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Collaborative Law Explained

Is it a practical alternative for divorce in New York?

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DISSATISFACTION with the status quo is often the impetus for innovation, and certainly this is true with respect to the innovative dispute resolution process known as "collaborative law." In the case of collaborative law the status quo is represented by an adversarial judicial system that, by definition, pits parties seeking to obtain a divorce one against the other. To a lesser extent the motivating dissatisfaction is also with the initial response to the perceived shortcomings of the adversarial system, mediation.

Collaborative law was founded 14 years ago by Stu Webb, a former matrimonial litigator who had reached a point in his career where his own disenchantment with the judicial system and the role he played in it in contested divorce cases was so intense that he was on the verge of leaving the practice of law entirely. Collaborative law addresses the problems that Mr. Webb perceived as inherent in the court system by adopting as its cornerstone a central principle by which the parties in a collaborative divorce cannot go to court or threaten to go to court with the lawyers who represent them in the process.

This article discusses collaborative law in the context of the adversarial system as it affects divorcing parties.

The Divorcing Context

Matrimonial attorneys are all too familiar with the difficulties facing so many divorcing parties. The sense of loss and grief, which psychologists have likened to what follows the death of a loved one, is often compounded in divorce situations by the reality of the other's continued existence. Parties are denied the relief of having an opportunity to mourn.

At the same time they find themselves confronted by harsh, anxiety-producing economic realities. Most households, no matter what their income, stretch their budgets to the limit. Divorcing parties, having lost their economies of scale, must find a way to support dual households when they were barely able to support one. In addition, they lose many small but significant day-to-day joint economies, e.g., one watches the kids so that the other can work late or go to the market.

Monetary shortfalls are extraordinarily difficult to deal with. Parties see their lifestyles in peril. They are scared that they won't be able to make it. Emotionally, they are often wracked by a number of fears and anxieties. Many fear being alone for the first time in years. If there are children, they fear losing their accustomed parenting role or having to assume a new and different role. And the fear and sorrow are often exacerbated by a mixture of anger, rage, guilt and an overwhelming sense of failure.

Barry Berkman

Confused, fearful and angry, the parties retain attorneys, competitive by nature and trained to advocate zealously on behalf of one and against the other. The attorneys themselves are products of the adversarial culture of courts and judges. They refer to one another as "opponent" or "adversary." The cases are entitled one vs. the other. The common language is one of conflict,

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and results are seen in terms of "winner" and "loser."

Most divorcing parties do not want to end up in court. Usually the attorneys are asked to help negotiate an agreement. The negotiations, however, take place against a backdrop of non-determinative (i.e., dependent upon subjective standards, and therefore unpredictable) laws that seem to invite disagreement, with ample room for each party to find support in existing statutory and case law.

The key issues of spousal support and equitable distribution are determined by an uncertain weighing of numerous factors. A best-interest-of-the-children standard (as opposed to a primary caretaker or joint custody presumption) for the award of custody adds to the possibility of disagreement. The line between the active or passive nature of the appreciation of otherwise separate property is often difficult to discern. Valuation questions of degrees, licenses and professional practices have spawned entire cottage industries of dueling experts.

The oft-seen result of this is that the parties, already hostile, suspicious and fearful, are polarized even further upon receiving widely disparate advice as to legal entitlements or obligations from their respective attorneys.

Armed with vastly conflicting estimates of likely outcomes in court, each party often enters initial negotiations unprepared to deal with the seemingly unbreachable gap between each of their views of how the matter should be resolved. Quickly this gap evolves into impasse, always caused by the perceived intransigence of the other side, and, it seems, leaving no choice but to commence an action. Much the way the needle of a compass drifts to the north, the attorneys seem to drift to court.

Once in court, the parties and attorneys are immediately confronted with the standards and goals requirements, wherein the court's interest in clearing its calendar often conflicts with the parties' and attorneys' genuine desire to resolve the case. Yet early in a case the parties often find themselves in highly volatile states of emotional turmoil. They need time to reflect, to focus, to become emotionally all of one piece.

However, once they are within the system, one of its primary goals is to get them out. How often have litigators been told by the assigned judge that settlement discussions are not an excuse for the delay of discovery?

