

This article was written in conjunction with Michael Mastracci, Attorney at Law for a law magazine. Our writer took some of his content, did additional research, and wrote the piece collaboratively with the client. This article has been posted here with permission.

How Collaborative Practice Benefits Children

By Michael A. Mastracci, Esq.

Other than perhaps the death of a parent, divorce is often the single most traumatic event in a child's life. In America 60% of all marriages end in divorce and a third of those divorces involve bitter conflict. One million children in our country are involved in divorce each year. These children are twice as likely as children from intact homes to develop behavior problems, psychiatric illness and addictions. Children of divorce are 50% more likely to divorce than children from intact homes, perpetuating the cycle and driving statistics up each year.

As typically practiced in America, divorce rips asunder the very foundation of a child's world. It shatters the family structure, destroys communication between the parents, and irrevocably changes the child's relationship with each parent. Children suffer not only their own fears and misery over the loss of the family but, too often, are used as pawns by one parent to hurt the other. Out of anger or emotional need, one parent may seek to monopolize the child's time and affection to the exclusion of the other parent. There are no winners in a divorce. Everyone loses, but the children lose most of all.

Divorce professionals and researchers alike have concluded that *how* a couple conducts themselves during a divorce has far greater impact on their children than the separation itself. Weary of acrimonious divorce battles that dragged on in court and the expense and emotional damage they cause, attorneys and clients sought a more constructive way of divorcing. The sad reality is that divorce involves far too many complex personal and family issues to be adequately addressed and appropriately resolved by an already overwhelmed judiciary. People wanted to

maintain control over their lives, not have decisions that would have such a major impact on their future dictated by an uninvested third party through the courts.

Collaborative Practice (also called Collaborative Law and Collaborative Divorce) became the answer. Founded in 1990 by Minnesota attorney Stuart G. Webb, collaborative practice focuses on the fact that divorce is not just a painful ending but can also be a new beginning. Stressing cooperation over confrontation and resolution over revenge, collaborative divorce is quickly transforming how couples dissolve their marriages, divide their assets, and reinvent their post-divorce parenting relationships. “Collaborative practice promotes respect, places the needs of the children first and keeps control of the process with the spouses,” explains the International Academy of Collaborative Professionals (IACP) website (www.CollaborativePractice.com).

An alternative to traditional litigious divorce and child custody proceedings, collaborative law is a commitment to a principled, negotiated settlement that focuses on client empowerment. It harnesses the problem-solving skills of both attorneys and their clients to arrive at creative settlements that address the needs of each parent and their children without the threat or use of court action. The collaborative law method provides the tools, resources, and professional assistance in a specialized and structured framework to achieve effective outcomes for families in transition. Interest in collaborative law is growing and is now practiced in the U.S., Canada, United Kingdom, New Zealand and Switzerland.

What is collaborative divorce?

As defined by the IACP: “Collaborative Law, Collaborative Process, and Collaborative Divorce are terms often used interchangeably. However, they are all components of Collaborative Practice, which has these key elements:

- 1) the voluntary and free exchange of information,

- 2) the pledge not to litigate and the withdrawal of both attorneys - and in most cases all of the other professionals on the team - should either party initiate litigation in spite of this pledge, and
- 3) the commitment to resolutions that respect the parties' shared goals.

“Collaborative Law describes the legal component of Collaborative Practice, made up of the parties and their attorneys. Collaborative Process means the key elements of the process itself.”

How does the collaborative process work?

Collaborative law takes place outside the court process. Collaborative practice uses a cooperative team approach rather than an adversarial approach to arrive at an equitable divorce settlement. The core of any collaborative team is the two divorcing parties and their respective collaborative lawyers. Before the process begins, the lawyers and their clients formally contract to work together to resolve their issues in an atmosphere of honesty, cooperation, integrity, and professionalism. Both lawyers contract not to take the case to court. All parties sign a contract titled *Participation Agreement* (often referred to as a *four-way*) stipulating their commitment to the collaborative process. In traditional litigation the divorce process begins with the filing of a lawsuit. The collaborative process begins with the signing of the Participation Agreement.

Given the voluntary nature of participation in the collaborative process, coupled with the specialized training of the attorneys, the parties themselves are able to completely control the process, the outcome, and their futures. All decisions are reached jointly and voluntarily. Family matters can remain private. Within this framework, and given the voluntary nature of the process, anger, suspicion, and paranoia decline dramatically.

Collaborative practitioners work as part of an inter-disciplinary network of professionals to resolve conflict and provide expertise and advice to the entire team on issues relevant to the

ultimate settlement of the case. Team members sign a document titled *Statement of Understanding Among Team Members* which affirms their commitment to work together as a team with the common goal of resolving all issues in a way that best meets the needs of all involved. Each team member should ascribe to the ethical guidelines set forth by the IACP that prohibit team members from becoming involved in court proceedings connected to a case and demand withdrawal should the collaborative process fail and the case move to court.

