

# CONTENTS

Preface	vii
Foreword	ix
Acknowledgments	xi
Biographical Details of Author	xiii
<b>Chapter 1</b>	
<b>Development of Family Law in Ireland since the introduction of Judicial Separation and Divorce</b>	<b>1</b>
General	1
The Irish Constitution 1937	1
Formalities	2
Introduction	3
The Judicial Separation and Family Law Reform Act 1989	4
New Obligations on Solicitors to Discuss and Advise Clients Re Inter Alia Mediation	5
Separation Deed vs Judicial Separation	6
Separation deed bar to subsequent judicial separation	6
Separation Deed and Pensions	7
Benefits of a Separation Deed	7
Judicial Separation vs Divorce	7
Duty on Solicitors to Advise Clients About Mediation on Divorce	8
Widening the Scope of Section 6 and 7 Certificates	9
Potential Conflict of Interest	10
The District Court	10
Lay Litigants	10
Civil Partnerships	11
General	11
Civil partners – similar rights to marriage?	12
Civil partners and ADR	12
Cohabitants	13
General	13
Definition of a cohabitant	14
Qualifying as a cohabitant	14
Factors in deciding who is a qualifying cohabitant	14
Relevant factors taken into account in granting a redress order	15
Cohabitation agreements	15
Consequences of cohabitation	16

Cohabitation and the use of ADR	16
Statistics and Their Significance	16
Relatively New Jurisprudence and Case Law	17
Conclusion	19
<b>Chapter 2</b>	
<b>The Adversarial Nature of the Family Court System</b>	<b>21</b>
Outline of the Differences Between the Irish Adversarial and ADR Systems in Family Law Matters	21
General	21
Family Disputes in Ireland – Adversarial Approach	22
General	23
The shortcomings of the Irish family justice system	24
Impact of Adversarial System on Children	26
Judges – an investigative role	26
The voice of the child in adversarial proceedings	27
Children in chambers?	27
Best practice	28
Guardian ad litem	29
Impact of Adversarial System on Litigants	30
Cases Requiring Urgent Litigation	30
Constructive (Traditional) Negotiations	31
Positional Based Bargaining	32
Interest based bargaining	33
General	33
Ad hoc shuffle/caucusing style negotiations	34
Lay Litigants	34
Round table discussions	35
Importance of full financial disclosure	35
Negotiations on the trial date	36
Know thy judge	36
Role of ADR in adversarial proceedings	37
Calls For Reform	37
<b>Chapter 3</b>	
<b>Lack of Resources Within Current System</b>	<b>41</b>
General	41
The Nature of Conflict	42
General	42
Definitions of conflict	43
Separating couples and conflict	43
Maslow's hierarchy of social needs	44
Neuroscience and scarf's hierarchy of needs	45
The dispute resolution continuum	46
Resulting consequences on litigants and their children	47
The Five Kubler-Ross Stages of Grieving	48
Dealing with the stages of grieving	48
Ego states	49

Types of ego states	49
Ego states and ADR	50
ADR and international family justice reform	51
Australia	51
New Zealand (NZ)	53
England and Wales	54
United States of America	56
Family mediation in Europe	56
ADR in Canada	57
England and Wales, Scotland and Northern Ireland ADR booklets	60
Brief Outline of All Forms of ADR Presently Available in Ireland	61
What does the term ADR mean?	61
General scope of ADR	62
Costs of ADR in family matters	67
Law Reform Commission (LRC) and family ADR in Ireland	69
Types of ADR Available in Ireland	72
Negotiation	72
Mediation	73
General	74
Collaborative practice	75
General	75
Conciliation	75
Arbitration	77
Choosing the Appropriate ADR Mechanism?	79
General	79
Duty of solicitor to advise client concerning ADR	79
Collaborative Practice vs Mediation	80
Power imbalance	81
Interest based negotiations	81
Advocacy	81
Collaborative practice and mediation similarities	81
Collaborative practice and mediation differences	82
Identifying the better option for the client?	83
Conclusion	84
<b>Chapter 4</b>	
<b>Mediation</b>	<b>85</b>
Flow Chart Diagram	85
What is Mediation?	85
General	85
Statutory definition of mediation in Ireland?	87
Main differences between mediation and court?	88
Mediation in practice from family lawyer's perspective	88
Voluntary nature of mediation	89
Mediation documents	90
Research	91

Changing Attitudes of Family Lawyers Towards Mediation?	91
Mediation in practice from client's perspective	92
Mediation is not	96
General Principles of Family Mediation	97
The Role of the Mediator	98
The mediator's role is non-judgmental and non-directive	99
Mediation fosters good communication	99
To what extent should court encourage parties engaged in matrimonial/family litigation to attend mediation?	100
Mandatory mediation information sessions	100
Cornerstones of Mediation	101
Expert Advice	102
Benefits of Mediation	102
Types of Mediation Agreements	102
Screening in Mediation	103
Domestic abuse	103
Types of abuse	103
Safety of children	104
Sensitivity	105
Identifying abuse and screening for violence	105
Exceptions to immediate bar where there is abuse	106
Law Reform Commission on screening in family mediation	107
The Basic Stages of Mediation	108
Mediation Skills	111
Family Mediation Models	113
General	113
Styles of Mediation	115
General	115
Facilitative mediation	115
Evaluative mediation	116
Transformative mediation	116
Therapeutic Mediation	117
Conclusion	117
Coalitions in the Triangle of Mediation	118
Dealing with Impasse in Mediation	118
Use of Language in Mediation	120
Conclusion	121
Dealing With Emotions in Mediation	121
Grief chart	122
Family lawyers and emotions	122
Managing the process	123
Examples of emotions in mediation	123
Strategies for dealing with emotion	124
Questioning in Mediation	126
Questions to initiate open-hearted conversation	126
Child-focused questions	129
Types of questions	129
Questions when all else fails	131