The result is that the parties and attorneys must proceed on a double track. They do their best to settle the case often through haphazard meetings, phone calls, and so on. At the same time they must proceed diligently pursuant to the discovery schedule set during the first conference and with whatever motions may need to be made. Often pendente lite motions are made early in the action, wherein each side perceives the other as having retrospectively altered or distorted reality and which all too often are replete with pejorative characterization and mutual accusations of wrongdoing.

These defensive/aggressive postures on the part often of both parties and lawyers set the tone for the settlement negotiations and cast a long dark shadow over the possibility of constructive dialogue. A typical result of this double track approach is that the case is in fact settled, but only after substantial motion practice, discovery, court conferences, etc., often, as the expression goes, "on the courthouse steps," all at substantial cost to the parties.

And all too often the result leaves the parties dividing a much diminished pie, further embittered, unable to communicate effectively, and continuing to find themselves at odds over parenting arrangements and decision-making, and sometimes not all that thrilled with their respective attorneys.

In their book Beyond Winning, Robert H. Mnookin, Scott R. Peppet and Andrew S. Tulumello further underscore the inefficiencies inherent in the litigation model:

> First, even when cases settle, they often settle late rather than early, and this leads to unnecessarily high transaction costs. Legal disputes become trench warfare rather than exercises in problem-solving. Each side takes extreme positions and refuses to compromise, even though each side knows that ultimately a settlement is likely. Time is wasted, relationships are damaged, and in the end the case is still settled on the courthouse steps. By that point the parties have already spent a great deal on the dispute resolution process.
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> Second, the settlements reached in the litigation process typically ignore the possibility of finding value-creating trades other than saving transaction costs. Although the litigation game includes the evaluation of the legal opportunities and risks, it does not usually incorporate a broad consideration of the parties' interests, resources, and capabilities. As a consequence, the parties may never discover possible trades that could have left both sides better off.[1]

Collaborative Law Begins

Stu Webb and other early collaborative lawyers, in viewing the court system as it played out in divorce cases and finding themselves participating in the frequent recurrence of the foregoing patterns, asked a number of questions:

- Is it necessary to pit divorcing parties against each other when structuring their future with separate households?
- Since the vast majority of cases settle before trial anyway, is it necessary to take parties through the various stages of a litigated case?
- What percentage of the marital estate built up over the years together is necessary for parties to a divorce to spend in order to continue with their separate lives?
- As a matrimonial litigator, how much am I doing to help families?
- Why not simply look to mediation as a solution?
- Can a substitute process driven by understanding rather than by power or coercion really work?
- Can a process be devised that avoids the pitfalls of mediation and effectively utilizes interest-based bargaining techniques, thereby facilitating genuine win-win solutions as opposed to the zero sum competitive bargaining approach so common to divorce cases?

From the answers to these questions arise many of the assumptions that underlie the practice of collaborative law, such as that parties to a divorce in fact share many of the same concerns, and need not experience themselves in opposition to each other. Non-coercive, interest-based bargaining methodology can be viable, effective and cost-efficient. Perceived intransigence on the other side need not connote the necessity of court, but rather an invitation to a deeper dialogue.

Families were certainly better off

not engaging in an adversarial process, particularly at a time when what is most needed is healing. And mediation, while it offered many valuable and effective dispute resolution techniques, because of power imbalances, disparity in financial sophistication and/or ability to articulate points of view and negotiate for oneself, was not always appropriate. Parties to a divorce often needed representation.

Thus Webb, in developing a model for collaborative practice, first looked to mediation for constructive dispute resolution principles and techniques and then added representation to the mix. Simultaneously he subtracted from the customary model of representation the ever-present options of resorting or threatening to resort to court. Thus in collaborative law (as well as mediation), the focus is on settlement. In the context of this focus, the goal is to facilitate settlement processes that are qualitatively different from, and more effective than, the ordinary settlement model.