Additional team members, chosen jointly at the outset, may include:

- **Divorce coaches** for each party to assist with communication skills, self management, and negotiation skills;
- **Financial adviser** to provide accurate, impartial financial information, assist in gathering necessary financial documents, and provide possible settlement options;
- **Child specialist** to represent any children and present their concerns and needs; and
- **Case manager**, often one of the coaches, to keeps everyone informed and on track.

What is the attorney's role?

In a collaborative divorce, the client's attorney is *not* neutral. Attorneys fully represents their clients, but with a change in emphasis and attitude. Instead of taking an adversarial approach, lawyers who practice collaborative law emphasize mutual respect and cooperation. Both lawyers are trained to consider the other party's perspective in order to help both reach agreements that accomplish the goals of both and preserve the welfare of the entire family, particularly the children.

As in any divorce proceeding, the lawyers serve as a resource, educator and advocate for their clients. They perform the usual investigations and determinations and help their clients organize disclosure documents and understand those provided by the other party. The lawyers

apprise their respective clients of their legal rights and obligations and guide them client in analyzing the consequences of competing options.

Collaborative law diverges from traditional litigious practice in that a collaborative lawyer tries to anticipate conflict, works to achieve creative solutions to problems that are acceptable to *both* parties, and strives to manage the divorce process to promote cooperative resolution in a setting of mutual respect and dignified behavior. Specialized training helps a collaborative practitioner hone the ability to practice respectful communication and listening skills and actively promote cooperative behavior. A collaborative lawyer must understand the motivations of both parties and develop the ability to identify the issues and concerns of both in order to bring the clarity of reason and reality to emotionally charged situations.

Many of the negotiations in collaborative practice are performed in a four-way setting with each participant being represented by counsel throughout the process. The parties do not “hide” behind their lawyers. Unlike a traditional litigation setting, the opposing attorney can speak directly to the other lawyer’s client in four-way meetings. This maximizes the group’s potential for creative problem solving and exposes any obstacles to resolution. The two attorneys themselves may sometimes meet to discuss ways to resolve issues in an amicable and cooperative fashion.

In collaborative divorce, court is not an option. If a settlement cannot be reached, the collaborative lawyers and team must withdraw, leaving the divorcing parties free to retain trial attorneys to pursue the matter in court. This ensures the commitment of the attorneys to reach agreements and overcome impasses through cooperative negotiation.

Much like court mediators, collaborative divorce lawyers are required to obtain special training. A collaborative divorce can save both parties the pain and anxiety of months spent

haggling in court as well as the considerable expense generally incurred in an adversarial divorce. Through collaborative divorce, couples have the opportunity to emerge with a fair settlement and peaceable relationship while minimizing the negative effects of divorce on their children.

What the ABA says.

In mid-October 2007, the American Bar Association Ethics Committee issued a formal opinion supporting the use of collaborative law and collaborative practice. State ethics committees are expected to follow suit. Formal Opinion 07-447, *Ethical Considerations in Collaborative Law Practice*, dated August 9, 2007, states:

“As explained herein, we agree that collaborative law practice and the provisions of the four-way agreement represent a permissible limited scope representation under Model Rule 1.2, with the concomitant duties of competence, diligence, and communication. We reject the suggestion that collaborative law practice sets up a non-waivable conflict under Rule 1.7(a)(2).”

Why choose the collaborative process?

Collaborative law provides an opportunity for continued mutual respect between the divorcing parties, both through and after divorce. By working together, collaborative divorce allows both parties to move on with their lives with dignity and peace. The emphasis in settlement meetings is on creating fair resolutions to differences in an open, safe, supportive environment. It is particularly effective when children are involved and parents must maintain a responsible relationship as they struggle to raise their children in two separate households.

Through the collaborative process, parents learn and practice open communication, self-management and negotiation skills that can form the basis for successful future interactions. Through collaboration, parents learn to manage and reduce conflict and the anguish and divided

loyalties it engenders in children. Through collaboration, parents have the opportunity to lay the foundation for the respectful, cooperative parenting of their children.

One of the most difficult aspects of divorce is the redefining of parental roles. To help children transition successfully during and after divorce, parents *must* learn to set aside their anger and disappointment with each other and learn to parent together. Parents must come to agreement on sharing time with and responsibility for their children. They must respect the child's right to be with the other parent and the other set of grandparents and relatives. They must find ways for both families to attend school events, sporting activities, teachers meetings, share birthdays and holidays, etc.

The goal is to create a new family system that supports the children and provides them with necessary stability. When parents continue to act together in their children's best interests, they make it possible for their children to make a healthy adjustment to the divorce and any changes that come later. Parents may separate and wish to sever ties, but children are irrevocably tied to *both* parents and those ties must be maintained if the child is to emerge from divorce happy and healthy.

The goal of collaborative divorce is to reach an equitable agreement that meets the needs of both parents and their children through cooperation without going to court. It is hoped that the collaborative process will set the stage for future cooperation and shared support so that parents can continue to work together to raise their children after divorce. Those of us who practice collaborative family law believe collaborative divorce *can* become the new norm in America.