Practical tips for mediators to consider	132
Conclusion	133
Terminating the Mediation	133
Financials in Mediation	134
Pensions in Mediation	134
Tax in mediation	135
Documents in Mediation	135
Agreement to mediate (Appendix 3)	135
Mediation Information Form (Appendix 4)	137
An open financial statement/summary (OFS) (Appendix 5)	138
Memorandum of understanding (MOU) (Appendix 6)	141
Interim Agreements	145
Pre-nuptial Agreements	146
Civil Partnership and Cohabitant Disputes	147
The Role of the Child in Mediation	147
General	147
Ways to keep mediation child-focused	148
Child focused mediation vs child inclusive mediation	149
Parenting Plans	150
General	150
The Law Reform Commission (LRC) and parenting plans	151
Mandatory ADR Information Sessions?	152
General	152
LRC and mandatory mediation information sessions	152
Conclusion	154
Case Progression – Circuit Court Rules (SI 2008/358 and SI 2009/539)	154
General	154
Case progression and provision for ADR	154
Privilege in Mediation	155
General	155
Family Law (Divorce) Act 1996	155
<i>Farm Assist Limited (In Liquidation) v the Secretary of State     for the Environment, Food and Rural Affairs (No 2)</i>	156
Privilege in mediation and Art 7 of EU Mediation Directive 2008	156
Conclusion	157
EU Directive on Mediation (2008/52/EC) AND EC (Mediation) Regulations 2011 (SI 2011/209)	157
General	157
Conclusion	158
Council of Europe's Committee of Ministers' Recommendations No R (98) 1 (1998)	159
Code of Practice/Ethics for Mediation (Appendix 7)	160
General	160
Fundamental principles of the code	160
Necessity for a code of ethics	161

Law Reform Commission report (LRC) 2010 and Code of Ethics	161
Professional Conduct of Legal Professional Mediator	162
Insurance for lawyer mediators	162
Draft Mediation and Conciliation Bill 2010	163
The Mediation Bill 2012	168
High Court Mediation Rules	178
Circuit Court Rules (SI 2009/539)	179
History of the Mediators' Institute of Ireland	179
The Mediators' Institute of Ireland	180
The Family Mediation Service (FMS)	185
Dolphin House District Court Family Mediation Service	191
General	191
Update on Dolphin House pilot project	192
DSBA (Dublin Solicitor's Bar Association) Family Lawyer Mediation Panel	193
DSBA Family lawyer brochure	193
Conclusion	194
Training in Mediation	195
The Role of the Lawyer Mediator	195
The Irish Commercial Mediation Institute (ICMI)	197
The Role of ADR in Business Disputes	201
Marketing a Mediation Practice	204
General	204
<b>Chapter 5</b>	
<b>Collaborative Practice</b>	<b>207</b>
General	207
A Brief History of Collaborative Practice	207
Development of Collaborative Practice in Ireland	208
Definition of Collaborative Practice	210
What is Collaborative Practice?	211
Principles of Collaborative Practice	212
Negotiations vs Collaborative Practice	212
Screening in Collaborative Practice	213
General	213
Law Reform Commission (LRC) and screening in collaborative practice	214
Conclusion	214
Can Your Client Rise to the Challenge of Collaborative Practice – Some Tough Questions?	215
Attitude to Dispute Resolution	216
Core Elements of Collaborative Practice	217
How Does Collaborative Practice Work?	218
Philosophy of Collaborative Practice	219
Advantages of Collaborative Practice	219
The Association of Collaborative Practitioners in Ireland (ACP)	220
Role of Collaborative Lawyer	223

The Paradigm Shift	224
General	224
Making a paradigm shift	225
Impediments to the paradigm shift	225
Assisting the paradigm shift	226
Accepting the paradigm shift	227
Conclusion	227
Stages of the Collaborative Process	228
What happens at four way meetings (useful information for clients)	231
Debriefing between meetings	233
Collaborative lawyer only meetings	233
Guidelines for the effective lawyer team in a collaborative four way	235
Tools of the Collaborative Practitioner	236
General	236
Documents in Collaborative Practice	238
Participation agreement (Appendix 10)	238
Retainer agreement (Appendix 11)	242
Affidavit of means (Appendix 12)	243
Disclosure in Collaborative Practice	243
General	243
Financials	244
Facts and wishes	244
Conclusion	245
Collaborative Lite/ Cooperative Law	245
General	245
Rationale of collaborative lite/cooperative law	246
When is collaborative lite/cooperative law appropriate?	247
Conclusion	247
Collaborative Practice Models	248
General	248
Undisciplinary Team	248
Multidisciplinary team	248
Interdisciplinary team	249
Transdisciplinary model	249
Conclusion	250
Why Choose Collaborative Practice?	250
Confidentiality in Collaborative Practice	252
How Does Collaborative Law Differ From the Traditional Adversarial Court Process?	252
Traditional Negotiations vs Collaborative Practice	253
Children in Collaborative Practice	254
General	254
Working towards solutions	254
Research on children in collaborative practice	255

