

An Introduction to Collaborative Law¹

E Richard Toray

INTRODUCTION

This article is intended to introduce the concept of Collaborative Law in general and its application in family law specifically. Family law encompasses a number of areas, including divorce, or in family law parlance: “dissolution of marriage” proceedings. Family law also includes “post-decree” situations involving disputes in such areas as child support, parenting time and decision-making authority for the children (formerly “child custody”), and maintenance (formerly “alimony”). Normally, if one seeks a divorce one goes to court, which conjures up certain images and terminologies, mostly negative. For example, divorcing couples prepare to do “battle” for custody of the couples’ children and property; often the divorce is described as “bloody” or “nasty”. When couples get divorced, almost all of the associations and terminology are negative. Although divorce is often perceived as a “win-lose” proposition, in reality it is often a “lose-lose” situation. Do you know any “happy” divorcees? Maybe a few divorcees find satisfaction in humiliating and defaming their former spouses in an open forum, assuming they can afford the best lawyers and spend the most money. But more often no one “wins”. Indeed, rarely will the children of a crumbling marriage emerge from the process unscathed. As a California Appellate Judge stated: “Family law is where they shoot the survivors”. But what does the lawyer do? We have to zealously represent our clients within the bounds of the law. Don’t we have to play hard-ball? Isn’t that what the client wants, after all? To best the other spouse?

The question reveals the problem, which is the mind set of the divorce institution: it’s not calibrated to achieving a positive outcome for **all parties** involved in the process. Collaborative law, on the other hand, dispels the myth that the process cannot be dignified, respectful and healthy.³ Indeed, the collaborative family law concept recognizes that divorce is woven into the social fabric as tightly as marriage, graduation, and other rites of passage. Because half the married population divorces, it is not an aberration; it is a very possible outcome of marriage. Given that framework, doesn’t it make sense to remove the blame, shame and social stigma from the process? Some intrepid family law practitioners thought so, and did something about it.

The lawyers who could no longer bear witness to the human courtroom carnage, where the victims were often the innocent children of the blinded divorcing parents, decided to

¹ This article was published in the CTLA “Trial Talk” and the Univ of Denver “Preventative law Journal”.

² Pauline Tesler, Collaborative Law, American Bar Association 3 fn 5(2001), citing Justice Donald M. King, Address at the New Ways of Helping Children and Parents Through Divorce, November 21 (1998).

³ The collaborative process is much less contentious, whether it is much less expensive depends on each individual case.

try something else.⁴ What emerged was Collaborative Family Law, an alternative dispute resolution (ADR) process designed for clients who want to control their own destiny in the divorce process, as opposed to letting a judge, who has thousands of other cases to handle, decide how to divide their property, assets, and most importantly their children. It is not a stretch to coin this collaborative process “divorce with dignity”. Because divorce is now common place, there is no better time for a paradigm shift from an “adversarial” to “collaborative” process for undoing a marriage and all the lives impacted by that decision.

WHAT IS COLLABORATIVE LAW?

The Collaborative Law Process is like mediation, only without the mediator. Like mediation, collaborative law utilizes skilled dispute resolution professionals to help the parties reach a settlement that meets the parties’ needs. Collaboration like mediation allows the parties to retain more control over the decision-making process and more privacy, which generally equates to a greater likelihood of future compliance and success. Collaborative lawyers differ from mediators in that they actively advise and negotiate alongside their clients, as opposed to advising and counseling their clients outside of the mediation process, usually while the mediator visits with the other party and his or her attorney. This mode of mediation is dubbed: “shuttle diplomacy”. On the other hand, collaborative law “combines the positive problem-solving focus of mediation with the⁶ built-in lawyer advocacy and counsel of traditional settlement oriented representation”. Moreover, while the agreement reached during mediation can unravel unless it is signed by the parties at the conclusion of the mediation, it is unlikely that the collaborative agreement will collapse because “two skilled legal advocates can go much further than a neutral mediator in seeing to it that the playing field is leveled, at the same time that two skilled legal minds are engaged to help both parties arrive at creative “win-win” solutions wherever possible”. Another unique aspect of collaborative law is risk distribution among the lawyers and the clients.

In conventional representation and in mediation consultation, the lawyer’s work generally continues until there is a judgment, no matter how adversarial or cooperative the process employed. However, in the collaborative law process, the

⁴ Stuart Webb, a discouraged family attorney in Minnesota, decided he could no longer practice adversarial law and began a collaborative practice. Simultaneously, an interdisciplinary team of professionals in California (psychologist, divorce attorney, social worker and financial counselor) were developing strategies to work together to provide separating and divorcing families with a methodology for solving their problems in a non-adversarial fashion. Susan Gamache, PhD., Collaborative Separation and Divorce. The Collaborative Review 6 (Spring 2002)

⁵ This method of mediation, where the mediator shuttles between the Petitioner and his or her counsel and Respondent and his or her counsel, is often necessary because the divorce process has so alienated the parties that they literally cannot sit in the same room together.

⁶ Pauline Tesler, Collaborative Law. American Bar Association 8(2001).