In the service of this end, the attorneys do their best to:

- create a safe space where both parties feel free to express themselves;
- discourage their own clients from the oft-present negative, reductive, simplistic and dehumanizing views of the other;
- create a climate of understanding so that it is understanding rather than power that drives the process;
- search for and help articulate the real interests that underlie every position;
- encourage full participation of both parties in the process;
- bring out the responsibility of the parties for the ultimate result;
- engender a recognition on the part of both parties that any deal must work for both of them;
- recognize together with the parties that the conflict is not simply a fight over "stuff:" it's always a crisis of human identity and interaction;
- actively create multiple options in the search for win-win solutions as opposed to looking always for small compromises on each side so as to narrow the gap;
- continue to recognize and encourage their clients to recognize that people of good faith can sincerely view things differently; and
- emphasize process, again and again returning to the question of "how" the agreement is being reached, thus creating for the parties and attorneys a structure they can stand on.

The Agreement Is the Key

The key to the process is the agreement signed by both parties and attorneys not to go to court during the process and not to threaten to go to court. If either party decides to litigate, the process ends and both parties must engage new attorneys.

With this agreement in place, the attorneys and parties are freed to focus the entirety of their attention, energy and creative talents on settlement. The protocols that govern the process include:

- full disclosure of all relevant financial information, including sworn net worth statements and complete back-up documentation;
- four-way meetings marked by respectful dialogue, active listening, thoughtful discussions of the law and honest appraisals of a likely range of outcomes;
- utilization of jointly hired neutral accountants, appraisers and child therapists; and
- a commitment to search for resolutions that meet the needs of all members of the family.

In the process the attorneys and the parties commit themselves to work together to create equitable, interest-based solutions to the issues that divide them. Meetings are carefully planned and structured with prior agreement as to specific agendas for each. Minutes or memoranda of each meeting are circulated and agreed upon. Between meetings, parties are often asked to complete certain homework assignments such as obtaining helpful information as to available health insurance programs, mortgage rates, life insurance, etc.

The attorneys are called upon to draw deeply upon their conflict resolution and problem-solving skills and seek, while representing their own client, to bring a mediative sensibility into the room. By modeling respectful behavior, genuine active listening, thoughtful dialogue and honest assessments of the law as applied to the particular circumstances, the attorneys seek to re-orient the parties from their visceral sense of being in opposition to each other to a recognition that, in fact, they are in the same boat with shared fears and concerns.

With court no longer an option, the parties are encouraged to modify their aggressive/defensive postures and hopefully, by following the examples of their attorneys, become active participants in a carefully constructed and highly organized team approach to the problem-solving process.

Pejorative characterizations are eschewed. Even in private attorney/client conferences, demonization of the other party is discouraged. Contrary points of view are listened to respectfully with the idea that one point of view need not cancel another out. Even where a party seeks a result highly unlikely in any court proceeding (e.g., a mother who does not want the children to be with their father at all during the week), the impulse that underlies the view is heard respectfully and with understanding (e.g., the seeming unfairness to her of suddenly having so much less time with her children simply because her husband decided he wants a divorce).

The Challenge for the Attorney

The challenge here to the collaborative lawyer is to be able to fully advocate on behalf of the client's interests while at the same time maintaining a mediative approach in seeking a win-win resolution. Thus, the collaborative lawyer must be careful not to recommend outcomes that he could not in good conscience see as fair and reasonable were he on the other side. The lawyer also must not argue a point as controlling when she could just as easily argue a contrary point in representing the other spouse (e.g., mid-week overnights are good for the children vs. mid-week overnights are too disruptive for the children).

The attorneys would discuss with the parties the general need for maintaining a balance between the children's needs for frequent contact with both parents and their need for stability. Together they would look at the particular situation, children's ages, emotional needs, proximity, homework needs, etc., with a view to finding a schedule that really does work for everyone. If necessary, an agreed upon and neutral child psychologist may be consulted.

The lawyers' ability to successfully maintain the delicate balance between advocacy without being adversarial, and a

mediative presence without being neutral, is a test of their collaborative skills.

Perceived obstacles to settlement are discussed openly and transparently. With both lawyers fully advocating the interests of their clients and encouraging the parties to express and clarify their own interests as well, together the parties and attorneys can develop viable options designed as much as possible to meet the primary interests of both. The process at its best becomes one of all four participants working energetically and cooperatively toward a common goal, a resolution that works for the entire family.

