborative lawyers that had not used the process, only 15 % listed issues surrounding the disqualification process as a concern about the process.

¹⁰⁰ This in line with the research carried out by the IACP and Resolution. See (n 1).

¹⁰¹ Follow up e-mail from participant.

F. Interdisciplinary Model

Similar to the results indicated by the quantitative research, the most commonly employed expert amongst the collaborative lawyers interviewed was the financial expert. For those collaborative lawyers whose clients chose to use coaches, the lawyers commented that the coaches can be invaluable at explaining things to clients in a way that the client understands and appreciates rather than from a strictly legal point of view. One of these practitioners was of the view that ‘ignoring the other elements of what is happening for people is doing them no fairness or justice or service... there is a time for negotiation and there is a time for dialogue and the collaborative process offers the best mechanism for the interaction between the various disciplines’. This collaborative lawyer went on to comment that ‘a client cannot design the model because they haven’t been here before and they aren’t emotionally placed to be able to deal with it’. It was evident, however, in interviewing collaborative lawyers that are most experienced in the interdisciplinary model, that there are difficulties for clients in seeing beyond the additional costs involved.

G. Legal Advice

There was a general consensus amongst the collaborative lawyers interviewed that clients should be fully advised of the legal rights before entering the process. Comments made in this regard included:

‘No I think they need the background of the advice first but to be honest they normally look for that anyway. I think they need it because they need to be making their decisions with the knowledge as to what they’re giving up or not giving up.’

‘They do yeah absolutely, they would be fully briefed on (a) what their entitlements were and (b) what their potential expectations might be if the case were litigated, i.e. what a judge would be likely to do you know, so they will have a good overview in relation to that on each issue as it arose.’

Only one collaborative lawyer indicated that legal advice is often given to both parties together when at the four-way meetings. Collaborative lawyers when asked about the issue of support or advocacy believed that it was important that clients felt that the lawyer was on their side. However, the lawyers provide such advocacy while having:

‘regard for what the other players are doing... I have to be conscious of what they (the other lawyer and client) are doing, I have to try to facilitate my client in understanding what they are doing and what they are saying... to embolden them to be able to feel that they can use the process in the best way.’

H. Impact on Approach to Practice

In accordance with the results of the quantitative research, the collaborative lawyers interviewed also indicated that the training has had a positive impact on their approach to practice. It has made them question the practices that are routine within the adversarial system and has alerted them to the impact on the family as a whole. One practitioner described it as ‘... putting a definition or a system to a process that I needed to find about how to resolve issues for people in the people’s interest ...substantially, it met a need’.

Another collaborative lawyer noted that the process gave the client the freedom to tell their story as they saw it rather than the solicitor moulding their story into a predetermined framework:

‘... Before I would come to a meeting with a client and I would have a list of things that I wanted that client to answer. I’d come with a form – much like you have – and I’d have my questions already set out and I wouldn’t want them starting at where I would see as the end and telling me the story backwards. I would want them to start where I saw as the

beginning, which is probably not what they saw at all and so I would squish them into the peg that I wanted... I don't do that anymore so it's changed me dramatically in that regard.'

XII. The Voice of the Child within the Collaborative Process

A. Introduction

The collaborative process is promoted as a more “family friendly” method of resolving the issues that arise at a time of separation or divorce. As noted earlier, it is possible for parties using this process to engage the services of a child specialist to speak to the children in a non-threatening way and to bring any concerns that they may have back to their parents. This section explores the extent to which the needs and views of the children of the separating parties were taken into consideration by the participants in this research, namely, the separating parties and their collaborative lawyers.

B. Consideration of the Children's Interests

At the beginning of a collaborative case clients are asked to set out what they consider to be their goals for the process. It is evident, from this research and from research internationally, that procuring an outcome that minimises the impact on the children of the relationship and ensures that their needs are met is one of the most commonly aspired to goals. While there is this general consensus amongst the separating parties interviewed that the interests of their children were to the fore, both in deciding to use the collaborative process and throughout the negotiations, no participant had chosen to engage the services of a child specialist. Two parties had sought help for a child through a child psychologist outside of the collaborative process. In one of these cases, both of the parents took the advice of the counsellor on board and things improved for the child. In the other, a

participant commented that her husband refused to comply with the counsellor's advice that:

“You (the father) need to let her (the child) talk”, which would have been good if X (husband) had heard their voice. He didn't really understand. I felt the counselling was independent; someone who could communicate for them, the counsellor could speak for them, not coming from me.’

One participant who was using mental health experts as part of the process indicated that the best interests of the children were discussed at meetings with the mental health experts. However, in that case too, the other parent refused to follow the advices given.

The evidence from the research undertaken as part of this thesis shows that while the children's interests are discussed extensively within the collaborative process, that, as commented by one of the collaborative lawyers interviewed, even in ‘the so-called amicable ones, there can be a lack of awareness of what might be the issues for the children’. This collaborative lawyer went on to say that they:

‘...find it very difficult to persuade clients to get a child specialist. I particularly find clients who are highly educated and well healed much less likely to get a child specialist because, if they don't perceive a problem with the child, they are not going to listen to you telling them that there might be. You're much more likely to get a hearing from someone who's not as sure of themselves.’¹⁰²

Parents, understandably, have concerns about exposing their children to what is perceived as therapy or counselling. As noted earlier, one participant had brought his children to counselling before entering the collaborative process and described it as “detrimental”¹⁰³. The child specialist role is not,

¹⁰² This was also evident in the research undertaken by the International Academy of Collaborative Professionals. See Connie Healy, ‘The Role of the Child Specialist’ (2012) 12 (1) *The Collaborative Review* 22.

¹⁰³ See p. 289.

however, a therapeutic role but one which aims to provide a forum for children to express their views. One collaborative practitioner explained that there are:

‘huge benefits to be had from simple, non-aggressive, non-court driven intervention with children..., where parties agree that the kids are there and really they are involved in this somehow, and therefore they deserve to be consulted with in a child appropriate way, rather than dragging them into it where people are attesting or where courts are ordering it or where it is being used by parents against each other.’

Collaborative lawyers indicated that, in particular, the training had encouraged them to challenge their clients a bit more into exploring the best interests of their children. One practitioner commented that it is only recently that they have begun to challenge parents to think more deeply as to how their children are affected and what they can do to help, rather than just accepting their ‘partisan perception of what is in the best interests of the children’.

The majority of parties separating through the collaborative process also expressed the view that the children were “fine”, with one parent being of the view that children will have problems as they grow up but he felt that it was not possible to say whether this was because of the separation or whether the child would have had these problems anyway.

In examining specific cases, parents commented:

‘I think they are fine. I think that I can probably put my hand on my heart and say they are fine that their mum and dad have separated but they are not fine with the fact that it has now moved on...The little one who is 14 year old doesn’t choose to talk about it and the other girl wants to know here I am every minute of the day. She is not struggling with the separation though. I think ... she doesn’t trust me maybe as much as she did.’

When asked if they were ever offered counselling or assistance, this participant went on to say:

‘... yes I am thinking about that now, I think it is only actually after the events happen that the kids actually need it and both x and I are in new relationships now and I think that is very difficult for the kids. Life has actually moved on a bit now and I think that is where the difficulty actually starts rather than the physical separating. I think it was probably quite a relief for them that we separated.’

This issue of parents perhaps being in denial and only appreciating the impact the separation may have had on the children at some point afterwards was also mentioned by a lady who had separated through the court process. She felt that:

‘... You’re going through such a dark time of your own. I mean a lot of cases wouldn’t necessarily have been as acrimonious as mine but from what I can see around me it’s such a dark space. It’s very easy to overlook the impact on your children and a lot of people don’t tell their children and they’re in a little bit of denial there. Because most children know what’s going on, or that something’s going on. Some of them are cute enough not to say anything because they don’t want to upset anybody, but I don’t think it’s very fair for children to be asked to walk a tightrope in between everybody.’

Another collaborative participant, whose ex-spouse had quite a difficult time with mental health problems, indicated that the children, who would have been aged 6 and 9 at the time, were never aware of these issues. However, in that case the parents had considered the situation with one of the children sufficiently serious that they consulted a child psychologist ‘but she just said that it was our problems that was causing the, it wasn’t the child at all, that it was our reaction to each other, the way we were talking’. While these parents did change their behaviour as a result of the advices of the child psychologist, subsequent to their meeting with her, additional

issues arose in that case, including the fact that '[h]e took the kids out of the school without telling me and went off with them and started telling them that he was all upset over me'. Despite this, the participant was still of the belief that the separation did not affect the children and that the children were not aware of what was going on. She commented:

'Oh God no, and I wouldn't want them. They didn't even know that there was a problem and I hope to God that there wouldn't be. There was no need for it in our case. If you understood the two of us now we are very mature when it comes to, the children won't get involved and we are brilliant when it comes... You could be quite stressed out but the minute the kids come along, you go or do something and they never notice it so they never got involved. In our case we are lucky.'

Other parents commented that their child, who was only in primary school at the time of the separation, was much better after the judicial separation came through and the Dad had moved out of the house. In that situation the father would not speak to the mother. She recalls attending counselling as part of the collaborative process and the coach trying to encourage the father of the child to speak to the mother when picking the children up for access visits but he did not act upon the advice given. This lady also sought advice from a counsellor as to how best to deal with the separation and the counsellor stressed the importance of being honest and truthful with the child.

Others were quite aware of the impact on their children, with comments such as:

'It definitely did, it definitely affected them, the separation, and I mean it would be a complete and utter lie to say that it didn't affect them. Sometimes when they are down with me they would cry, I can't sleep I want my dad. Then when they are up with him, they can't sleep up with him either.'

and another commented that '[m]arriage breakdown happens to a family. Somebody needs to hear their concerns. It is their life and they are hugely affected. It changes everything. People need to realise that'.

In examining the place of older children, children perhaps from their mid-teens upwards, there was recognition amongst collaborative lawyers that often older children are left out of the negotiations that take place within the court process, with lawyers taking the view that older children will be able to decide for themselves:

'I had a situation in court two days ago where the focus of our discussion were the two boys who were 10 and 11 but the 18 year old boy and the 15 year old girl were kind of, they weren't even in the mix, because they were old enough to make their own arrangement in terms of contact with Dad and so on, but there was no one addressing well what do they need.'

This was also recognised by solicitors and barristers who deal with cases through the courts system. However, it is notable from interviews carried out with older children, which will be dealt with in more detail later in this chapter, that despite their age at the time of the break-up many referred to themselves as "still a child". One participant commented that no matter what age they were they were still their parent's child and needed the love and support of their parents at such a time.

One collaborative lawyer noted that in many instances:

'... you might have them (parents) going off talking inappropriately, separately to the children or spreading information which is inappropriate to the children, but they won't have even thought that it was the right thing to do to find out a way of bringing the children on board in a very measured child centred way and there is an irony in that which, I think, the collaborative process can reverse. There is

a lovely scope for practitioners to be able to educate the client about how beneficial this could be both for them going forward in their new co-parenting role in a separated family but also for the children during the process of separation.’

Interestingly, this awareness also seems to be growing amongst family law practitioners who use the court process, as many of them have indicated that they now suggest counselling to their clients and advise them in relation to getting help with the parenting issues. However, again, the difficulty lies in the fact that parents determine whether such services are engaged and while they may be advised as to the benefits of such support, the final decision remains with them.

C. Adult children

Three of the participants who had used the collaborative process had children who were over 18. The fact that the separation also impacts on these adult children was acknowledged by one participant in particular. In her case her children were all over 18 and she indicated that she got the impression from her collaborative lawyer that including older children was not the “done thing”. This is a concern because collaborative practitioners assert that the whole family unit is taken into consideration during the process. In her opinion, her daughter was ‘definitely affected’ and would have liked to be part of the process.

Another issue that was raised during the course of the research undertaken for this thesis was the extent to which adult children can, in fact, support parents who may decide to separate in later years and that, again, bringing them into the discussion through a structure like the collaborative process, may provide support for them and for the separating couple. One collaborative lawyer explained that she:

‘...invited the adult children to come and meet with me before we started the process... I sat down with them and a coach and we talked about what their parents were going to do; how it would look and what problems might arise for them and how supportive they could be... things they could expect as we journeyed through this and I think that that made an enormous difference because they were involved, they knew what was going on.’

Unfortunately, as noted earlier, it was not possible to source any young adults whose parents had separated using the collaborative process, possibly due to the fact that the process is still relatively new in Ireland and/or the fact that the uptake amongst separating parties, in comparison to the numbers that use the courts’ system is relatively low. However, it was decided that the views of young adults should be sought to clarify issues such as the extent to which they feel that the family transition impacted on them, whether they had or would like to have had a voice within whatever process their parents had chosen to use and what such “participation” or “voice” meant to them. These views are outlined in chapter 6.

XIII. Solicitors’ and Barristers’ Views on Mediation and Collaborative Practice

While half of the solicitors and barristers interviewed were of the view that the courts system as it stands serves clients well, referring only to issues of facilities at the court house and lack of judges as possible problems, for the other half of those interviewed there was some acceptance that efforts could be made to keep acrimonious letters at a minimum and to avoid ‘upping the ante’. There was unanimous recognition that the attitude and personality of the lawyer on the other side of the case can determine how matters progress. This is in accordance with the views expressed by Lowenthal¹⁰⁴ that one cannot take a collaborative approach if your opponent is to take a competitive one. One solicitor commented that ‘the identity of the legal

¹⁰⁴ Gary Lowenthal, ‘A General Theory of Negotiation Process, Strategy and Behaviour’, (1982) 31 *University of Kansas Law Review* 69, 92.

advisors contributes ‘greatly... to whether a case will settle or not. Some practitioners take the view that the matter goes to a full hearing no matter what and no amount of meetings will advance settlement in those circumstances’.