⁷ Id. at 9.

lawyers have no further role if a settlement acceptable to both clients cannot be fashioned within the collaborative process.⁸

INTERDISCIPLINARY APPROACH

The collaborative law process is not necessarily confined to the two parties and their attorneys. Even the most seasoned family attorneys draw upon the expertise of other professionals in other fields. Precisely because family law involves myriad issues, from the best interests of the children to division of retirement accounts to valuing businesses and real estate, the assistance of trained professionals in other disciplines is often needed. Just as in a traditional divorce case, therefore, the collaborative lawyers and their clients will occasionally need to draw upon the experience of other professionals to solve problems. Unlike a traditional divorce, however, where each party hires his or her own “expert” to assist them in building their own case, the professional who joins the collaborative team is called a “neutral” and has no allegiance to either party or either attorney; rather, the neutral’s allegiance is to the process and to the best interests of both parties.⁹ For example, if a couple is at loggerheads over a financial issue, a financial specialist can be brought in to help the parties creatively solve that particular problem. Likewise, a child specialist, normally as social worker or psychologist can be brought into the fold to understand the situation from the perspective of the children and advocate for their best interests. Thus, the collaborative family law model is not only an interdisciplinary model; it is *a team* model, a collective effort to achieve the desired result that is in everyone’s best interests.

THE FRAMEWORK

The collaborative process is accomplished via a series of four-way settlement meetings, set at approximately two-week intervals. During the settlement sessions, both parties and their attorneys, bound by the Agreement¹⁰ they signed, are committed to working together in creative problem solving; neither party’s attorney is expected to be a “neutral”. During the sessions the parties hope to create a synergistic environment that will engender novel solutions. Although denominated “four-way” conferences, indeed the communications are “six way”, hence the synergy. Think of a square table, where the lawyers sit across from one another and the parties do likewise. Instead of communications only between lawyer to lawyer, client to client, and each lawyer to own client (four-way), six currents of communication emerge because of an additional channel of communication: each lawyer to other client.

Unlike traditional divorce, the parties never go court; the judge only sees the final agreement signed by the parties and their attorneys. The parties, and the lawyers, take

⁸ Id. at 11.

⁹ It should be noted that in traditional divorce cases many Denver Metropolitan Counties now employ a “simplified” divorce procedure wherein the professionals are retained as “joint experts”, either by the parties’ agreement or order of the court.

¹⁰ The term “Agreement” is explained more fully later in this article.

¹¹ Id. At 11.

responsibility for reaching a negotiated agreement. Two lawyers and their two respective clients sign an engagement stipulation defining the scope and intent of the lawyer's roles, which is to solve their problems and do so in a "win-win" mind set. There is an escape clause, in that if one or both parties no longer want to collaborate, the party can go to court but the collaborative lawyers won't go with them. Sheila Gutterman, a seminal collaborative law crusader in Colorado, described the collaborative family law model as

mandate[ing] the total *contractual* commitment to a collaborative outcome *without litigation*, made by *all* participants at the start of the process. (In many instances, the collaborative negotiations take place before the filing of a petition.) Collaborative family law practitioners contend that the deliberate creation of a solution-based environment makes a synergy of creative problem-solving not only possible, but also probable."¹²

Indeed, it is the contractual agreement to resolve the dispute without litigation that is the heart of collaborative law. In addition to the commitment to settle, the engagement stipulation must "define the collaborative family law process; must spell out other available alternatives, such as litigation and mediation; and can address, if the attorneys so choose, specific concerns and possible consequences of this model". There are numerous particulars of the collaborative family law stipulation. Many of the particulars spell out what events or conditions will trigger disqualification for the attorneys. For example, all collaborative team members must withdraw from the case if either client chooses to litigate. If that is the case, then each lawyer must follow a protocol to ensure the orderly transfer of the case to appropriate professionals. The engagement stipulation also contracts for full and honest disclosure of all material facts, adhering to the ethical standards of the professionals' various disciplines, and other specific criteria.

CONCLUSION

Collaborative family law does not alter an attorney's ethical obligation to diligently represent the client. The collaborative family law process does necessitate consideration of the financial and emotional needs of both spouses, the children, and the family as a whole in working toward global settlement, but the collaborative lawyer is expected to represent his or her client with the same due diligence owed in any proceeding.¹⁵ The

¹² Gutterman, Sheila, Collaborative Family Law-Part II, 30 The Colorado Lawyer 57 (Dec. 2001).

¹³ Gutterman, Sheila "Collaborative Family Law—Part I," 30 The Colorado Lawyer 57 (Nov. 2001).

¹⁴ Gutterman, Sheila, Collaborative Family Law-Part II, 30 The Colorado Lawyer 57 (Dec. 2001).

¹⁵ Id., see also International Academy of Collaborative Professionals ("IACP"), Statement of Principles of Collaborative Law, III: Cautions (2001) at: www.collabgroup.com ("Although the participants are committed to reaching a shared solution, each party is still expected to identify and assert his or her respective interest and the parties' respective attorneys will help each of

collaborative lawyer's job it to bring about a mutually satisfactory and beneficial resolution to issues facing the divorcing parties. The collaborative lawyer emphasizes creative, mutually beneficial problem solving and attempts to expand the pie, so to speak, so that one person's gain is not necessarily the other's loss. Apart from the benefit to the clients, the collaborative lawyer gains a sense of satisfaction by helping the client achieve a win-win resolution to a process that is emotionally and financially draining.

In Colorado, more about collaborative law can be learned by visiting the following web sites: Colorado Collaborative Law Professionals at www.ccfpl.org; Rocky Mountain Collaborative Law Professionals at www.rmclp.com/members.htm.

them do so.").

¹⁶ Pauline Tesler, Collaborative Law, American Bar Association 15(2001).