Resolution Collaborative Practice Forum March 2021 – Participation Agreement Q&A

1. **Can it be made clearer if a practitioner is able to act for a client in a variance to order, years after the original collab case is complete and other party wants to go via court instead of collab?**

Although Resolution’s collaborative principles are silent in respect of this particular situation, the IACP Ethics and principles state that ‘The collaborative process ends upon its’ conclusion as defined in standard 1.0. (conclusion means either a ‘Resolution’ or ‘Termination’ as defined’). Here, a previous client wishes to choose a collaborative process for an issue that has arisen *after* a resolution has been reached, but the other has appointed a non-collaborative lawyer and is intent on a court route. Firstly, it is easy to recognise that a client who has received exceptional service from their collaborative lawyer in the first instance and who further believes that individual will have knowledge of their past case would consider that professional to be a good choice even if it proves impossible to have a new collaborative process. In reality, despite having supported the client through the original case, and especially with the passage of time, there will have been changes in the client’s situation and work will still be required to a. understand the detail of the matter and b. consider the approach to be taken in any contested proceedings. The remaining issue is that the new matter relates to a variance of the agreement previously reached at the conclusion of the original collaborative process. Although it could be argued that this would generally rule out their acting as representative, it must be weighed against whether the original resolution is taken as the end of the collaborative process or not. A common-sense approach would seem to be that it is reasonable to accept that the initial collaborative process ended with the first resolution and the solicitor may act on the basis that it would be unreasonable to assume that either collaborative practitioner involved in reaching the first resolution is therefore ruled out from acting in perpetuity. It will be important however, that you use an element of professional judgement in weighing up the particular circumstances of any case.

1. **Can it be made clearer if the PA is inclusive of outcomes as well as consent orders such as parenting agreement, separation agreement, settlement agreement?**

Yes, the Participation Agreement has been amended to assist you and so that it covers any agreement.

1. **Can there be more information about how arbitration is now possible within the disqualification clause?**

We have amended and updated the information provided in the Guidance to the Participation Agreement which we hope will assist all practitioners. Please see p. 4 of the amended PA Guidance document.

1. **Can lawyers continue to act for their client in the move from collab to arbitration, and use the information gathered via collab to prep for the arbitration?**

Yes, essentially, your clients remain in their collaborative process whilst choosing to use an arbitration to reach a decision on some or all of their issues. Once an arbitral decision has been made, your clients can then return to their collaborative meetings to discuss and plan how to put the decision into place practically and for the future.

1. **Can we now move from collab to mediation to arbitration and back to collab?**

Yes, the Participation Agreement allows and encourages a flexible, integrated pathway for you and your clients to plan together what services will help them best at each stage of their journey to reach an outcome. It will be important for you and your colleague to have developed your network of other professionals who can be called upon in the design of any collaborative approach. We hope that this will provide the best wrap around, comprehensive service that can be offered to clients – and one that avoids proceedings.

1. **If an arbitration decision is appealed, could a practitioner continue to represent their client?**

No, because if the arbitral decision is appealed, unless the appeal is against the actions or negligence of the arbitrator (rather than the decision itself), there is a level of contest between your clients, and which will essentially need to be resolved via contested proceedings and an adjudication if it proves impossible for them to resolve it together in their collaborative process. It is also important to remember that as a collaborative lawyer supporting your client through their collaborative process and their arbitration, you will have been party to information and discussions which have been confidential and privileged.