Another interesting issue which was raised was that of family lawyers perhaps indulging their clients too much and not bringing some objectivity to bear when issues like access are being decided. In doing so, these lawyers are inadvertently disempowering their clients and causing them to be over reliant on the courts’ system or their lawyers to resolve issues. One litigator commented that with family law:

‘the lawyers ...(are) sort of point scoring and, it is very bitter between the lawyers which is astonishing but they seem to take more of an evangelical role in looking after their poor client who is hard done by and just considering their client’s point of view.’

Solicitors and barristers were asked for their opinions on mediation and collaborative practice. Overall, there is some limited acceptance of mediation. Three practitioners interviewed recognised some benefits with mediation. Two others felt that it added an additional layer of costs and one indicated that they advised clients about mediation simply because they were obliged to do so under the legislation. One barrister commented that ‘I don’t think that mediation works in the vast majority of family law cases’, while another commented that:

‘I think there’s a sort of general tendency to commit people to the courts. Clients will be guided but it needs both parties to be guided. There’s no point in encouraging one party (into mediation) if that encouragement doesn’t come from both (solicitors) and I would see that there’s an absence of that coming from within our system.’

However, when it comes to collaborative practice, only one solicitor who is actually trained in collaborative could see any benefits in the process. The other solicitors, though dealing with family law, were not familiar with the process and the barristers in general were, unsurprisingly, quite negative

about the process. One described it as ‘daft’, going on to say ‘I think you either mediate with the mediator who will do a sort of a – whereas the costs of collaborative law just seem to me to be phenomenal and also our role as barristers and solicitors – it is an adversarial type of role.’ Other reasons given were the cost implications for clients and the pressure to settle, with comments like:

‘I also don’t understand for the life of me. Like of course once they have signed up to settle the case they are going to bloody well try and settle it because they are not going to want to lose the case either so that has financial implications for them so I can’t imagine how that could be cheaper.’

Solicitors and barristers who resolve issues through the court process refer to the fact that it is the break-up of the relationship and not the method used to resolve it that causes the conflict¹⁰⁵. Similarly, they argue that if separating parties have a relationship where they can sit down and work things out then there is no reason that they could not do this just as effectively with a mediator – saving themselves the expense and structure of the collaborative process.¹⁰⁶ Therefore in an effort to test this assertion, that these parties would have settled their cases anyway, a review was carried out of the participants who took part in the collaborative process to determine the level of acrimony present at the time they entered the process and the effectiveness of collaborative practice as a method of dispute resolution.

It was noted that two of the participants indicated that they were communicating relatively well with their ex-spouse at the time that they entered into the process.¹⁰⁷ However, for the other eight participants the situation was not as straightforward. For two participants a significant

¹⁰⁵ Marital breakdown is acrimonious – it’s an acrimonious place to be and I think the acrimony comes from that into the legal process rather than the legal process creating it – barrister interviewed.

¹⁰⁶ Three barristers expressed this view.

¹⁰⁷ Both of these parties had, in fact, tried mediation some time earlier. One party had managed to agree access arrangements within the mediation process but the remaining issues were not resolved. The other party did not find the mediation process helpful.

amount of time had passed since the initial break-up.¹⁰⁸ This was a double edged sword. As commented by one participant, things that used to annoy them at the outset after the break-up seemed less significant. However, against this, another participant commented that it was difficult to go into a situation where they are back sitting in a room together many years later, particularly in view of the fact that, in that particular case, the parties did not speak to each other even when the children were being handed over for access. For the majority of the participants there was in fact quite a level of conflict and apprehension. Participants commented:

‘It [the relationship] was just good enough to get through it. Before the collaborative process we were at each other’s throats.’

‘I was driving it and at that point in time X didn’t want it at all, so he was very angry and very negative, so the first meeting was quite nerve wrecking.’

‘... I think, you see, he was very antagonistic about the whole thing but I think he was much more favourable to than going to a court, the pressure of lawyers, solicitors and stuff is very cold faced.’

Another indicated that they were ‘absolutely terrified’ and that the first meeting did not go particularly well. They noted that their ex-spouse is quick to lose their temper but that ‘each meeting was slightly better’ and that they ‘felt that the meetings were helping them to communicate’. One commented that they would say that their solicitors saw it as ‘one of the most difficult collaborations’ indicating that his ex-wife was ‘spinning her wheels’.

Therefore, it would not appear to be an accurate assessment to assert that these cases could be ‘settled anyway’ as it is evident that the separating parties had a number of issues to work through as part of the process.

¹⁰⁸ Four years in one case and eight in another.

XIV. Judges' Views on Mediation and Collaborative Practice

As with solicitors and barristers who practise within the courts' system, there was a greater acceptance of mediation than of collaborative practice by members of the judiciary. In general, there was a view that alternatives to the adversarial system should be recommended in family law matters, with one judge of the view that there is a 'huge waste of judicial time in family law cases. Tit for tat revenge arguments are of no constructive value'. The issue of the training and competence of mediators was mentioned by two judges and the lack of accreditation.

Judges who had practised as solicitors prior to being appointed to the bench were more accepting of collaborative practice than those that had practised as barristers. One judge who had practised as a solicitor commented '[f]amily law should not be conducted in any other way'. Of those who were barristers, one indicated that they had no experience of it, one didn't know what it was, one expressed concerns regarding the additional costs involved if a case did not settle and one described it as a 'waste of time'. Interestingly, this judge was similarly not convinced about mediation, commenting that it was 'hard to say' if it was of any benefit.

Two judges who had practised as solicitors commented that the courts should have the power to mandate mediation as a prerequisite to court proceedings particularly in custody and access disputes. One judge also mentioned the difficulties in the fact that there are no proper sanctions for parties that fail to comply with orders.

XV. Conclusions – Collaborative Practice

The aim of this aspect of the empirical study was to examine the development of collaborative practice in Ireland, the extent to which it

serves the needs of separating couples and their children, and its acceptance by the legal profession in general.

A. For Separating Parties

Collaborative practice is a relatively new process. As one of the Irish participants commented, people ‘tend to dismiss things that we don’t know and I think that collaborative practice will require a bit of a hard sell initially.’ While the sample size in the Irish study is small, significantly there is triangulation between it and the results of the research in Canada¹⁰⁹ and England and Wales.¹¹⁰ Overall, the majority of the participants interviewed were satisfied both with the process and the outcome and it would therefore appear that for those who choose to use it, the process provides a valuable alternative to the court process. Macfarlane in concluding her research noted that collaborative practice had an element of what she termed “value added”¹¹¹ – some additional factor that the clients perceived as important. For many in my research, this equated to what Wright has called the “relationship objective”.¹¹² Eight out of the ten Irish participants indicated they have a good relationship now and this they attribute mainly to using the collaborative process.

The research undertaken for this thesis demonstrates, therefore, that engaging in the collaborative process may help parties to learn to communicate in new ways. One collaborative lawyer commented that:

‘... Parents/ couples when they are married will have ways of fixing disputes. They will have a way of communicating in order to solve a problem and they will have learned that together over the time. And if they are not the type of people who sit around a table and discuss it in such a way that they are able to come out the other end both

¹⁰⁹ See Macfarlane (n 1).

¹¹⁰ See Sefton (n 1).

¹¹¹ Macfarlane (n 1) 58.

¹¹² Katherine Wright, ‘The Role of Solicitors in divorce: A note of caution’ (2007) 19(4) *Child and Family Law Quarterly* 481, 489.

feeling that they have been heard, what you have to do in collaborative law is to re-teach them how they can go about communicating in order to resolve differences.’

Collaborative practice provides an opportunity for parties to recognise how they communicate and what, if any, changes may help them to deal with resolving differences more effectively.

A theme which emerged amongst participants who used the collaborative process is a sense of empowerment. Clients feel that they were directly involved in the decisions being made and that they had input into those decisions, and that such participation had given them a sense of enlightenment.¹¹³ One participant in particular noted that after the initial marriage breakdown they had:

‘... started feeling all these inferior things, oh my God, X is such much better than I am, he has a better job, he has been doing this and that and I suppose the breakdown of a marriage does reduce you to nothing. Whereas when we went into the collaboration and as long as the counselling went on and when I listened to x talking and I was hearing the same things I heard 10 years ago, I thought, you know I am not the person that he made me feel I was,... know and I am a, b, c, d and e ...and I was able to see.’

This was also acknowledged by one legal aid board lawyer interviewed. They felt that collaborative practice ‘actually empowers them (clients). When they were allowed to think for themselves and make their own decisions it empowers them hugely’.

B. For their children

Parties who used the collaborative process, stressed, in many cases, that their reasons for doing so was for the benefit of their children. However, there still appeared to be a general lack of awareness of the impact of

¹¹³ See Warshak chapter .1

separation and divorce on children amongst those interviewed. None had chosen to instruct a child specialist and in cases where they had sought advice from child psychologists or other expert outside of the collaborative process, many failed to take the advice given. The fact, however, that many participants interviewed indicated that participating in the process helped them communicate and had reduced the level of acrimony between the parents, may have long term benefits for their children. This is an issue which will require further research.

C. For the Legal Profession

Amongst the wider legal profession, there was some limited acceptance of mediation but not of collaborative practice. What is clear, however, is that clients, in many cases, will be influenced by what they are advised by their legal representatives as the experts and while some clients are researching matters themselves and are less willing to hand the control of their issues completely to a lawyer, the whole area of alternative dispute resolution remains, as described by one practitioner, ‘a minority sport.’

Both the results of the quantitative research carried out as part of this study and the collaborative practitioners who were interviewed highlighted apathy from the legal profession and a lack of willingness to engage as the main stumbling blocks to the development of collaborative practice. Many lawyers will never be of the mindset that they are willing to sit down around a table with clients and give them advice as to where and how to access information and services that may help them to reach a more holistic solution. This is clear through the negativity expressed by some litigators towards the process.

The risks for collaborative practice lie in the fact that it requires more structured up-front preparation time for lawyers, for, as demonstrated in this research and research internationally, and contrary to what the legal profession assert, no greater financial gain. This may mean that the service will simply not be offered to separating couples. The Law Reform Commission have recommended that processes like mediation and

collaborative practice should be taught at the Law Society and the Honourable Society of Kings Inns and that information on such services should be provided to potential family law litigants at mandatory information sessions. This may help to ensure that clients are advised as to all of the processes available. However, as was evident in this research, the risk is that clients may be offered such services, simply in name, with lawyers continuing to negotiate as they have always done.

D. Access to Justice

A point made by one of the collaborative lawyers interviewed was that the clients are 'not disqualified'. If they are not satisfied with the process, they can proceed to court. Will it be more expensive to do both? Probably, yes. This stresses the importance of clients making an informed decision when opting to try the collaborative process. It is not a process to engage in unless a party is committed to seeking an amicable, non-court based resolution to the issues. For 80% of the participants interviewed, there was no need to resort to the courts.

The fact that collaborative practice may not be an option for couples who cannot afford legal representation is a concern. However, this process is available through the legal aid board in Ireland at present and the evidence from this research is that in some cases, private solicitors are willing to come to arrangements with potential clients regarding fees.

E. Concerns with the process

As noted above, clients need to be fully informed prior to entering the process. They need to be aware that they are, for the duration of the process, forgoing their rights to seek orders from the court, be that in relation to custody/ access, maintenance or discovery. Affidavits of Means will be sworn prior to entering the process and these affidavits will be admissible in

any subsequent court proceedings. Each item in these affidavits will be reviewed during the course of the negotiations. There has not been any evidence demonstrated through the research undertaken to date that parties have used the process to hide assets or that the non-owing spouses do less well. One of the parties interviewed for this research advised that she knows she would have received more in financial terms from the court, but she negotiated other issues that were of greater importance to her during the collaborative process, which she felt she would not be in position to do within the courts' system.

The extent to which clients have to disclose issues of a personal nature, which are not subject to normal discovery orders as part of the court process, is something which needs to be addressed and which the clients need to be aware of before entering the process. A balance needs to be struck between the need to disclose issues which may be relevant and the need to protect a client's privacy.

From a lawyer's point of view, there will often be, as Menkel-Meadow referred to, "settlement facts",¹¹⁴ which may influence a client's decision to settle in a particular way or at a particular point in time. In the normal course of legal proceedings, these "settlement facts" do not have to be disclosed. Built-in legal advice is one aspect of collaborative practice which distinguishes it from mediation. Therefore, the fact that four participants interviewed felt unsure of their legal rights is a concern.

¹¹⁴ Carrie Menkel-Meadow, 'Settlement facts -When Winning Isn't Everything: The Lawyer As Problem Solver' (2000) 28 Hofstra Law Review 905, 919.

CHAPTER 6: “Scaffolding” Children to Participate

I. Introduction

Building on the theoretical framework regarding the issue of participation and the development of children’s rights outlined in chapter one, chapter 2 addressed the “best interests” and the “voice of the child” and examined the means through which the voice of the child is heard within the court process. Chapters 3 and 4, in assessing mediation and collaborative practice as to their effectiveness as dispute resolution processes, also addressed the extent to which they facilitate the hearing of the child’s voice. In addition, chapter 5, through the results of empirical research into the way in which collaborative practice has developed in Ireland, revealed that although many separating parties indicated that they chose the process specifically because they felt that it would result in a better outcome for their children, there was no evidence that this meant that the voice of the child was heard. Parents seemed reluctant to involve their children (see chapter 5) and in many cases were of the view that “the children were fine”.