Code of Practice and Ethics for Collaborative Practitioners in Ireland	255
Principles and guidelines for collaborative law (US)	255
Uniform Collaborative Act 2009 (US)	256
Is a statutory Code of Practice necessary in Ireland?	257
Referral to Collaborative Practice	258
The pitfalls	258
Conclusion	259
Insurance for Collaborative Practitioners	259
Training for Collaborative Practitioners in Ireland	260
Criteria for training as a collaborative practitioner in Ireland	260
Training, quality control, mentoring & practice groups	261
Basic training for collaboration	261
Training for high potential collaboration	262
Statistics in Irish Collaborative Practice	262
The International Academy of Collaborative Professionals	263
General	263
IACP publications	263
IACP conferences	264
European Collaborative Conferences	264
The European Collaborative Network	265
Collaborative Law in England and Wales	265
General	265
Resolution ADR conferences	266
Development of ADR in England and Wales	266
Overview of collaborative practice in Ireland	267
Collaborative Practice in Wicklow	267
Collaborative Practice in Kildare	270
Collaborative Law and Mediation in the West – A Personal Reflection	271
Collaborative Practice in Cork	272
Collaborative Practice in West Cork	275
<b>Chapter 6</b>	
<b>Neutral Experts in Family ADR</b>	<b>277</b>
General	277
Role of Divorce Mentor in ADR	278
The Role of a Counsellor in Separation	280
Role of Pension Expert in ADR	282
Role of Accountant in ADR	284
Role of Valuer/Auctioneer in ADR	288
Role of Child Psychologist in ADR	290
Role of Family Therapist in ADR	294
Conclusion	296
<b>Chapter 7</b>	
<b>Finality Within Reason</b>	<b>299</b>
General	299

The Collaborative Process	299
Recital	300
Proofs	300
Mediation	301
Enforcement and review of mediated agreements	302
Practical Considerations	303
Consent orders	303
Interim agreements	303
Costs	303
Implications of a Breakdown in ADR Process	304
Privilege	304
File auditing	304
ADR inventory	305
Emotions on Conclusion of ADR Process	305
Emotional closure where ADR process successful	305
Emotional closure where ADR process unsuccessful	306
Support Systems	306
Parenting After Parting	307
General	307
Referral	307
The Future of ADR in an Irish Family Justice System?	308
General	308
Recent ADR Developments	308
Conclusion	309
<b>Appendix 1</b>	
<b>Frequently Asked Questions About Mediation?</b>	<b>311</b>
<b>Appendix 2</b>	
<b>Frequently Asked Questions About Collaborative Practice</b>	<b>315</b>
<b>Appendix 3</b>	
<b>Agreement to Mediate</b>	<b>317</b>
<b>Appendix 4</b>	
<b>Mediation Information Form</b>	<b>323</b>
<b>Appendix 5</b>	
<b>Open Financial Statement</b>	<b>327</b>
<b>Appendix 6</b>	
<b>Memorandum of Understanding</b>	<b>335</b>
<b>Appendix 7</b>	
<b>The Mediators' Institute of Ireland MII Code of Ethics and Practice</b>	<b>347</b>

<b>Appendix 8</b> <b>Draft Mediation and Conciliation Bill 2010</b>	<b>361</b>
<b>Appendix 9</b> <b>Draft General Scheme of Mediation Bill 2012</b>	<b>385</b>
<b>Appendix 10</b> <b>Participation Agreement</b>	<b>405</b>
<b>Appendix 11</b> <b>Retainer Agreement</b>	<b>411</b>
<b>Appendix 12</b> <b>Affidavit of Means</b>	<b>415</b>
<b>Appendix 13</b> <b>Expectation of Conduct Sheet</b>	<b>421</b>
<b>Appendix 14</b> <b>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</b>	<b>423</b>
<b>Appendix 15</b> <b>Cross-Border Mediation (EU Directive) Regulations 2011, SI 2011/1133</b>	<b>431</b>
<b>Appendix 16</b> <b>Resources/Support Services</b>	<b>451</b>
<b>Appendix 17</b> <b>Law Reform Commission Summary of Recommendations</b>	<b>455</b>
<b>Appendix 18</b> <b>HSE Standard Form for Reporting Child Protection and/or Welfare Concerns</b>	<b>471</b>
<b>Appendix 19</b> <b>Biographies of Contributors</b>	<b>475</b>
<b>Appendix 20</b> <b>Bibliography recommended further reading</b>	<b>483</b>