

COLLABORATIVE FAMILY LAW

By David P. Schwartz

Nearly everyone in our society knows how painful, costly, and toxic separation and divorce can be. The traditional family law system compounds the damage by requiring divorcing families to resolve their issues in an adversarial system. This system sends a message that fighting, the last thing the family needs, is the state-sanctioned method. Much too often litigation only adds fuel to the fire. Yet this state of affairs is so much a part of the terrain that it has become accepted, at least tacitly, as the norm.

Divorce is tough, so what's new? What is new is the Family Law sub-specialty, Collaborative Family Law, which holds the promise of an effective, dignified, respectful, lawyer-supported and constructive alternative to the adversary system for the resolution of divorce and other family issues.

How Collaborative Family Law Works

Each Collaborative Family Law case begins with a written commitment, signed by both clients and lawyers, that neither side will threaten to or actually invoke the power of the court to resolve any dispute. Should either client resort to litigation, neither collaborative lawyers nor any experts retained as part of the process may participate in the litigation. The parties and the lawyers also agree to full disclosure, to share experts and to correct any mistake, misunderstanding or oversight of the other party. The stipulation and the Principles and Guidelines are available for review on our group's web site via the "Getting Started" link at www.collaborativefamilylawyers.com.

In the Collaborative Family Law process, the lawyers work to empower the clients to run the show. The parties are capable of figuring out what is most important to them and to their children. They do not need some stranger (a lawyer or a judge) telling them, "I cannot allow you to pay that much support" or "You have to insist on getting at least what the DissoMaster provides." The parties do need and appreciate help from their lawyers in assuring that all of the relevant information is examined and that the important

consequences of various alternatives are realistically considered. Each lawyer is responsible for maintaining an atmosphere in which the clients feel comfortable and supported in the expression of their real concerns and interests.

The Collaborative Family Law process rejects blame, confrontation and threats. It emphasizes the value of mutual problem solving and encourages understanding of the other person's point of view. Mutual understanding fosters constructive interest based negotiation instead of manipulation and position taking.

While the collaborative lawyers assure that nothing significant to either person is overlooked, the clients are given the ability to identify the subjects that they need to address to have a complete resolution of their divorce. To the extent that it is feasible, the clients also assume the primary responsibility for gathering factual information and for generating possible solutions. When human needs and interests are given precedence over legal issues and litigation tactics, people may come up with arrangements that are unconventional, at least when viewed through the eyes of a litigator. But these agreements are genuinely meaningful to the parties. There is usually a strong sense of satisfaction and a desire to act in ways that enhance the viability of the deal.

The process is a true collaboration. The clients and their lawyers comprise a single team with a common goal - to create a mutually acceptable solution that is based on full disclosure and joint analysis and evaluation. Like four climbers on a single line half way up the face of El Capitan, they all want to make it to the top. For one to get there, the other three must also succeed

This approach gives the collaborative lawyers a common interest: the success of both clients. The process is collegial. There is a substantial amount of communication between the *other* lawyer and the *other* client. Each lawyer cares that the outcome is satisfactory for both clients and knows that his or her colleague has the same concern. Collaborative lawyers train together and

speak the same language. They are committed to helping both clients find and focus on their common interests. Collaborative lawyers encourage their clients to avoid taking positions, to understand each other's concerns, to fully exchange information, to explore a wide range of alternatives, and to reach solutions acceptable to both.

Co-operative Is Not Collaborative

Negotiating under the threat of trial and further hearings is inherently coercive.

We co-operative lawyers never forget our duty of "vigorous advocacy" as it exists in litigation. We know exactly to whom our duties run. We understand conflicts of interest and the perils of dual representation. We know what we may and may not disclose. We consider the alternatives with regard to the disclosure of our own analysis of the facts and the law. If there is money left on the table, must we share it with the opposing party? If we think our client stands to do much better in court, isn't that where we want to go? We are opponents in the adversarial process. What your client gets, my client loses.

Contrary to a popular perception, however, it is not unusual for opposing counsel in a traditional family law case to co-operate in various parts of the case. Lawyers are even capable of seeking resolutions that each side is comfortable recommending to their respective clients. Lawyers agree that, at least as a general rule, a negotiated settlement is to be preferred. But this co-operation is not the equivalent of what happens in a Collaborative Family Law case.

The spirit and the letter of the Collaborative Family Law process is that the parties are not adversaries. They share a history and, particularly if they have children or mutual friends, they share a future. They want to be comfortable at their children's weddings and at the births of their grandchildren. Despite their emotional trauma, or because of it, each spouse wants to put the highest value that they can on dignity, civility and fairness. They are

willing to commit to the goal of an agreement that each can accept as fair or appropriate under the circumstances. They seek an agreement that is based on their own needs and interests. This type of negotiation does not happen when the parties are trying to point guns at each other. It thrives when the clients are empowered and when they see the lawyers modeling positive constructive behavior.

Collaborative Family Law Today

The Collaborative Family Law concept originated in the late 1980's with Stuart G. Webb, a Minneapolis attorney. Over the last dozen years or so, family lawyers throughout North America have recognized the merits of this sub-specialty. We have organized to provide training, to work with the bench and the bar, and to publicize the availability of this alternative to litigated divorce.

There are Collaborative Family Law groups in at least 25 states, the District of Columbia, and 5 provinces in Canada. In Medicine Hat, Alberta, it is said that each of the approximately 15 family lawyers has adopted the collaborative practice to the exclusion of litigation and that it is almost impossible to have a litigated divorce there today. There are one or more collaborative groups in at least 19 California counties. For a relatively current listing of Collaborative Family Law practice groups go to www.collabgroup.com, which is the site of the International Academy of Collaborative Professionals. The state of the art is well laid out in *Collaborative Law, Achieving Effective Resolution in Divorce without Litigation*, Tesler, ABA 2001, www.ababooks.org.

The demonstrated success and great potential of Collaborative Family Law is the subject of the current (Spring 2003) edition of the newsletter of the Association of Certified Family Law Specialists. It has

been endorsed by family law judges in Los Angeles, Ventura and San Francisco counties. Speaking from the standpoint of my own experience as a practitioner, it is clear that our Collaborative Family Law clients are universally more satisfied and less stressed than our litigation clients. The same is true for the practitioners. As most of the rest of the world knows, there is much more satisfaction from being part of a constructive process. Collaborative Family Law is a powerful tool that gives people the support and encouragement they need to effectively resolve the issues of divorce without going into battle.

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