This chapter, in delving further into the importance of determining what is in the “best interests” of the child and the extent to which, **from their own perspective**, they wish to avail of their rights under Article 12 of the United Nations Convention on the Rights of the Child, presents the results of empirical research undertaken with a number of young adults whose parents separated when they were children. The aim of this aspect of the empirical research was to elicit the extent to which these young adults actually **participated** in the decisions being made at the time of their parents’ separation or divorce and **whether they felt that their voices were heard**. It outlines what **they** viewed as of importance to them and highlights how they feel the process could be adapted to help them to understand and to participate.

Particular attention is paid to the views of older children (from age 15/16 upwards) who are often left to decide for themselves regarding the

arrangements being made and also young adults who, though being over 18 and therefore not considered children under the law, are nonetheless, affected by the family transition. This research explores whether this age group (15 upwards) value this freedom to participate/choose or whether they prefer structure.

In addition, the role of the child specialist¹ within the collaborative process was outlined to all of these young adults and their views sought as to whether they felt that having such a specialist would have provided them with a “scaffolding”² mechanism or an avenue to enable them to ensure that their voices were heard.³

II. The Young Adults’ Perspective on the Voice of the Child

A. Introduction

There has been very little focus on the impact of separation and divorce on children, on what Fawcett describes as the ‘complex shifting process, unique to each individual, which usually began before the parents separated and which continued to affect their lives in the months and sometimes years after the marriage breakdown.’⁴ This aspect of the empirical research undertaken for this thesis seeks to address this issue and to provide an insight that is not that of adults, lawyers or detached policy makers, but instead focuses directly on the parties most closely involved, the young adults themselves.

¹ Chapter 3

² As outlined in chapter, Wood Brenner and Ross were of the view that children should be provided with a scaffolding mechanism to assist them to develop their decision making capacity and that such scaffolding would be gradually removed as their capacity evolved. See chapter 1.

³ It was not possible to interview young adults who had actually been provided with a child specialist within the collaborative process mainly because this process is relatively new in Ireland.

⁴ Margaret I. Fawcett, ‘The Changing Family in Northern Ireland: Young People and Divorce’ (2000) 32 *Youth and Society* 81, 88.

B. Profile of young adults

Fifteen young adults were interviewed. Their ages at the time of their parents' separation ranged from the age of 3 to 16 years of age. Twenty six per cent of respondents were under 5 at the time their parents separated. Six per cent were between the ages of 6 and 10. Thirty three per cent were in the 11-15 age group and 33 % were over 15 at the time of their parents' separation. Thirteen per cent of the respondents were only children, 47 % of participants were the eldest in the family. Twenty per cent were male and 80% female.

These young adults were from varying financial backgrounds, with some describing their lifestyle pre-separation as "affluent" and others of being less financially secure. What was evident was that all suffered a diminution in living standards post separation.

C. Custody & Access

With the exception of one case where the father was fighting for full custody, issues in relation to custody and access were agreed at the early stages. However, this did not mean that the children were not affected. It is clear for many of these children that they felt that they were drawn into their parents' separation in many other ways, be it in terms of decisions about maintenance and how the financial matters should be resolved, being left to look after younger children or being treated inappropriately as confidants.

D. Hearing About the Separation

Sixty per cent of the young adults interviewed were told about the separation by their Mums. One participant indicated that they walked in on a row between her parents and another that they had come in when their Mum was upset and that she told them about the separation but she doesn't believe that her Mum had intended to tell them at that point. In three cases

the mother left the family home. Thirteen per cent were told by their Dad and 13% said that they were told by both parents together. One participant indicated that they weren't ever officially told, that it was just a gradual thing that happened over a period of time.

Participants were asked if they could recall how they felt at the time they were told. Most participants indicated that they felt shocked. Twenty six per cent of the respondents said that they had an idea that things weren't going well in their parents' relationship but that they didn't think it would come to this.⁵ One participant commented that hearing the news about the separation was like hearing that someone had died. Many expressed sadness at missing the non-resident parent and a feeling that there was no one that they could talk to about this. Emotions expressed included: sadness; fear; relief; insecurity and in some cases a sense of feeling like they were to blame.⁶

As noted, just over one quarter of the participants was under the age of 5 when their parents separated. However, all of these participants, even at this young age indicated that they can recall specific memories and remember a sense of there being change. One participant indicated that they can clearly remember a time when their father lived with them and then when he moved out and the immediate sense of things not being the same. Another who was also three at the time of the separation, made the point that in some respects at that age it is more 'geographical' than emotional because a child doesn't really understand the concept of a relationship or a relationship breaking up – just that one parent is no longer in the family home and that they have a new house.

⁵ Diane Hogan, Ann Marie Halpenny and Shelia Greene, 'Children's Experiences of Parental Separation'. Children's Research Centre, Trinity College Dublin, 2002.e Dublin

⁶ Many of the same emotions were expressed by participants in the research carried out by Professor Dale Bagshaw. See Dale Bagshaw, 'Reshaping responses to children when parents are separating: Hearing children's voices in the transition' (2007) 60 *Australian Social Work* 450.

The issue of context⁷ was an important factor, in that one participant referred to the fact that her parents' relationship was always quite acrimonious when they think about it now, but at the time they thought that this was what marriage was like. Significantly, therefore, what is normal to one person may be a dysfunctional relationship for another person and this needs to be taken into account when assessing their views.

E. Not having a voice

While the majority of participants indicated that their parents probably felt that they had their best interests at heart, these young adults were of the view that their parents didn't understand or appreciate the impact that the separation had on them, specifically because their parents had made such decisions without hearing their voices or considering their views.

As was seen in the interviews carried out with separating parties, there was a general view that "the children were fine" (chapter 5). The young adults interviewed were questioned on this assertion and the extent to which they felt that their parents appreciated and understood the impact of the separation for the children. Overwhelmingly, even in the cases where issues were resolved amicably between the parties, young adults disagreed strongly with this view. This opinion did not vary when examined across factors such as gender or the child's age at the time of separation. Interestingly, however, the young adults instantly recognised and accepted this as being the view of their parents – there was no sense of surprise expressed. One participant was of the belief that 'parents underestimate how much kids understand, that is a big thing. Oh they might say that the kids were not affected but have you ever asked them what do you remember from that, how did you feel'. This participant went on to say:

⁷ Richard Warshak, 'Bringing Sense to Parental Alienation: A Look at the Disputes and the Evidence, (2003-2004) 37 *Family Law Quarterly* 273.

‘If you were to ask my mother, ‘How did your daughters deal with the divorce?’ she would say, they were fine. In the long term I am fine but there were little things that would have upset me when I was younger, that would have worried me, a sense of having to mind my sister, a sense of guilt but she would probably say, ‘Oh no the kids were fine throughout the divorce’. I don’t think parents realise. Some kids will go bad and will start doing bold things whereas I didn’t, I went along with my daily things, still worked as hard as I had, so nothing changed in my personal life so my Mother would think I was fine. Now everything was fine, you know, but it doesn’t mean it didn’t hurt like.’

Another participant, again instantly recognising this view, commented:

‘My Mam believes that; my Mam believes that it had no impact on us at all and it is bullshit. Some of it was a good impact but it is a very big upheaval. You have to know the logistics of what is going on. At 13 years old your friends want to see you and you need to know what house you are going to be in. So no, you do need to know what is going on, you need updates and you need treated like, to be told that because this is going to impact on your life every day like yeah, you need to know where you stand I would think. I would feel.’

Others, however, found it more difficult to assess or express, even now, the impact that it actually had. One participant’s initial reaction was that:

‘It didn’t have any major impact I don’t think, or actually no, on the whole it has definitely impacted me somewhat...whether I am conscious of it or not... It definitely had some impact. I am not fully capable of saying what but ... yeah.’

That sense of being different because of it was echoed by another participant who referred to the fact that ‘it definitely affects every child because your parents don’t live together and that is not the norm shall we say, so I think it is important that the child understands and the parents

understand that it will affect the child no matter what, no matter whether it is the most peaceful thing.’

For others, the impact was more direct. Two participants were quite angry at this assertion, that the children were “fine”, with one referring to the immediate impact for them, at age 14, of having to be the one to tell her mother ‘that he was having the affair because everyone knew expect for us of course, which is the way it happens, the usual’ and another commenting ‘they (the parents) don’t know that (that the children are not affected) ..., they are not in their head; that drives me crazy because I know it does affect them’.

In situations where the break-up was particularly acrimonious the impact seems to be more lasting. One participant indicated that:

‘It affects me now still and I am 20. It is an incredibly on-going thing because it is going to affect you the day you get married because your parents aren’t there, they aren’t together, it will affect you if you think they are going to end up fighting. Like when I graduate I can’t have the two of them at my graduation because I am afraid they will bicker or they will cause a scene....’

The separation may not only affect the children of the relationship, but also the next generation. This view was expressed by one participant, in particular, who indicated that difficulties had arisen when her niece asked her father to her Communion Day celebrations. Twenty years later it was still an issue that her Mum and Dad could not be in the same room together. In talking about this event, the participant mentions that:

‘I think she (her mother) was a bit taken aback by this and all the usual, well he treated me really badly during the marriage and we were sort of saying, it was not our marriage. He didn’t cheat on us and it is not our fault anymore, or it is not our problem anymore and, ... I think we just stopped indulging it to a certain extent, you know. But it is difficult all the time, a constant game of negotiating with all the players in the room so that they are never together and so that

there is always someone talking to one of them and not the other one.’

Again, the issue of ‘fault’ is mentioned. Many years later the children of this marriage appear to have a sense of fault about the marriage breakdown, even though this participant can clearly see that her parents were somewhat incompatible from the outset, that they were just, as she puts it ‘they are like a cat and dog in the room. They just have a reaction to each other’. This feeling of the separation being their fault was also echoed by other participants. One in particular did not get on well with her father and therefore was concerned for a long time that she was at fault for the break-up of the marriage. Another when speaking about whether she would like to have had an opportunity to speak to the judge, saw this as an opportunity to alleviate some of the blame, ‘you know the judge is telling me that it is not your fault, it might go into your head a bit better’.

The long term impact therefore seems to be the insecurity of not knowing how their parents will react to each other when they meet, of continuously having to show loyalty to one or other parent, of having to make allowances for their behaviour and in some respects placing the responsibility on the child to fix things for them. Two participants referred to the fact that it was only ‘now that I have gone through all of the people, the counselling and the workshops and everything I can go, “No, you are my parent, I am not your parent, you do it.” But that needs to be offered, people need to know that’. Similarly, another indicated that it was her counsellor who said ‘[y]ou have to step out of your Mother’s shadow, her life is not your life and I was like (clicks her fingers) obviously’ and this clarified matters for her and in some respects arguably gave her permission to move on with her own life.

Three participants indicated that in later years their parents did appreciate the impact – in two cases this realisation came from their mothers and in both of these cases they did not believe that their father had any understanding. For the third, it was the participant’s father that realised the affect more. In that case the father was the one that had initiated the

separation and therefore was possibly more conscious of the impact for this reason.

1. Stigma

Similar to those interviewed as part of Fawcett's study in Northern Ireland, the young adults frequently referred to the social stigma attached⁸ to their parents' separation. Bearing in mind that separation and divorce are still relatively new in this jurisdiction, many referred to the fact that they were the only children in school who had parents that were separated at that time and that they were teased about this by other children. There was a sense of shame, of it not being the norm.

2. Lack of structure

Most participants referred to the fact that they felt that the whole stability and structure had been removed from the family and that they found this quite frightening. One commented that she missed the rules that her father had imposed, even though she didn't think that she would. She missed him helping her with her homework and putting pressure on her regarding exams. For one participant she thought that divorce meant that she had lost her father and another referred to the fact that the children were left alone to cope with a depressed mother while the father, in many respects, carved out a new life for himself and was more financially secure than they were after the separation. This participant referred to the fact that their siblings and mother ended up living in a council estate, wearing second hand clothes while the father went on with his own life.

⁸ Margaret I. Fawcett, 'The Changing Family in Northern Ireland: Young People and Divorce' (2000) 32 *Youth and Society*, 81,88.

3. Fear

Fear was one of the main emotions expressed, with participants referring to the fact that they didn't know that they weren't going to starve, fear of not knowing what was going on and fear of upsetting their parents. All participants agreed that one of the most important tasks for parents is to remove the fear and insecurity by explaining things to the children in an age appropriate way and letting them deal with it. This fear featured strongly with participants indicating that they felt:

‘Fear is the biggest, biggest problem that exists with divorce. That uncertainty, that insecurity that, “What is going to happen to us? Don't let a child have that, tell the child this is what is happening. This is the course of events, this is how we feel about each other.’

Fear also featured strongly as an emotion expressed by separating parents, fear for their future and fear of the legal process.

F. What did “Participation” mean to the young adults interviewed?

What was evident was that it was not a simple matter of whether young adults had wanted to participate or not but that participation meant different things to different people. Warshak⁹ cautions that children's wishes must be accompanied by an understanding of the context in which those wishes are expressed. Agreeing with his view, as noted above, this research has endeavoured, where possible, to outline the context in which specific comments were made.

None of the participants interviewed were ever given an opportunity to present their views to the judge. None were assessed by a section 47 reporter. Only three participants were given a choice by their parents. One other was given an opportunity to decide how access would be structured

⁹ Richard Warshak, ‘Bringing Sense to Parental Alienation: A Look at the Disputes and the Evidence, (2003-2004) 37 *Family Law Quarterly* 273.

during the summer months and in one family the children were given a choice when they reached the age of 13.