Answering the Critics

Critics of the process claim inter alia that the process is subject to abuse. Parties over time become comfortable with their lawyers and gain trust and confidence in them. Why must one party have to lose her lawyer because the other arbitrarily decides to terminate negotiations and file a summons? What about stopping the clock? In other words, aren't parties vulnerable in this process to the bad faith actions of the other?

The simple answer to this last question is "yes." One party acting in bad faith can waste the time, money and energy of the other and cause her to lose her chosen lawyer. The hope is that prior to signing off on the collaborative protocols, in discussing process choices with their clients, the collaborative lawyers will have carefully explained the potential risks and benefits of the process, determining together with the client whether or not the case is appropriate for the collaborative process.

The attorneys, as they develop collaborative skills, must also develop their ability to advise clients as to appropriate process choices. Stopping the clock on the accumulation of marital property, often the putative reason for the filing of a summons, can always be negotiated through a simple, properly executed agreement. In fact, if negotiations break down over this issue, it is probably a good sign that the matter was not a good candidate for collaborative law to begin with.

Much as effective litigators have honed their skills through a combination of experience and adversarial training, collaborative law groups throughout the country encourage and require trainings in mediation skills, interest-based negotiation and collaborative law practice.

In a relatively short period of time collaborative law has gained a foothold in many states throughout the country, often becoming the greater part of a matrimonial lawyer's practice. In September 2001, Texas, taking the "If you can't lick them, join them" approach, became the first state to codify the use of collaborative law processes in matrimonial cases.[3]

Collaborative law groups have arisen in at least 28 states as well as in a good number of Canadian cities. By organizing collaborative affiliations that sponsor trainings, peer discussion groups and continuing education programs, collaborative lawyers, while remaining economically independent of each other, learn to work together effectively, grow to trust each other and make a commitment to continually improve their collaborative skills through ongoing training.

In New York there are at least seven groups operating now,[4] each having a Web site listing affiliated attorneys and providing information to the public about the process.

Old habits run deep and anecdotal reports indicate that many collaborative attorneys discover the challenge of negotiating in this mode to be enormously difficult. Comfortable in the time-tested approach of reason backed by power, they often find themselves struggling with a methodology wherein the reliable fallback — a default setting to many — of the service of a summons is removed from the equation and replaced by the imperative of deeper inquiry. To ease the transition from adversarial norms, rigorous continuing education requirements (on top of the original training requirements) in various aspects of conflict resolution and substantive matrimonial law have been instituted by many of the collaborative affiliations.

Collaborative law is often a topic at ABA and state bar association Alternative Dispute Resolution conferences. The very fact that it is labeled as "alternative" suggests that the core way of resolving disputes remains within the adversarial court system. Yet the concept (of collaborative law) has struck a chord that has resonated amongst numerous divorcing couples who are determined not to become embroiled in an adversarial proceeding but are hesitant to enter into mediation.

While the process entails risk, and presumes good faith and an element of trust between the parties, more and more couples are finding it worthwhile. Similarly, many attorneys are attracted to a process that offers a possibility of healing. Collaborative practitioners report that they find themselves reaching customized settlements with less pain and frustration, not only for the parties, but for themselves too.

For those matrimonial attorneys who have embraced it, the process represents a sea change in the way in which matrimonial disputes are resolved, in fact a true paradigm shift. Many find themselves practicing law in a way that is much closer to what they had envisioned in law school. And as increasing numbers of attorneys seek to practice in this mode, the hope for many is that as a model for professional service the designation of "alternative" will no longer apply.

1. Mnookin, Pepper and Tulumello, Beyond Winning, page 108.

2. So, for example, to say it is silly to fight over a chair often misses not only the point but also an opportunity to create some genuine understanding that can go a long way toward moving the process forward.

3. Tex. Fam. Code Ann. §6.603.

4. New York Collaborative Law Group, Manhattan, Brooklyn, Nassau and Westchester; Association of Collaborative Family Law Attorneys, Rochester, N.Y.; Collaborative Family Lawyers of Central New York, Ithaca, N.Y.; CNY Collaborative Family Law Attorneys, Syracuse, N.Y.; Finger Lakes Collaborative Law Association, Steuben, Yates, and Livingston Counties, N.Y.; Niagara Collaborative Law Group; and the Association of Collaborative Lawyers of Rockland/Westchester.

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