

Collaborative Divorce Has Many Advantages, but Some Disadvantages Too

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For couples contemplating divorce, collaborative divorce can be an attractive approach to respectfully resolve their differences without going to trial. Often, it is also less adversarial, more economical, and holds the potential of a more expedient resolution. And, many family law attorneys encourage couples to take a collaborative law route for the sake of the children. Their belief is that keeping the divorce process less contentious will help the parent-child relationships later on. Parties who choose a collaborative process will generally agree not to litigate, nor even raise the possibility of adversarial actions at the courthouse. By

doing so, a collaborative stance is regarded as sacrosanct. Indeed, if the collaborative process is not successful, the attorneys will not and cannot represent their respective clients in subsequent court proceedings.

Some states encourage or even require that a collaborative law alternative be offered. For instance, New Jersey Court Rule Court Rule 5:4-2 mandates that parties filing for or receiving a divorce complaint must be notified regarding the availability of different alternative dispute Resolution (ADR) methods, "...including but not limited to mediation, arbitration, and collaborative law (New Jersey Family Collaborative Law Act, N.J.S.A. 2A:23D-1 through-18), and that the litigant has received descriptive material ..."

Collaborative divorce focuses on the parties. Collaborative divorce is nonadversarial. Collaborative divorce encourages parties to engage in neutral negotiations, in a protected setting, outside of the courtroom.

But, collaborative divorce is not all candy and roses. Here are some significant concerns:

- Can the couple and their respective advocates really work together? If not, they shouldn't set themselves up for failure.
- If there's a high likelihood a collaborative approach doesn't work, the divorce will be even more arduous and expensive than it might otherwise have been.
- Collaborative divorce is not cheap. There will likely be other professionals involved, such as a mental health professional neutral to act as a check and balance on the emotions in the room, and to assure that the best interests of minor children are served.
- One party may unnecessarily be compromising financially.
- Extenuating circumstances, such as one or both parties having extramarital relationships, may be minimized.
- Fair market values of assets may be established by agreement; the focus on settlement may undermine ascertaining true values.

- Compromise may engender hurt feelings.
- If there has been domestic violence, collaborative law may not provide a safe forum.
- Confidentiality must be maintained.

How does the process start? At the outset of the collaborative law case, each party and their respective attorneys sign off on a written agreement pledging to not take matters to the courthouse, and to instead meet and negotiate in good faith. The parties or their attorneys may bring in neutral experts, including:

- Business evaluators;
- Forensic accountants;
- A neutral who acts as a mediator; and/or
- Mental health professionals.

There is an understanding that there are rules to live by, including maintaining civil communications throughout the process, and note taking to be potentially shared with the litigants and their representatives, all with a vision of crafting a unique settlement that fits the circumstances of the collaborating couple. Transparency is an essential part of the collaborative law process. Discovery should be cooperative, such that if documentation is identified as being necessary and one party has access to the documentation and the other does not, there is an expectation that the documentation should be timely produced by the party in possession of the document. Accordingly, if the request is made at or just after the first meeting, the expectation is that if the next meeting is six weeks out, that should be ample time to gather and voluntarily submit the documentation to the requesting party.

Group phone calls and Zoom meetings can and do save travel time. However, there are things attorneys and their clients have all learned in the last two years:

- No one seems to have a poker face on Zoom;
- The nuance of body language is often lost via a phone call or Zoom (nervous feet, wrenching of hands are unobservable, and whether there are other people who might be listening or coaching in the room).
- A phone call can bring people together with ease—schedules permitting.
- Nuance is important in understanding if a given party is interested in focusing on solutions, civil communication, and willing to be introspective in a healthy way, focused on serving the dissolution of the relationship in a healthy, proactive manner.
- Delays can impede the process. The more individuals are involved in the collaborative process, the more difficult timing and follow-up may be. Pivoting and patience are possible and necessary.

There may be moments in the collaborative process when one party may say things that are inappropriate. Such moments do not serve an interest-based negotiation, where individuals address their goals and interests, hopefully to achieve a number of solutions to the issues presented. How can the presence of a mental health professional neutralize such moments? Mental health professionals have focused a portion of their education and their practice on:

- Respectful listening;
- Reframing communications between individuals if those communications grow rancorous;
- Regarding the needs of children of the relationship as an essential part of the process.

There are issues that can be particularly provocative. People vary in parenting styles. In married life, children, sex, money and taxes are frequent subject matters. The mental health professional can help the parties by not allowing inflexible personality traits from derailing the

process. Grief is a natural part of the divorce process: Where does each party fall, in a given week, in the Kubler-Ross scale of the grieving process? Will anger prevail? Guilt? Acceptance and proactive issue resolution? Does one party harbor a particular weakness or strength? Does either have signs of a personality disorder or a mental health issue? The sophistication of the parties may also vary. The advocates and neutral must be mindful of each party's socio-educational background, vocation, and how those factors may impact their parenting time.

Communication is key. At the end of each session, after the parties leave, the mental health professional, attorneys, and any other professionals involved should debrief. They should focus on:

- How the meeting went;
- Improvements that can be made in conduct and goals for subsequent meetings;
- What steps can be taken for the team to act more cohesively, bearing in mind the reality of the emotions that the parties have.

There may be a need to expand the collaborative circle. If there are custody or access issues related to minor children, bringing in a mental health professional whose practice focuses on child related issues can help propel the parties and the process forward, particularly if one party is in denial as to the needs of their child. A forensic accountant can help trace assets, and not simply identify separate property as such. An accountant can help mitigate misunderstandings about the metes and bounds of the estate, and will need access to account information in order to engage in such an analysis. The accountant can also help the parties understand the need for liquidity for a lower wage earner, and the payment of accumulated lines of credit where a company has had

financial hardships, and the parties are faced with loans being called during the divorce process.

Importantly, the normal constraints and benefits of having a judge and jury do not apply in collaborative law. The parties and their attorneys sign a collaborative law agreement. The goal is to structure a settlement outside of the judicial system. The parties make a financial investment in the process, agreeing that their respective collaborative attorneys must withdraw in the event that the process is to become adversarial.

Moreover, absent an emergency, there is to be a 30-day cooling off period before any adversarial hearings are scheduled. Harder to control is third parties who influence the collaborating spouses. Think mental health counselors who for years have heard their patient opine as to how sneaky the other spouse is, or a controlling but well-intentioned parent or sibling of one of the parties. How many times does a party have a sibling who is an attorney or accountant or mental health professional in another city or state who just needs to let you know how poorly the other spouse has treated their relative? Such third parties hope to help the collaborative process. While those well intentioned third parties may be helpful, they may unwittingly impede the process by coaching their relatives without having the benefit of all the facts, or of capturing the tenor of prior meetings. Clearly, this may be an issue impacting each party.

Collaborative law, the brainchild of Stuart Webb, moved forward by astute professionals such as Pauline Tesler and John McShane, appears to be here to stay. How can attorneys make collaborative law an integral part of their practice? Reach out to likeminded colleagues. Let others

know that collaborative law provides a new way to achieve peace even in the most brutal and complex family law cases.

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