While the majority of the participants agreed that having some kind of ‘forum’ for the children to talk would have been beneficial, they did not see this as necessarily having to be to a judge or solicitor. Interestingly, only one participant felt strongly that she would like to have had an opportunity to speak to the judge at the time of the separation. For this young adult, participation meant having a say and being given the opportunity to address the decision-maker. They were 16 at the time their parents separated and commented that children:

‘Definitely should have their say. Yeah, I think children obviously need to be protected but they are often the ones that are at the hub of everything, they are the ones that are at the hub of everything. They know a lot more than people let on and yeah I think they should have a say... it is such a huge decision to be making on the future of a child without actually asking them what they want... because like a judge isn’t going to make a decision because the kids want that, he is going to listen to everything and what harm can come from listening to what the kids want. It is only more information that he will make his well informed decision on and his judgement.’

Examining these comments in context, this participant had been aware that there were difficulties in their parents’ relationship. They felt a huge sense of loyalty towards their father and when their mother left, they largely took on a parenting role within the family. As a result, they felt strongly that they should have been able to present their views to the judge as to what they considered in their own best interests and in the best interests of their younger siblings. The judge however made an order for joint custody, which the participant was annoyed about at the time but now looking back comments that ‘thank God everything is fine but you know at least the Judge had that kind of foresight to see that obviously the time situation is important... obviously they know as well that this is a fraught time in your life and it isn’t necessarily always going to be like that’.

Another participant, although she didn't want to speak to the judge at the time, felt that talking to the judge would help make her feel that she had 'kinda someone to go looking out for you, we will sort it out, don't be worrying about it'. One participant felt that talking to a judge would be too "scary" and one commented that judges are not the most approachable of people.

What appeared to frustrate two of these participants more was that even when they reached the age of 18, they still could not participate:

'I said ...it is about me. I am 21. ... I am not a child by law but ... in this I am still a child... I could have no input, I wasn't allowed stay there. ... You are not represented when you are a child in this and can't even be involved when you are an adult either....'

And

'... I was 18...why can't I do this? I would love to have been able to have my say somehow and I am sure the others felt like that as well'.

1. Making Decisions

Cashmore and Parkinson,¹⁰ argue that children as "active participants" post separation or divorce understand the difference between providing input into decision making and making the final decision.¹¹ However, the majority of young adults interviewed for this research associated participation as having to make a choice themselves and felt that this was too much responsibility to put on a child¹². Participants commented that:

¹⁰ Judy Cashmore and Patrick Parkinson, 'Children's participation in family law disputes: The views of children, parents, lawyers and counsellors' (2009) 82 *Family Matters* 15.

¹¹ Bren Neale and Carol Smart, 'Agents or dependents?: Struggling to listen to children in family law and family research'. Centre for Research on Family, Kinship and Childhood, (1998) Working Paper, 3.

¹² 11 participants or 73%. Contrast this with Bagshaw's research where all children indicated that they wanted to have input and felt that they had a right to do so; in my research many young adults associated this input with having to make a choice. See (n 82)

‘... if you are asked that, then they are asking you to choose your favourite parent and as a young child that is very difficult and if I had to choose it would have affected my relationship with either or both of my parents.’

And

‘Sometimes I thought about that over the years, and part of me would love to have the decision, to talk to them. But then the other part of me says that you are putting the weight on the child and at the end of the day, even though I am saying that children obviously do have an opinion, it is a big decision for them to have to make and then especially if they feel that they are playing one parent against the other. Had I been asked at that age, it is sort of who (sic) do you love more Mammy or Daddy and that is a very hard question to ask a kid.’

One young adult specifically referred to the fact that children do not want to choose and:

‘If you were to ask that child, Mammy or Daddy, she would say can I not have both?’

This issue was also raised by one of the separating parties who had taken their case before the court.¹³ They indicated that their sons wanted to have a voice in the proceedings and in fact wrote a letter to the judge, not to choose one parent over the other but to try to ensure that they would have contact with both parents.

One fifth of the young adults interviewed¹⁴ as part of this research associated participation with having to make decisions about how financial and other issues should be resolved between the parents. One participant commented:

Dale Bagshaw, ‘Reshaping responses to children when parents are separating: Hearing children’s voices in the transition’ (2007) *Australian Social Work* 60: 450–465.

¹³ This participant took her case before the court.

¹⁴ Three participants or 20%.

‘... if I had just been asked serious questions I don’t think I would have made the right decisions and also I don’t think it is fair to put that responsibility on a child...I think that is too much to ask a child. But I do think there should be more, maybe an indirect communication. Not “What do you think should happen here? How much money do you think? I would have had the fear of somebody saying “Do you think your dad is giving your Mom enough money? And me saying “No because we keep running out” and then there being war about this, you know, so I think that the child’s voice should be heard but maybe in more of a protected way.’

This issue of the children being drawn into disputes in relation to maintenance and other factors was also raised by four other participants who referred to being manipulated by their parents. Comments made included:

‘I don’t think they should be manipulating the children to win. I mean each parent is entitled to their own relationship with the child and it should be fair and where possible it should be 50/50 access and it should not be down to money.’

‘I shouldn’t have been in any way connected with the whole situation, I think, but I was hearing what was going on through lawyers and solicitors and stuff but I shouldn’t have been, I don’t think I should have been exposed to that.’

What was evident from the research is the importance of making the distinction between ‘keeping them informed’ and ‘decision-making powers’ and explaining that in simple terms to the child, so that they are clear from the outset what is expected of them if they are asked for their input.

2. Parents being over protective

There was an acknowledgement of the view that some parents think that children should be protected from the separation. One participant commented:

‘There was a fear that I might, I don’t know, break down and completely destroy myself had I completely understood the situation... but over the years ... I got really ... frustrated at them for being so non-descript about it all.... I think it is best, upfront, if you allow a child to deal with it. It might upset him for a week or two, but it will clear the air for the remainder of his life.’

This issue of protection was addressed by another participant who believed that to try to protect a child from something that is happening in their own house is ‘an asinine argument. You can’t protect a child. You cannot go into a child’s house and protect them from what is going on. Basically, be open, you present them with their options, help them, keep them informed’.

The young adults, in general, acknowledged the importance of the evolving capacity¹⁵ of the child and the need to update children as matters progress. Many referred to what you can safely discuss at various ages. While the issue of context was raised by the participants, in that some children are more sheltered and may not be aware of what is going on in their families, there was a general view that children know more than adults think, ‘that children are not dumb’ and that that they need to be updated as matters progress.

An important element of this explanation is that each child receives the same information to avoid suspicion and tension between siblings. This was also relevant in the context of not over-burdening older children by giving them too much information as to the personal issues between their parents, while not excluding younger children through lack of appropriate information. One participant commented:

¹⁵ Article 5 of the UNCRC; *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

‘I think a certain amount should be explained. Explaining look, we are doing this just because we don’t get along. Explaining that we love you, explaining that you can still see your father, we can organise things. Nothing like custody was ever explained to me, nothing about rights to visit Dad...you don’t have to explain to kids the legal system but you can say to them look you can visit your Dad, you can visit your Mother and it is ok to miss them.’

Lack of explanation was blamed for a lot of the insecurities that participants felt after the separation, the fact that they found it difficult to get an unbiased opinion. Getting an explanation and an assurance from their parents, they commented, would remove some if not all of the insecurity and uncertainty involved. In many respects children just wanted their parents to “be parents”. Rather than doing this through secrecy or trying to protect them, they felt that they needed parents to acknowledge what was happening. They needed parents to understand and accept that it was a difficult time for them and to take control of the situation and assure them that they, as parents, would deal with it and that the children could just go back to being children. Through this secrecy and lack of information, as Goldson asserts, parents ‘inadvertently add to their children’s stress.’¹⁶ Warshak similarly notes that ‘[t]he best parenting plans reassure children that their family is not broken but rearranged’.¹⁷

G. Was having a voice important to their relationship with the non-resident parent?

The majority of the participants interviewed had no input or opportunity to voice their views into the decisions being made about access with the non-resident parent. Only three, two of whom were 16 and one who was 17 at the time of the separation, were allowed choose for themselves as to which parent they wanted to live with. One of these 16 year olds thought that this was a good thing. This participant had come from a situation where they

¹⁶ Jill Goldson, ‘Hello I’m A Voice, Let me Talk: Child Inclusive Mediation in Family Separation’ (2006) *Centre for Child and Family Policy Research* 6.

¹⁷ Richard Warshak, ‘Punching the Parenting Time Clock: The Approximation Rule, Social Science, and the Baseball Bat Kids’ (2007) 45 (4) *Family Court Review* 600, 613.

were heavily influenced by their mother's negativity towards their father, commenting: 'I was with Mum all the time and I was hearing oh, your Dad is awful and then I didn't want to go to spend time with him because he is a bad person'. Whereas, the other 16 year old felt that it would have been better if they weren't given a choice, indicating that they chose the parent that meant that they would have the least structure and this subsequently affected their schoolwork and education. For the 17 year old, she indicated that the older ones were allowed to choose but that the breakdown affected her 'relationship with both parents. I haven't spoken to my Mother now in 16 years, by virtue of how she used us in the relationship when the relationship broke down'. This participant felt that her mother had manipulated the children over access as a means of gaining maintenance and indicated that 'all of us have varying degrees of relationship or not with her and it is very kind of shallow as opposed to, I think there is more respect I think in hindsight for our father'.

An interesting finding was that in a particular case, where the children had to stay with their mother until they were 13 and could then choose, the participant indicated that it caused divisions amongst the siblings themselves:

'... so the two older girls had the choice but it did kind of create divisions within the, among us kids like, "Oh you are leaving us you are going to live with Dad" or "why are you still with Mom?" or so in that way I guess if we didn't really have a choice we wouldn't have had those divisions among ourselves...'

Only two participants (both female) wanted to have the option of making a choice. In one case this was motivated by the fact that the non-resident parent had treated the other parent rather badly and had left the participant to care for the resident parent and the younger children. This participant was quite bitter and did not wish to have any contact with the father. In the second case, the participant's Mother had left the family home and the participant felt a sense of abandonment as a result of being left with her father.

In assessing the impact of having a choice, one of the participants referred to the situation with her friend. She indicated that her friend was put:

‘in a position where she has had to choose and she has literally gone back and forth, has argued with one and moved to another, argued with one and moved to another, and it is still going on to this day..., because it was never dealt with, it was never explained, it was never open, there was no openness in the family or any outside help unfortunately.’

The rest (80%) preferred some element of structure and felt that this should be created by their parents. Most participants felt that in hindsight, even though they may have not liked it at the time, that the time spent with the non-resident parent was important. Comments made included:

‘Yea, but now I am kind of glad that we didn’t because it was so difficult, and it was so difficult to be around my Dad that I think we would have opted to not see him because he was quite a difficult person anyway, ... but now I look back and I think, difficult and all as it was, he still kept coming and he still kept trying with us and if we had had the option we would probably have said, we don’t want to go and then we would have lost our relationship completely.’

‘My relationship with my Da wouldn’t have been great at first because he blocked it out for a while, just because he was finding it very hard to deal with but then he personally really worked on it and like if I hadn’t been given, if my brother, for example, had been given a chance to maybe not really see that much of my Dad he probably would have gone for it but now he has a good relationship with my Dad. Because it is really important and he really worked on it. ... Especially, if you are talking about teenagers. I think you would need to, I know it is awful, but maybe, yeah, (be) forced to spend a bit of time with them just to be there... Particularly if that is what the parent wants ... because you (the non-resident parent) could get pushed out.’

‘I think I would have lost contact, not completely of course but it was good to have that regular contact with my Dad and that it was fixed and they decided it which was fine.... we didn’t really have a choice in the every two weeks (every second weekend) and the two weeks in the summer and I think that was important because I wouldn’t have been able to choose myself.’

Interestingly, even in two cases where participants indicated that they wanted nothing to do with the non-resident parent it was clear that the participants had made some efforts to maintain contact and a relationship, but that this had not been reciprocated. One participant had made contact with her father in order to have a relationship with his daughters from his new relationship and another commented:

‘... I tried and then he was an absolute idiot and it just continuously and continuously got worse so I had to cut myself off because it was too hard....’

Looking at their relationships now, 5 participants, all female, indicated that they would not have good relationships with their Dad now. However, in all of these cases they would have had difficulties with their relationship prior to the separation and therefore it cannot be directly related to the separation. Two participants indicated that they would not have good relationships with their Mothers – these participants’ views were based on the way that their Mothers had treated their fathers at the time of the separation, citing issues such as manipulation of the children regarding access and telling lies at the court hearing. Eight participants have good relationships with both parents. Looking at the parents’ relationship with each other, approximately half of the young adults indicated that their parents are at least sociable to each other now for the sake of their children. For the other half, there is still quite a lot of acrimony and this acrimony is continuing to affect the children and their relationship with their parents. Is there any evidence to suggest that the court process increases the acrimony? All of the cases where the parents still have unresolved issues went before the court; however, it is difficult to say

that the court process had an impact in all cases. For five out of six of the cases that went before the court, there was still increased acrimony over things that were said.

H. Would they have benefited from someone in a “Child Specialist” type role?

The role of the child specialist as defined in collaborative practice was explained to all of the young adults interviewed and their views sought as to whether they thought that having someone in such a role would have been a benefit to them or would, in their opinion, be a help to children who find themselves in this situation. Overwhelmingly, all of the young adults interviewed felt that they would have benefited from someone like a child specialist. Two were a bit apprehensive about talking to strangers and felt that it would have to be done in a relaxed way to make the child feel at ease and one other felt that it would have to be a mandated part of the process:

‘so that it wasn’t kind of are you airing our business to somebody that is not family, you shouldn’t be telling these people.... yeah, it (mandating this) would take the responsibility or the fault off the child and avoid the issue of it being seen as talking to someone outside of the family about family business’.

Two participants saw the main benefit as been able to talk to someone without getting in trouble or hurting anyone’s feelings. Two felt that asking the child how they felt about this and helping to explain matters would be a huge benefit without the pressure of feeling that you had to choose. One participant made the point that at the time her parents separated nobody really knew how to deal with it and one participant referred specifically to the fact that it would have to be done in a very genuine way, not simply to tick a box.

The issue of the separation being family business, the secrecy, the stigma and shame of separation and divorce came up regularly during the course of

the interviews, in many respects placing an extra burden on children and, indeed, the adults involved that there is nobody they can talk to. For adults, of course, they can choose to seek professional help in terms of counselling or support but for the children they often felt quite isolated and alienated from their friends because their family situation was not perceived as the norm.

However, four or 27 % of the young adults were of the view that one or other or both parents would not have agreed to them attending a child specialist. Again, this was partly due to the parents' lack of awareness of the impact on the children and again social stigma attached to any form of what may be perceived as counselling. In addition, it raises the issue of parents as gatekeepers and the reluctance of considering the children and their wishes when assessing their best interests.

I. What were the views of young adults as to the “ideal” way for parents to handle family transition?

In the words of one of the participants interviewed, '[t]he decisions that the parents make at the time are very, very significant'. How therefore do these young adults believe that matters should be dealt with? Taking all of the suggestions made by participants into account – the approach that they have suggested would involve.

1. Parents deciding together exactly what information are to be shared with the children.
2. Sharing with all children at the same time.
3. Making clear to each child individually that they are loved by both parents and are not at fault in any way.
4. If the parents decide to make the arrangements regarding access without consulting with the child, make sure that the child knows why these decisions are being made in this way.
5. Do not burden older children by telling them personal details or treating them as confidants.

6. The information should be updated as matters progress; for example, if the parties decide to formalise matters through a divorce at a later stage or if they meet someone else. Children should be kept up to date in accordance with their evolving capacity.¹⁸
7. Assuring children that they are the priority and always will be the priority.
8. No manipulation or arguments in front of the children.

In examining the issues outlined as being important from a child's perspective, it is notable that the emphasis is placed by these participants on procedural issues and having structures in place. As noted earlier, 80% of the participants wanted their parents to provide this structure and stability for them. This they felt would allow them to get on with their own lives in the knowledge that their parents were dealing with the bigger issues and still loved them. They wanted reassurance and openness from their parents and an acknowledgement that each parent is entitled to a relationship with the children which is not dependent on the payment of maintenance.

In addition, the young adults felt that there should be somebody to oversee the separation, to check in with the kids and the family or some kind of workshop that they could all attend to deal with the emotions involved without apportioning blame or taking sides. This they felt could be in the guise of a mediator, whether an agreed relative on one or other side of the family or some court appointed person or body who would look at the new arrangements, and talk to the children. Earlier, it was noted that the Children and Family Court Advisory and Support Services (CAFCASS) in the UK provides initial support and services; however this service is only involved when there is conflict between the parents.¹⁹

¹⁸ This issue was raised specifically by one applicant who recalls his cousin telling him that his parents were divorced.

¹⁹ See chapter 2.

J. What themes emerged from the interviews with young adults?

One of the aims of this aspect of the empirical research undertaken for this thesis was to examine the importance and impact of children's participation. While 60% of the young adults interviewed wanted to have a participatory role, this for the most part equated to being shown respect through honest, age appropriate explanations. These young adults simply wanted to be included in the decisions being made.

1. A Sense of Responsibility

What emerged was the huge sense of responsibility felt by children, to look after siblings²⁰, to try to fix things and to protect parents and their step parents from their true feelings. In two of the cases, in particular, two girls one aged 14 and one aged 16 immediately took on the responsibility of looking after younger siblings, protecting them from the conflict where possible. This sense of responsibility came to the fore in 5 out of the 15 participants interviewed. In general, this was felt more by the eldest children in the family and it seems to be agreed that it is more difficult once children are of an age when they can understand. One participant, as noted earlier, referred to the fact that her older sister had to go out and work to help support the family and therefore did not have the opportunities that she did.

It is not fully possible to examine the impact of gender in this feeling of a sense of responsibility, in that, only three participants were male, one of whom was an only child and the other two males had older brothers and sisters. One male, however, advised that he felt an increased sense of responsibility when his older brother left home.

²⁰ This is in contrast to Fawcett's findings where this support from siblings was not evident. See (n 1).

Kaganas and Diduck²¹ refer to the “good’ post-separation child” not simply as a victim but as one who has a responsibility and a role to play in shaping the post-separation family. It is clear that many of the young adults interviewed felt this pressure to be the good post-separation child but the question is whether this is a good thing? Should the responsibility for the family situation post-separation not rest mainly with the parents? Parental responsibility came across as an issue in this research – the sense of parents needing to take responsibility for their children and their needs and in some cases an acknowledgment by the parent who chose to leave that the children needed to be cared for. Two participants referred to the fact that their parents were not mature about the way they dealt with the separation, while acknowledging that in every other area of their lives their parents would be the most together people they know. Two participants referred to the new life that one of their parents appeared to be having while they were left behind with a parent who may have been overcome by the separation.

2. Resilience

There was a sense amongst 40% of the participants that, although it was a difficult time, they got through it. There was recognition amongst the young adults interviewed that even if decisions are made that the children do not like at the time, that:

‘I think that if it is explained to them, they would understand. If they still want to stay with Mum and they are told that they have to stay with Dad, they are still going to be upset regardless of whether they told them or someone asked them or not. You can explain anything to kids. They might be upset but as long as it is in their best interests they will adapt, they will adapt like so quickly as long as they are being looked after and they are safe.’

This comment once again reiterates the importance of issues being explained to children in developing this resilience to move on. With the

²¹ Felicity Kaganas and Alison Diduck, ‘Incomplete citizens: Changing images of post-separation children’ (2004) 67 (6) *The Modern Law Review* 959.

exception of one participant, there was also an acceptance that even as young children there are times when they knew that it was better that their parents did not stay together and that, as one participant commented, they would rather have ‘two semi happy families than one awful situation’. Also, despite what may have occurred, children were willing to give parents every chance to rebuild relationships. One participant who had been treated particularly badly commented:

‘... You love your parents anyway, but you hate what they have done. It was never a situation that I hate him, I always hated what he done and the way it was done ...’

Another young adult explained that the separation did not have to be such a negative experience if the children know where they stand:

‘... those kids know exactly what is going on and the more you keep from them, the more you confuse them and hurt them... I suppose the bottom line I would say is that it doesn’t have to be a bad thing. It just doesn’t have to be. The most positive influence on my life, the most positive person with the greatest positive influence on my life, is my stepmother, you know, so how is that a bad thing?’

This sense of resilience was also expressed by two parents who had separated through the court process, with one commenting:

‘I’ve gone through it now and essentially, in a warped sort of way, it’s helped me to evolve to where I am now. Okay, it was a negative experience but sometimes you need those to spur you on and to realise that I need to take control of this myself for good or for worse.’

III. Voice of the Child within the Court Process - Views of Solicitors and Barristers

The issue of children's participation was also raised with solicitors and barristers who use the court process. There was a general consensus that children's views were not sought, other than through their parents. These practitioners indicated that in a situation where parents could not agree terms, judges would threaten that they would bring the children into court. Therefore the child's participation was viewed merely as a means of encouraging parties to negotiate.

The general consensus was that the judge would very rarely ask to hear the child's views through the medium of a judicial interview but if the judge felt the need, they would appoint a section 47 reporter and that the court would rely heavily on the recommendations made by this expert. One barrister noted that therefore 'it was a matter of convincing them (the client) of getting on the right side of the author of the section 47 report you know'. On the issue of the judge speaking to the children directly, this barrister went on to say that it:

'... depends on the age of a child, like I wouldn't be bringing in a three or four year old you know but if you are talking about kids in the early teens or whatever really I don't believe that they are intimidated anymore by a man sitting in a room that is just going to ask them straight out... you know, it might save the State a lot of money to get a judge to establish what they want in chambers rather than a situation where you have got a battle between both sides.'

Another barrister commented that they have a client:

'who does not want the dad of the child to have anything to do with the child and she's working the psychologist and I don't think it's right but again I'm her lawyer – I'm not her counsellor – I'm not the child's counsellor.'

These comments raise concerns as to the reasons why, and the manner in which, children's views are sought. The emphasis from counsel representing the parents is, as is in accordance with their role, on settling matters between the parents rather than approaching the issues from a children's rights perspective. The views of the young adults interviewed, as demonstrated above, indicate that they would, in many cases, find having to speak to a judge quite intimidating and that if this is to be done, it needs to be clearly explained and carried out in an appropriate way.

Barristers interviewed also raised this issue of children being drawn into the parents' dispute used the word "abuse" when describing the way children were treated:

'The children are left out of it; they don't have a voice and more and more I see that children are pawns and used as pawns by women and, indeed, men and invariably what I find is that, almost without exception, parents will discuss the issues with children and drag them into court and one will bad mouth the other and children will be fully informed in relation to what the husband is claiming and what the wife is claiming. Fully informed as regards issues about selling the house... I call it abuse and it is abuse... They're being emotionally blackmailed or compromised and sometimes it's done deliberately and sometimes it's done subconsciously but it's happening without a shadow of a doubt and it's the first thing that people should be told. The letters are shown to them; pleadings are shown to them. Your father said this; your mother said this; your mother did this; your father did that and kids are torn apart. Invariably you see that the school is suffering.'

Similarly another barrister commented:

'Some parents are telling the kids, you know, I'm divorcing your dad because he did this, which is child abuse to some degree because the children shouldn't know the whole background to the break-up and it should be broken to them very gently and watered down and diluted.'

IV. Irish findings compared to Research Internationally

The interviews carried out with young adults in Ireland revealed that within this particular sample, the extent to which they were given an opportunity to participate or express their views, in accordance with their rights under Article 12, was limited. This was again confirmed by the views of solicitor and barristers working within the courts' system (see above). However, unlike the research carried out by Parkinson and Cashmore²² these young Irish adults did not want to be active participants in their parents' separation or divorce. In contrast, there was, in fact, reluctance by many to get involved due, mainly, to not fully understanding what would be required of them as part of such participation. As outlined, many perceived that in participating they would have to choose between parents or to make wider decisions as to maintenance. Rights were only referred to in situations where these young adults felt disempowered by the actions of their parents. Again, as outlined above (see Sense of Responsibility p.346), in contrast to the views of Kaganas and Diduck, the Irish participants did not willingly take on the role of the "good post separation child", but in many cases felt that they had no alternative but to do so.

The results of this Irish study revealed that similar to the views expressed by the participants interviewed by Mayall as part of his "Negotiating Childhoods" project in the UK²³(see p.8), these young adults did not want to be burdened by adult responsibility and in outlining what they perceived as the best or ideal way for their parents to address the issue, gave a clear indication that they expected their parents to take charge of the situation, assure them that they were loved and would be cared for and allow them to get on with enjoying their childhoods. Children have an innate sense of justice and fairness. It is clear that they wanted to be treated fairly, to be

²² See page 23

²³ Berry Mayall, 'Negotiating Childhoods' (Economic and Social Research Council, 2005) Programme (ref. No. L129 25 1032) Available at <http://www.esrc.ac.uk/my-esrc/grants/L129251032/read>.

respected and included and when decisions are made, that such decisions are explained.

What has emerged, though not unexpectedly, from the interviews carried out as part of this research with young adults in Ireland is that children and young adults need support at a time of family transition.

V. What, if any, support had they received?

Of the fifteen participants interviewed, 47% had not had any counselling or support. One participant commented that she was definitely a 'weird kid' and was 'just drawing pictures of people fighting or just morbid stories of violent families you know and nobody picked up on that.' Two participants attended counselling but this was as a result of other issues that arose for family members, in one case a mother's health concerns and in the other case the participant's brother's drug related issues. Two participants had private counselling, in one case organised by the participant's father and in the other case the participant's mother. Two participants commented that they attended counselling for other reasons many years later and that the issue of their parents' separation came up. One participant indicated that he would not like to have spoken to strangers about it. Only one participant had availed of the listening service provided by Teen Between. This participant found that service to be extremely helpful.

In one case, the participant advised that social workers called to the house shortly after her parents separated. They brought the children to a room upstairs and asked them if they were alright. She said that the separation was very raw at the time and they didn't really know how they were feeling or what to think and they just said they were fine. This was the only contact they had with social support.

In general, the participants expressed the view that it would have been good to have someone to talk to:

‘If someone had come and asked us how we were feeling and (had gone) and told her (mother) how we were feeling, it might have opened her eyes a bit. It might have opened her eyes.’

Another was of the view that:

‘...there should be an independent body that goes around to the house and sees what is going on, ... looks at the new arrangement looks at the relationship, talks to the kids. That the parents should have to ... work with them and come to an agreement... I think that there should be more work on just the social work side ... their whole battle seemed to be financial and nobody really seemed to notice that there was family involved...’

VI. Previous research carried out in Ireland and Northern Ireland

In 2002, The Children’s Research Centre at Trinity College Dublin (TCD) published a report entitled *Children's Experiences of Parental Separation in Ireland*.²⁴ This report was based on research carried out by interviewing children between the ages of 8 -17 and eliciting their views as to the impact of their parents’ separation. A study similar to the TCD research has been carried out by Fawcett in Northern Ireland, in 1999.²⁵ In Fawcett’s research children between the ages of 12-18 were interviewed.

Similar to the results of the research undertaken for this thesis, and thus again, in contrast with the research carried out by Parkinson and Cashmore, the TCD study revealed that the children interviewed did not have direct involvement in the decisions made. In fact, similar to my research, they did not wish to be consulted or involved and again, did not want to have to make decisions about what they perceived to be the bigger issues. Again,

²⁴ Diane Hogan, Sheila Greene, Anne Marie Halpenny, *Children's Experiences of Parental Separation in Ireland* (The Children's Research Centre Trinity College Dublin 2002)

²⁵ Margaret Fawcett, ‘What hurts? What Helps? Study of Needs and Services for Young People Whose Parents Separate and Divorce’ (Relate Northern Ireland and Queens University Belfast 1999).

only one child in the TCD study spoke about the issue of rights and many raised the issue of “loyalty” to parents.²⁶ This issue of “support” was also raised in previous research carried out by TCD.

Comparing the results of my empirical research to research carried out by TCD in 2002, there is a marked difference in terms of the outside support sought and obtained. In the TCD sample, two thirds had received support ‘through a formal service provided and, in most cases, these were services specialising in issues of parental separation.’²⁷ However, it has to be acknowledged that the researchers in the TCD study had recruited some of their participants through support agencies, whereas the participants in my study were self-selecting. What is of importance is that those that availed of such services in the TCD study felt that it had been of significant value to them in overcoming the issues surrounding the separation. There was less of a sense of blame or guilt experienced by the children interviewed in the TCD study than was evident in my research, which can possibly be attributed to this counselling support.

Interestingly, similar issues arose in both research studies in that a number of the participants had undergone counselling as part of other wider issues that arose within their families be it mental illness, drug abuse or domestic violence. It is not possible to say whether these additional factors impacted on the relationship prior to, during or after the relationship breakdown.

In Fawcett’s study, 50% of the children interviewed had received help from Relate Teen, a counselling service for teenagers in Northern Ireland.²⁸ Both Fawcett’s study and my research noted that there was a general lack of awareness amongst participants as to how the divorce process worked and the availability of services. Teachers provided the main source of professional help in Fawcett’s study. This is significantly different to TCD’s results which showed that only 2 children received support from teachers

²⁶ Hogan et al (n 24) 35-37

²⁷ *ibid* 27.

²⁸ Counselling Service.

and in my research only 1 participant referred to support from her teacher as being very helpful in overcoming issues that arose as a result of the separation.

In both my research with young adults and TCD's research, siblings were an important source of support. This contrasts with Fawcett's findings that siblings had not been supportive, often because they were younger or away from home. However, both Fawcett and TCD's participants found extended family a valuable source of support and this contrasts with the findings of my research where participants commented that extended family distanced themselves, often because of misinformation that they had been given or because they did not wish to be seen to take sides. Two of my participants are still quite angry with extended family specifically because they felt that they had been abandoned at a difficult point in their lives.

In concluding, both Fawcett and TCD²⁹, point to the need to raise public awareness of the issues surrounding separation and divorce and how it impacts on the children, as well as the need for additional accessible support services. Fawcett also highlights the need for training amongst teachers and other professionals.

VII. Where is this support and advice to come from?

Research carried out by Kilkelly during the Youth Consultation which was undertaken prior to the drawing up of the Child Friendly Justice Guidelines (referred to in chapter 2) indicated that most children want the information regarding their rights and the supports that are available to them to come from their parents.³⁰ In many cases, the actions of parents at a time of separation or divorce are unintentional. It is understandable that parents may not realise the importance of seeking guidance as to how best to care for

²⁹ Hogan et al (n 24) xiv.

³⁰ Ursula Kilkelly, 'Listening to Children About Justice: Report of the Council of Europe Consultation with Children in Child-Friendly Justice' available at http://www.coe.int/t/dghl/standardsetting/childjustice/CJ-S-CH%20_2010_%2014%20rev.%20E%205%20oct.%202010.pdf 22.

their children when going through a traumatic experience themselves. However, for all separating parties some clear, non-judgemental advice may help both them and their children deal with the family transition, adapt and move on. What is needed therefore is an education or awareness campaign to highlight to parents the huge benefits there may be in seeking advice or assistance on how best to deal with the separation from their children's point of view and to alert them to the provisions of Article 12 of the UNCRC.

An issue as part of this will be the extent to which parents are willing or able to take this advice. It is clear that for two of the participants that used the collaborative process the other parent was unwilling to listen to the advices of counsellors.

A solicitor's role is to advise their parents in relation to legal issues and to present their case to the court. As commented by one barrister interviewed for this research, solicitors and barristers are not social workers and while many give information and advice about parenting and how best to deal with the implications of separation, it is not their role to do so.

The young adults interviewed were, for the most part, less concerned with having a voice in the proceedings than demanding that their parents respect them through inclusion and explanation. They highlighted the importance of receiving an assurance that their parents would fulfil their responsibilities financially and emotionally and that they could get on with just being children and not feel 'different' or stigmatised as a result of issues that were outside their control. Perhaps then, as noted by Goldson³¹ when analysing the results of her research into child inclusive mediation, it is more about a parental refocus - focusing less on the rights that parents have over their children and more on the responsibilities that they have towards their children.³² Having interviewed the young adults who took part in this research, and having examined the extent to which parents remain

³¹ Jill Goldson, 'Hello, I'm Voice, Let me Talk: Child-Inclusive Mediation in Family Separation' (Families Commission, Innovative Practice Report No1/06 December 2006) <<http://www.jillgoldson.co.nz/>> (See chapter 3)

³² *ibid* 15

gatekeepers as to their involvement in proceedings, be it through the courts, mediation or collaborative practice, perhaps refocusing in this way would ensure by default that children's rights were upheld, rather than trying to overcome the difficulties that arise for young children, in particular, when they wish to assert their participation or other rights.

Having examined the extent to which children participate within the courts' system, the avenues that are potentially available for them through meetings with section 47 reporters, the provision of a Guardian ad litem or the possibility that the child may have the option to speak to the judge directly, it is arguable that for those ten per cent of cases which come before the court, these children may have an opportunity to express their view. This possibility will, upon the upholding of the referendum, be further strengthened to a Constitutional right.

Examining the voice of the child within the courts' process further, one notes that the concerns raised by the judiciary during this research also focused on **procedural** issues surrounding how they are going to facilitate interviews with children and how, within this, they can protect the due process rights of the parents rather than concentrating on the purpose of Article 12 rights, which is to provide a right for the child to participate and express a view. While they may have concerns, as commented by Thorpe LJ in *Mabon v Mabon*³³ 'judges have to be equally alive to the risk of emotional harm that might arise from denying the child knowledge of and participation in the continuing proceedings'³⁴ (see chapter 2). However, should this go as far as hearing evidence directly from the child as mooted by Lady Hale in the *Re W (Children)*³⁵ case or ordering, as she did in the case of *In the matter of LC (Children)*,³⁶ that children be interviewed for a third time, even though it was acknowledged that this was not in their best interests, purely to satisfy the interests of justice? (See chapter 2).

³³ *Mabon v Mabon* [2005] EWCA Civ.634 (see p.84 chapter 2)

³⁴ *ibid* [29].

³⁵ *Re W (Children)* [2010] UKSC 12, [2010] 1 W.L.R. 701

³⁶ *In the matter of LC (Children)* (No 2) [2014] UKSC 1, [2014] WLR(D) 11, [2014] 2 WLR 124

Therefore, while judicial discretion is crucial in each case, especially in determining the “best interests” of the child, having set procedures in place as to how the voice of the child is heard may alleviate some of the concerns expressed by the judiciary, allowing them to focus on the substantive issue of hearing the child’s views.

Having outlined the factors that the young adults considered important in facilitating participation, it is notable that the issues raised were, again, more procedural than outcome based. Before children are in a position to decide whether they wish to avail of their right to participate under Article 12, they need a clear understanding of how the process works, what participation will involve, to what extent their views will be determinative, to be kept up to date as to how matters are progressing and to be given age appropriate explanations as to the decisions made and the reasons for these decisions. The need for and benefits of having such a specialist to represent the children’s interest from an early stage in the proceedings was recognised by the young adults interviewed.

Ultimately, as noted earlier, consistent with other research into this area, children want this support to come from their parents. But when parents are not in a position to provide that support, there appears to be nowhere for these children to turn as the system is currently framed in Ireland. The little support services that are there, namely Rainbows³⁷ for younger children and Teen-Between³⁸ for the older age group, both require parental consent. In families where children feel that they cannot speak to their parents about the issues that have arisen for them perhaps at home, at school or in their wider social circle as a result of the breakdown, is it feasible that these children will be able to ask their parents to consent to their attendance at such support groups?

³⁷ This is a peer group counselling service operated under the guise of the Children and Family agency, formerly the Family Support Agency. Available at <<http://www.rainbowsireland.com/>>

³⁸ This is a peer group counselling service operated under the guise of the Children and Family agency, formerly the Family Support Agency. < Available at <http://www.teenbetween.ie/>>.

VIII. Support as a framework for Participation

In view of the fact that, as evidenced by international research, this is an issue which many jurisdictions struggle with, if one were to use the results of the Irish research as a case study to develop a framework for participation, it is submitted that compliance with Article 12 must start much earlier in the process. Article 12 ‘assures 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.’ The emphasis to date however has been more focused on Article 12 (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 national law.’

If, as this, and other research has indicated, 90% of cases have settled before they reach the judge, then a framework is required that provides these 90% of children with the opportunity to express their views in some other forum if a State is to be fully Article 12 compliant. It is submitted that the only way to achieve this is to provide early intervention for the separating couples and their children.

For the children, this would mean a support service that explained the separation process to them, explained their rights to participate and what that meant in terms of the final decisions made. Having such service in place would “scaffold” children so that, should they wish to participate, they would be prepared and fully understand what is required of them. It is submitted that, adopting some of the principles applied in the collaborative process, this service should involve an independent specialist, similar to the

child specialist within the collaborative process, to provide information and support for children.

This child specialist, if perceived by children to be part of the process of separation or divorce, a service offered universally to every child, would remove some of the barriers to participation by alleviating the stigma attached and removing the sense that they were talking about private family matters with someone outside of the family. Having had the benefit of advice, information and more broadly just someone to talk to, then they would be in a position to make an informed decision as to whether they wished to participate, directly or through such representative, in the proceedings. Additionally, providing this service to all children at the outset of their parents' separation or divorce would ensure a measure of compliance with Article 12 with each child being informed about their right to participate and being given an opportunity to choose to do so. It is clear, from the research carried out by James et al in Norway³⁹ that enshrining the provisions of Article 12 within national legislation will not in itself result in compliance, without adequate procedures and safe-guards in place. The assistance provided by this child specialist would also provide assurance for members of the judiciary.

Cognisant of the findings in this research, that no matter how amicable the separation is, it can have long term implications if not dealt with properly, these services would also assist parents to help their children develop the resiliency to move on. In view of the fact that the young adults interviewed indicated that while they felt that such a service would be of benefit to them, it was unlikely that their parents would engage with it, and also the lack of awareness displayed by the separating parties interviewed, engagement and consultation with this service would have to be a mandatory part of the separation process.

³⁹ Adrian L. James, Gry Mette Haugen, Minna Rantalaaho and Rebecca Marples, 'The Voice of the Child in Family Mediation: Norway and England' (2010) 15 *International Journal of Children's Rights* 313, 329.

IX. Conclusions

In delving further into the research question, this chapter presented the views of fifteen young adults whose parents separated when they were children, to get their unique perspective on the extent to which they participated in the decisions made, whether they understood what participation meant in this context, what if any of the mechanisms available within the Irish family law system at present were offered to them and the extent to which they felt that their parents were aware of what was in their best interests.

What is evident from the research undertaken is that none of these young adults availed of any of the formal methods of participation. In some cases, they were given the option by their parents to choose access arrangements or where they wanted to live, and contrary to what was expected, most of the participants interviewed indicated that they preferred such decisions to be made by their parents, with the parents taking responsibility for managing the family transition. In accordance with the research carried out by Mayall (see chapter 2), these young adults expected their parents to make these decisions.

The question which arises is whether the fact that many of these participants had different understandings of what ‘participation’ actually meant, may have impacted on their views. It is, arguably, understandable that children will not want to participate if they feel that they bear the responsibility for the ultimate decisions made and they are concerned about the impact this may have on their relationship with both parents. Is this because for children ‘participation’ is an abstract concept and therefore in outlining issues that were of concern to them, they highlighted more concrete procedural steps? Issues, perhaps, they could more easily identify with?

Therefore, it is submitted that a support mechanism that is perceived to be part of the “process” of their parents’ separation or divorce, an appointed

person, perhaps similar to the role of the child specialist in the collaborative process, that would provide early intervention, advice and support, would provide the missing link in enabling children's participation. Such a universal approach would remove some of the barriers associated with children's participation, namely a sense of being different and the reluctance to discuss family business with someone outside of the family circle. As noted by one participant:

‘I think that if it is explained to them, they would understand. If they still want to stay with Mum and they are told that they have to stay with Dad, they are still going to be upset regardless of whether they told them or someone asked them or not. You can explain anything to kids. They might be upset but as long as it is in their best interests they will adapt, they will adapt like so quickly as long as they are being looked after and they are safe.’

This research also raises the importance of parental responsibility and in accordance with Article 19 of the UNCRC, the State's obligation to support parents in their parenting role. Parents need to be educated as to the best way of dealing with the separation and this research helps to highlight the issues considered important from the young adults' perspective. The findings of this research which indicate the fact that older children/teenagers prefer structure and to have specific access arrangements in place will also be important for the legal profession who, as noted throughout this thesis, have a tendency to believe that children of this age prefer to choose for themselves.

CHAPTER 7: Conclusions

I. Introduction

This chapter will restate the research question which underpins this thesis and will synthesise the doctrinal and empirical research undertaken which answers the question raised. In doing so, it shall refer to the theoretical framework outlined in chapter 1 and the extent to which the theories explored were borne out in the research. It will address the empirical research findings in the context of the key findings of similar research studies undertaken in other jurisdictions and shall identify areas of convergence and divergence. The chapter shall also highlight the main findings of the research undertaken, the possible policy implications and shall identify gaps in the data where further research is required.

II. Research Question

This thesis sought to answer the question as to whether mediation and collaborative practice are effective in resolving conflict in family law matters, and the potential, if any, of these processes as a means of enabling the voice of the child to be heard in accordance with Ireland's obligations under Article 12 of the UN Convention on the Rights of the Child.

III. Voice of the Child

In providing a benchmark from which to address this issue, the thesis examined the voice of the child within the court process. Through doctrinal research including a review of the legislative provisions, it is

clear that the emphasis to date has been on protecting the welfare of the child and the courts have taken a paternalistic view, that parents, for the most part, know what is in the best interests of their children.

With the passing of the recent referendum of Children's rights, (if upheld by the Supreme Court) the accompanying legislation will provide for the enactment of legislation providing for the best interests and also for the voice of the child. This research has demonstrated that an important element of determining such best interests is hearing and considering the views of the child. The young adults interviewed stressed the importance of the "way" in which the separation is dealt with, highlighting the need for explanation, consultation and the freedom to express a view.

A review of recent case law has revealed that Judges in Ireland have demonstrated a willingness to hear the child's views either directly or through a suitably qualified expert, but that this is most often complied with under Article 11(2)¹ of Brussels II *bis* in abduction cases where the judiciary are obliged to do so.

Less attention has been paid in what could be described as "ordinary family law matters." Leading decisions in the UK including *Re W (Children)*² which have questioned the previously held view that children should not give direct evidence in family law cases and *In the matter of LC (Children)*,³ which resulted in orders being made to interview children for a third time, though cognisant of the fact that it was not in their best interests, indicate, perhaps, a move from the more paternalistic or welfare based approach, as espoused by writers such as Guggenheim, towards one that views children as autonomous

¹ Article 11(2) When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity. Council Regulation (EC) No. 2201/2003 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility (Brussels II bis) [2003] OJ L 338/1 repealing Regulation (EC) No 1347/2000.

² *Re W (Children)* [2010] UKSC 12, [2010] 1 W.L.R. 701

³ *In the matter of LC (Children)* (No 2) [2014] UKSC 1, [2014] WLR(D) 11, [2014] 2 WLR 124

individuals with opinions and evidence which their parents are not in a position to give.

Such a move, though welcome from a children's rights perspective, may cause difficulties, particularly for children within the Irish family law system, where nobody may ever have taken time to discuss their rights to participate with them and the broader implications of such participation.

Empirical research carried out with young adults for this thesis revealed, in contrast to some international studies, a reluctance to participate. This, however, may be influenced by the fact that they had varying perceptions of what participation involved. In situations where they do wish to assert their rights, there is currently no provision under the law for children in private family law cases for the appointment of a *guardian ad litem*. In situations where their parents may not be able to afford the services of a section 47 reporter, judges, by their own admission, have in many cases displayed a reluctance to speak to children directly. Such reluctance, as this thesis has demonstrated, is motivated by their lack of training in this area, concerns over the impact on the parents' due process rights and in some cases, a culture of not wishing to engage in what the judges' perceive as fact-finding, which they assert is not their role within an adversarial court process. This research, therefore, coming at a time when changes are required within the courts' system, if the Supreme Court upholds the amendment on children's rights, is pertinent in highlighting these issues and stressing that in the absence of such willingness from the judiciary, a state run and funded service is required.

However, in addressing the need for such a service, it has been envisaged that it would be available in cases which are due to be heard before the courts. Acknowledging, that only 10% of cases reach this point, how if at all is the State going to address the participation rights of all other children? Reviewing the systems in place in other

jurisdictions, it is clear that having legislation in place enshrining the provisions of Article 12 in national laws will not, of itself, be sufficient. Based on the doctrinal and empirical research undertaken for this thesis and specifically the views expressed by the young adults interviewed as to the “ideal way” for such issues to be dealt with, it is evident that there needs to be a clear and transparent avenue for children to obtain the explanations they require, an opportunity to express their views and that when decisions are made by adults on their behalf, purportedly in their best interests, that they receive an explanation as to the reasons for such decisions.

Referring to the theoretical underpinnings of this thesis, the views of Warshak⁴ on the importance of understanding the context in which children’s views are expressed have also been borne out. It is clear that the extent to which expressing a voice became important for the young adults interviewed depended largely on issues such as the level of conflict in their parents’ relationship and whether they felt that they had been afforded some respect in terms of receiving age-appropriate information and explanations. The issue of rights was only referred to by the young adults in cases where they felt disempowered by the actions of their parents and in those cases the young adults interviewed expressed the view that they had no-one to advocate for them. In accordance with the issues raised by feminist theorists, all the children interviewed spoke of the importance of the ethic of care, caring for others and the need for someone to care for them.

In cases where the parents set the boundaries, this research indicates that children, although not always happy with the arrangements made, adapted accordingly and with the benefit of hindsight, they were pleased, for example, that they maintained relationships with the non-resident parent. This tests Eekelaar’s views on ‘dynamic self-

⁴ Richard A. Warshak, ‘Payoffs and Pitfalls of Listening to Children’ (2003) 52 (4) *Family Relations* 373.

determinism'⁵ and displays that these young adults, with the benefit of hindsight realise that had they been given a choice, that they may not have known what was in their own best interests at the time. These young adults stressed the importance of being able to express their views in a “protected” way, allowing their input to be taken into account but not being determinative as they felt this would be too much of a responsibility and may affect their relationships with both parents.

Contrary to common belief that teenagers prefer to decide for themselves, they want structure, but that such arrangements are made in a way that is inclusive of their views and, again, provides an explanation for the decisions made. This finding is also of relevance and importance to solicitors and barristers who practise within the courts' system, mediators and collaborative lawyers. In negotiating settlements, such professionals often tend to concentrate on the arrangements for the younger children, leaving teenagers and older children to decide for themselves. However, these young adults have highlighted the importance of such arrangements and structure in maintaining relationships with the non-resident parent and also in ensuring that they have boundaries during the challenges of adolescence and young adulthood. In fact, this research demonstrates that regardless of their age, young adults still consider themselves ‘a child’ in describing their ongoing need for parental support.

IV. Effectiveness of mediation in Family Law matters

In addressing the research question as to the effectiveness of mediation as a dispute resolution process, an examination of the mediation process in Ireland indicates that, despite its long history through the State funded Family Mediation Service, only a small

⁵ Eekelaar believes that children should be allowed increased discretion as they get older and permitted to make choices as they see fit.

percentage of separating parties choose to use the process. While empirical research was undertaken for this thesis on the effectiveness of the collaborative process, all participants were asked for their views on mediation as an alternative. The general consensus amongst those interviewed was that they would not have the legal support they needed during the mediation process and that they were unwilling to negotiate directly with their ex-spouse in a framework where they were not supported. An additional concern raised was the fact that a mediated agreement was not legally binding and that they would subsequently have to contact solicitors to formalise matters legally.

While it may be somewhat reasonable to appear sceptical, therefore, about the efficacy of mediation in family law matters, with participants typically entering the process in a fragile emotional state after the breakdown of their relationships, and often without the safeguards of having received independent legal advice, the integration of the Family Mediation Service and the Legal Aid Board may be a positive development for separating couples. However, this will only be the case where it is not used as a less expensive way of resolving issues for low-income clients but is structured in such a way that legal advice is provided as necessary throughout the process. It appears that the integration of a mediation service within the Family Law Courts at Dolphin House in Dublin is helping to resolve family related issues in a more amicable way. Research will need to be carried out into the efficacy of this service in terms of whether agreements reached were considered equitable and made with the benefit of legal advice.

Making mediation mandatory before family law proceedings are issued may address the low take-up on mediation. However, the ethos of mediation is that it is a voluntary process. Attempts to compel parties to attend may be resisted or parties may attend purely to comply without any intention of engaging in the process, thus adding another step to an already difficult court process. However, what the project at Dolphin House appears to confirm is that making the

process easily accessible for potential litigants may succeed in encouraging, rather than forcing, family law litigants to consider mediation as an option.

As well as raising awareness of the process, there is also a need to increase consumer confidence in the process. Parties need to know that their procedural rights will be upheld and that the mediation process will be a fair and safe venue for discussions. Adequate safeguards need to be in place to ensure that parties are adequately screened and that the vulnerable are protected. Clear guidelines need to be drawn up for mediators to ensure that all parties taking part in mediation have a certain minimum level of understanding of the process. It is submitted that all parties should have obtained legal advice prior to taking part in the mediation process so that if they decide during the course of the mediation to concede on an issue in dispute, they are making an informed decision. Participating couples also need to be aware of the safeguards that are in place in that agreements reached are not legally binding. However, as evidenced by this research, this can also be a deterrent as it means further legal action has to be taken.

The provisions under the Draft Mediation Bill, which provide for more standardised or transparent mediator qualifications and the implementation of a Code of Conduct that will be applicable across all mediating bodies, is a welcome provision and should be instrumental in encouraging more separating parties to engage in the process.

However, caution must be exercised on the part of policy makers who see mediation as a means of dispensing with troublesome and time consuming family law matters in a less expensive way. Though viewed as suitable for the resolution of conflict in family law where the parties often wish to maintain an ongoing relationship, the emotional issues surrounding separation and divorce can in fact mean that the issues are more deep seated and difficult for a mediator to

resolve than if dealing with, for example, commercial issues where the parties may be less personally invested in the agreements reached.

V. Voice of the Child within the Mediation Process

In addressing the issue of the voice of the child within the mediation process, a review of the research carried out into this matter in Ireland to date clearly indicates that children are rarely heard. Though one may have thought that the opportunity to hear the voice of the child in a less adversarial process would be more easily attainable, it is evident that even though the staff of the Family Mediation Service has undergone training in issues surrounding the inclusion of children in the mediation process over the past two years, little has changed. A change in attitude and governance is also required.

The need for this change in attitude by mediators is heightened by the potential enactment of the Draft Mediation Bill, which though providing for the voice of the child to be heard within the mediation process under Head 18, leaves discretion to the mediator as to whether such inclusion will be recommended. General Comment Nos.12 and 14 issued by the UN Committee on the Rights of the Child, also envisage that the “best interests” and the “voice of the child” should be heard within the mediation process.

It is clear that the only way in which children are being considered at present is through their parents. This raises concerns in that children whose parents separate through the mediation process may not have the same opportunities to express their views as children whose parents separate through the court process. It is clear that a service will have to be provided by mediators to ensure that the voice of the child is heard.

While, as noted above, the pilot mediation service which was jointly run by the Legal Aid Board and the Family Mediation Service at Dolphin House, has been heralded as a success, this success has been

based on agreements reached by disputing parents and arguably services such as these, provided on site in courthouses, lessen further the opportunity for the children involved to have any voice or input into the arrangements made.

Research carried out into child-inclusive mediation internationally, has demonstrated that there are benefits both for the children and indeed for parents in hearing the views of the child. Parents need assurances that involving the child in the mediation process does not mean having them sit in during acrimonious settlement negotiations, but rather that it can be done in a non-intrusive way. It is hoped that an increased focus on the voice of the child, if and when, the legislation accompanying the referendum is enacted will impress upon mediators that this is no longer an issue that can be ignored.

VI. Effectiveness of Collaborative Practice

In addressing the research question as to the effectiveness of collaborative practice as a method of dispute resolution, and the potential if any of the process to provide for the voice of the child, these questions were answered through a doctrinal analysis of the collaborative process, its origins and development in the US, and the impact of the enactment of the Uniform Collaborative Law Act. The enactment of the Uniform Act was significant for the development of collaborative practice, not only in the US, but worldwide in that many other jurisdictions have referred to the provisions of the Act as a model of best practice. Indeed, the Law Reform Commission in Ireland referred extensively to the Act in reaching their view that collaborative practice was an “emerging method” of dispute resolution. The research also tested the views of the critics of the process and its development in Ireland. In addition, empirical research was undertaken, in accordance with the research question, to assess the effectiveness of the process in Ireland.

While the study was small, and the views are not being held out as being representative of all clients who use the process or of all collaborative lawyers, it provides an indicative evidential basis for law and policy-makers and a platform for both lawyers and clients considering using the process to make their own evaluation as to whether it may meet their needs. The study provides useful insights into perceptions, experience and expectations of lawyers and clients.

The research into collaborative practice undertaken for this thesis was compared to international research on the process carried out in Canada, the US, and England and Wales. Significantly, there was little to differentiate between the substance and findings of the studies undertaken. The Irish experience seems to fit the international norm in that there are significant benefits to be gained from attempts made to resolve family conflict in a less adversarial fashion. Importantly, many parties have noted the positive effects of learning to communicate in a different way. An additional theme which emerged amongst participants who used the collaborative process is a sense of empowerment. Clients feel that they were directly involved in the decisions being made and that they had input into those decisions. Opinion on the process has confirmed that in many respects it provides a bridge between mediation and the court process/ordinary lawyer negotiation where clients participate and have more control and yet are supported in relation to their legal rights.

Feminist concerns about the use of alternative dispute resolution/collaborative process were also addressed. There was no evidence from my research into collaborative practice that women did less well in the overall settlements achieved than men. Overall, high settlement rates were achieved and clients reported having a better relationship afterwards. Only time and further research into this topic in Ireland will reveal whether the post separation relationships continued to remain amicable and to what extent, if any, this was of benefit to their children.

Although collaborative law has received less than a warm welcome from lawyers and academics alike, the lawyers that use and promote the process,

as evidenced by this research and research internationally, are experienced family lawyers, many of whom have concerns about the impact of adversarial negotiation and the court process on their clients' ability to co-parent post separation or divorce. While recognising that it is often a more challenging way to practise, they appear to remain committed to the collaborative process because of the long term benefits for clients.

An important finding of this research is that undergoing training in the collaborative process alone had a big impact on the way lawyers approached family law cases. Ninety six per cent of those who responded to the nationwide questionnaire, indicated that it raised their awareness as to the impact that the tone of their correspondence may have on raising conflict in a case and how they now try to approach cases in a less adversarial way. This finding also has implications for the way that law is taught in third level colleges and in the Law Society and Kings Inns. Confirming the theory espoused by Lowenthal that it is difficult for lawyers to be cooperative if the lawyer they are facing takes an adversarial stance, it appears that many lawyers did not in fact realise that they were approaching a case in this way.

Yet, many lawyers are reluctant to engage in the collaborative process possibly because of the fear of losing a client. Perhaps removing the disqualification clause would make the process more palatable for the legal profession. In the US and UK pockets of lawyers have begun to offer cooperative law, which is effectively collaborative law without the disqualification provision. Research into cooperative law has found it to be effective and as such it should also be considered (see Ch.4). However, the research also indicated that many cases were being settled without any four-way meetings and that cooperative law therefore may, in fact, be no more than polite ordinary lawyer negotiation. One of the main factors which may undermine the collaborative process also is a blurring of the roles in that clients are being told that one or other approach is being taken and yet negotiations progress as normal with the lawyer continuing to act at the final hearing.

While the interdisciplinary model of collaborative practice provides the most holistic approach, the evidence suggests that despite widespread agreement about the benefits of such assistance, that to date most of the cases have been settled through the lawyer-only model. A concern is the ability of collaborative lawyers to deal with the wider emotional and other issues involved in the separation process without this additional expert assistance. Training is required to ensure that collaborative lawyers are adequately equipped to deal with these issues.

VII. Voice of the Child in the Collaborative Process

In addressing the research question as to the extent to which the collaborative process provides an avenue, through the role of the child specialist, to facilitate the voice of the child, this thesis examined the role of the child specialist and the methodology used. It noted that the aim of engaging such specialist is not to provide ‘therapy’ for the child but to provide them with a non-adversarial forum in which they can express their views, have questions answered as to how the separation process works and what is expected of them in terms of participation. In addition, the child specialist brings any issues that the children may want addressed to the attention of their parents, thus providing them with what Warshak referred to a sense of enlightenment and empowerment.

While it was envisaged that this research would also present an insight as to whether the role of the child specialist within the collaborative process provided an appropriate method of ensuring that the voice of the child is heard at a time of separation, it was not possible to source young adults who had been afforded the services of a child specialist in Ireland. One may speculate as to whether this is because the process is somewhat new and therefore there may not be a large well from which to draw, or whether it may also be possible that separating parties in choosing to use collaborative practice are still reluctant to involve their children or recognise their children’s need for support at such time.

The evidence from this research is that the collaborative process nonetheless takes a child focused, whole family approach. Parties who used the collaborative process reported a better relationship afterwards which may have had a beneficial impact on their children. There is ample evidence in the views expressed by the young adults to suggest that there could be tangible benefits for children if they were enabled to participate in either the mediation process or in the collaborative process. Yet, the views of children are rarely heard. It is interesting to note that even in the US, where the process is more established, there is still reluctance, more so amongst the more highly educated, to acknowledge the need for help for children. Thus while the collaborative process provides a valuable framework for the inclusion of the voice of the child in a non-adversarial way, educating parents as to the benefits of such assistance for their children is an important first step.

VIII. Conclusion

This is an important time in the development of law and policy surrounding the voice of the child and how this issue is going to be addressed within the courts process and also within less adversarial processes such as mediation and collaborative practice. While it was envisaged that mediation and collaborative practice may provide more inclusive approaches, this does not seem to be borne out in this research. Barriers to children's involvement seem to centre on a lack of awareness on the part of parents, mediators, and collaborative lawyers as to the importance for the children involved in such consultation and inclusion, both in removing their fears and concerns surrounding the issues of separation and divorce and in demonstrating respect for the children as an integral part of the family.

The collaborative process is new. This initial research has indicated it is a positive addition to the dispute resolution landscape in Ireland. Additional research will need to be carried out to test whether the initial benefits in terms of improved relationships and better communication were lasting and

also to access the further development of the interdisciplinary model in Ireland. Further research will also need to be undertaken to fully assess the impact of the training undergone by the Family Mediation Service in child-inclusive mediation; the benefits, if any, of the integration of the Legal Aid Board and the Family Mediation Service, and whether the settlements reached through the on-site mediation service at Dolphin House Family Courts were robust and child-inclusive.

This thesis, through empirical research carried out with participants who used the collaborative process, has verified that there are benefits to be gained from a multidisciplinary approach to conflict resolution. It submits that adopting such approach to the issue of the voice of the child, by providing a service for children which operates from once their parents separate, rather than at the door of the court or perhaps not at all within the mediation process, would enable children to understand the arguably vague concept of 'participation'. If structured in such a way that it was an automatic, mandatory part of their parents' separation process, then this would provide children with the framework or 'scaffolding' necessary to make an informed decision as to whether they wished to participate and would facilitate them in such participation. Providing such early intervention would also provide a measure of comfort for the judiciary.

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APPENDICES

Appendix A

Interview questions for participants in the Collaborative Process.

The Process

1. How did you first hear about the collaborative process?
2. When you attended your solicitor did she or he explain all the options to you?
3. What other options did you consider in the resolution of your marital issues?
4. Did your solicitor ask you any questions to determine if the process was suitable for you?
5. How did your solicitor explain the process to you?
6. Did your lawyer give you legal advice as to your legal entitlements before the process began?
7. Did you attend any pre-divorce counselling?
8. Did you have any concerns about the process? Prompt of necessary - the disqualification clause?
9. Why did you choose the collaborative process?
10. What were your goals?
11. Were you concerned about meeting each other at the four-way meetings?
12. Can you describe how you felt at the first meeting? How much talk was done by you or by your lawyer?
13. Can you describe how you felt after the first meeting?
14. Did you sign the participation agreement at the first meeting?
15. How many meetings did it take to resolve the issues between you?
16. Did you meet with your own lawyer before meetings?
17. Did your lawyer speak to you in between meetings?
18. How many months/years did it take to resolve your case?
19. Did you employ any additional experts to assist with your case, mental health, financial, child specialist?
20. Were these experts engaged from the outset or as required as you were going along?
21. Did any of these professionals attend the meetings?
22. Did you find the assistance of the mental health professionals helpful?
23. Did you or your partner go to any counselling before or during the process?
24. Did you find the assistance of the financial professional helpful?
25. Do you and your ex-partner have any children?
26. What ages are the children?
27. Did you consider your children's wishes during the process?
28. If so, how?
29. How did your older children react to the separation/divorce?
30. Did your children attend Rainbows or any other such service?
31. Did you feel that you trusted your ex-partner throughout the process?

- 32. How important do you consider that issue of trust to be in engaging in this process?
- 33. Were you satisfied with the collaborative process?
- 34. How well do you feel it met you needs?
- 35. Would you recommend the process to a friend?
- 36. Is there anything you would like to have done differently?
- 37. How are your children now?
- 38. Costs

Profile

- 39. Applicant or Respondent
- 40. Separation/ Divorce or other family law issue.
- 41. Age at the time you took part in the collaborative process:
- 42. Educational level
- 43. Were you in employment? Full time/ Part time.
- 44. Earnings per annum
- 45. Household income
- 46. Date of marriage
- 47. Date of separation

Appendix B

CONSENT FORM

I, _____ agree to participate in an interview with Connie Healy for the purposes of her Ph.d research.

I consent to this interview being recorded.

I understand that the interview will be strictly confidential. I agree that pertinent information may be used by Connie in future publications, presentations and research and that any such information will be used in general terms without any identifying markers.

Interviewer signature: _____

Interviewee signature: _____

Consent date:

Appendix C

Survey.

I am a solicitor, trained in collaborative law, and am doing some research in to the development of the collaborative law process in this country. My aim is to determine the effectiveness of this process within the Irish Family Law System.

I should be very grateful if you would answer the questions below:

1. When did you qualify as a solicitor?
2. What percentage of your work is in the area of family law?
3. Are you trained in the area of collaborative law? Yes/No
4. If yes, when did you do your training?
5. If not, have you any plans to train in the next year? Yes/No
6. Have you used the collaborative model in any cases to date? Yes/No.
7. If so, in how many cases?
8. Have you used child and/or family coaches?
9. Are you a member of a collaborative law practice group? Yes/ No.
If yes, which group?
10. Would you be willing to complete a short on-line questionnaire on your experience of using collaborative law/ the collaborative law process?

If yes, please furnish your email address and telephone number.

Thank you for time in completing this survey.

Connie Healy, Solicitor, Email: conniehealy@eircom.net

10 What year did you train as a collaborative practitioner?

11 Are you a member of a local practice group? Yes/ No

12 Have you ever dealt with a case through the collaborative process?

Yes/ No.

If yes, please skip to question 19 on page 4

13 If not, what are your views in relation to the potential of collaborative practice in the resolution of family law matters?

14. What do you believe are the reasons you have not dealt with cases through the collaborative process. Please rank 1-6 in order of importance:

- (a) You have fears about embarking on a new way of dealing with cases
- (b) Clients not interested in the process when it is explained to them
- (c) Lack of suitable cases
- (d) Lack of trained collaborative practitioners in your area
- (e) Lack of trained mental health professionals.
- (f) Other reason, please specify:

15. From your experience of dealing with family law matters, what benefit, if any do you see in the interdisciplinary model where clients have assistance from mental health experts to deal with the emotional issues?

16. What do you see as the barriers to the use of the interdisciplinary model in your city/county?

17. From your experience, are clients generally aware of collaborative practice as a means of resolving disputes when they attend their first consultation with their solicitor? Yes/No.

18. In what way, if at all, has your collaborative training affected the approach you take to family law cases in general?

If you would be willing to discuss your experiences of collaborative practice in more detail, I would be delighted to meet with you for a short interview. All interviews are confidential. If so, please contact me at m.healy23@nuigalway.ie or telephone 087 2570944.

Thank you for taking the time to complete this questionnaire.

19. Since the year you trained, how many cases have you dealt with through the collaborative process each year, by reference to their date of settlement/termination?

2005

2006

2007

2008

2009

2010

First quarter 2011

How many are ongoing?

20. How many of these cases settled reaching full agreement?

21. Of the cases that settled, how many would you describe as

- a. Easy
- b. Difficult
- c. Very Difficult

22. How long on average did it take cases to reach settlement?

<u>“Easy” Cases</u>	<u>“Difficult” Cases</u>	<u>“Very Difficult”</u>
0-3 months	0-3 months	0-3 months
3-6 months	3-6 months	3-6 months
Over 6 months	Over 6 months	Over 6 months
Over 12 months	Over 12 months	Over 12 months
Over 2 years.	Over 2 years.	Over 2 years

23. In how many cases was partial agreement reached?

24. On average, how many four- way meetings took place in each case?

25. How many cases terminated?

26. What were the most common reasons causing cases to terminate?

27. In how many cases did you use lawyer-only model?

28. In how many cases did you use the interdisciplinary model?

29. What additional experts did you use?

27 To what extent were the views of the clients' children considered during the process?

28 To what extent were the voices of children heard either directly or through a child specialist?

29 How do you screen clients as to their suitability for the process?

30. In your experience, are the final settlements reached through collaborative practice significantly different to those reached through the court process?

31. If so, in what way?

32. In general, how significant do you think the disqualification clause is in keeping parties at the negotiating table?

Very Significant,

Significant

Not very significant.

33. What concerns, if any, do you have in relation to the collaborative process?

34. On average, are fees in lawyer only cases lower, higher or much the same as fees in traditional cases?

35. On average, are fees in interdisciplinary cases lower, higher or much the same as fees in traditional cases?

36. Has your collaborative training affected your approach to family law cases in general?

If you would be willing to your experiences of collaborative practice in more detail, I would be delighted to meet with you for a short interview. All interviews are confidential. If so, please contact me at m.healy23@nuigalway.ie or telephone 087 2570944.

Thank you for taking the time to complete this questionnaire.

Appendix E

Survey for Judges

1. Are you a Judge of the District court, Circuit Court or High Court?
2. In what county do you preside?
3. In what year were you appointed to the bench?
4. Prior to your appointment, did you practise as a solicitor or barrister?
5. Approximately what percentage of your caseload is in the area of family law?
6. What is your preferred method of hearing the voice of the child?
7. In roughly what percentage of cases would you speak to a child in chambers?
8. What is your view about speaking to a child in chambers?
9. What is your view as to the role of mediation in family law cases?
10. What is your view as to the role of collaborative law/ collaborative practice in the resolution of family law cases?

Any additional comments you wish to make?

Thank you very much for taking the time to participate in this research. All views expressed remain totally confidential.

