

An Overview of Collaborative Divorce

1. What is Collaborative Divorce?

Collaborative Divorce stems from the belief that the current method of ending a marriage is harmful to the parties, to their children and to the legal system. It is a process which returns control and decision-making back to the people whose lives are directly impacted by the final decision – the parties. The clients, along with their attorneys, commit to resolving all issues surrounding their divorce without going to court, or threatening to do so. The parties share a common goal – a just, equitable and mutually acceptable settlement.

This is not to say that the parties will not be in conflict or will never disagree. Clearly, since they are in the middle of a divorce, they are in conflict and they disagree. The collaborative divorce process allows clients an opportunity to have input into important financial and emotional issues in a cost effective, time saving process that helps keep the health and function of the family intact, despite the fact that the parties are divorcing. This will be achieved by working with their attorneys and jointly hired experts through a series of four-way meetings.

◆ **A. Process Overview**

Both the clients and their attorneys sign a contract in which they agree to commit to the collaborative process. The parties and their attorneys work together as a team. All information gathering is done cooperatively. The Participation Agreement confirms that there will be full disclosure by both parties of all assets and liabilities. The parties further agree that they will strive to arrive at a settlement that meets the needs and interests of each party and the family.

Each party hires an attorney who is trained or knowledgeable of the collaborative process. Settlement negotiations occur via a series of four-way meetings in which both lawyers and their clients attend. Any information needed to assist in making the meetings productive – such as financial data, account records, etc. – are identified and exchanged prior to the meetings. Experts or other neutral professionals can be brought in upon agreement of the parties when extra guidance would be useful. Finally, and perhaps most importantly, if either party decides that the collaborative process is not the right path and wishes to pursue a traditional litigation or court process, both attorneys must withdraw and both parties must retain different counsel. The reason for this is to encourage frank and open discussion in a settlement context without fear by either party that information provided may be used against him or her by the opposing attorney.

◆ **B. Four-Way Meetings**

The initial four-way meeting is generally used to confirm the protocols to be used by the parties during the process. Any emergent issues will be discussed (i.e. temporary child support, short term parenting arrangements, bill payments). The

initial meeting is often used as a chance for the attorneys to get to know the other party. Since both attorneys are present, informal questions may be asked, issues raised and concerns expressed. It is the duty of the attorneys to ensure that the parties do not engage in conflict or accusatory behavior. Both parties should feel "safe" and free to discuss his or her concerns without creating a conflict situation.

Subsequent meetings may address specific issues or groups of issues. For example, a subsequent four way meeting may be necessary to discuss parenting issues that have arisen, rescheduling visitation etc. One meeting may be used to explore all assets and debts so that the parties are clear on the specific assets/liabilities to be divided. Financial planners, parenting experts etc. may be invited to a four-way meeting or may choose to meet with the clients independent of the attorneys to discuss particular issues.

The number of four-way meetings is exclusively dependent upon the facts of the case, the needs of the parties etc. Divorces can be resolved in as little as two or three meetings or as many as ten meetings. Most cases seem to be able to be resolved in 3-8 four-way meetings. In a recent poll of collaborative lawyers, most attorneys estimated that they averaged about ten hours of legal time per collaborative case.

◆ C. When Conflicts Arise

Conflicts are inevitable when parties are in the process of a divorce. For the most part, they would not be getting divorced from each other if they did not already have conflicts with each other. The attorneys can address the conflict in a series of different ways.

If the conflict arose over a parenting issue, if it does not involve an immediate safety or health issue, the next four-way meeting can be used to address the specific concern. If it is a continuing escalation problem, parties can be referred to a parenting investigator/mediator to assist them addressing that specific issue or all parenting plan issues.

If the conflict involves power imbalances between the parties, coaches may be used to assist either or both parties through the emotional trauma of divorce. Coaches tend to be preferable because they more easily provide short term assistance for specific issues.

If the conflicts are based on positional issues that the parties are unwilling to deviate from, mediation of specific issues is a viable alternative to the four-way meetings.

2. How Does It Differ From/Work With Mediation?

◆ A. Collaborative Process vs. Mediation

In the collaborative process, each party is represented by an attorney. The parties work in interest-based negotiations toward resolution. Attorneys remain required to maintain client confidentiality, but encourage their clients to be as open and honest as possible. The focus of the negotiations includes all possible solu-



LAWLADY, INC.

*Applying Holistic Principles
to the Practice of Law*

tions. This allows the parties to explore creative options and solutions to address both client's concerns and issues. The attorneys are present to protect the client's legal interests while allowing the parties to explore different options.

In the mediation process, the mediator is a neutral third party who assists the parties in resolving their conflicts. The mediator's primary focus is communication facilitation. Attorneys are often present in the mediations. When attorneys are present, the attorneys' role in a mediation is to advocate for their client, protect the client's interests and often to speak for the client, except when it is helpful to allow him or her to speak for themselves. The mediator's role tends towards protecting the neutrality of the process. He or she cannot give legal advice to the clients. The mediator is not going to protect either client's interests, but will assist them in exploring possible solutions.

There are generally two cross-roads in the relationship between collaborative divorces and mediation. The first may occur when a mediator believes that attorneys need to be brought into a mediation to discuss legal implications of possible solutions being considered. Thus, the parties are in the process of mediation, but need the assistance of legal advice and planning. The second cross-road is when the parties and their counsel are unable to work through a specific issue – i.e. they get stuck.

◆ **B. Referral from Mediators for Specific Situations**

Often, when mediators find themselves in a place with parties where they need side assistance from attorneys, CPA, financial people, etc., the mediator will give the parties names of professionals in the appropriate area and have them get the needed advice before continuing. Or, they may agree to bring that professional (s) into the mediation if "real time" assistance would be helpful. Of course the professionals sign on to the process. In a collaborative case, it is possible those professionals are already involved, or, if not, the mediator may suggest they become involved. In this scenario, the mediator is likely to be more proactive/interactive with counsel (assuming, of course, agreement of the parties). For example, a mediator might meet with the parties in an initial effort before the parties meet with other members of the collaborative team. Or, the mediator may send the parties back to their attorneys to get appraisers involved, gather asset information, etc. At some point there will be a teleconference between counsel and the mediator to explore the next step- the mediator stepping back in once the information is received and agreed upon by the parties.

◆ **C. Use of Mediators When Parties Get Stuck**

In a collaborative situation, it is possible that the attorneys recognize that the 4-ways have worked up to a point, but the use of a neutral third party is necessary to help the parties better root out and identify their specific needs and interests and/or refocus on those needs. If communication by the parties has become a problem, the mediator can work with the parties to improve their dialogue and help the par-



ties shift from position-based to interest-based discussions. Of course it's possible a coach could be useful here as well. If the collaborative process is at risk for breaking down completely, a mediator could be brought in to keep all parties on task and help preserve the ultimate goal of keeping the parties from litigation.

◆ 3. Utilization and the Role of Experts

One of the financial benefits to parties entering into a collaborative divorce process is the retention of one expert for the parties. Accountants, financial planners, real estate appraisers etc. will all be agreed upon by the parties and an allocation of costs will also be agreed upon. The expert performs his or her analysis and provides the information to the parties. Additionally, the parties can meet with the expert independent of the lawyers to work through specific areas of concern.

◆ A. Parenting Investigators

When parenting issues arise, parenting investigators or other child specialists can be hired to help analyze the specific dynamics of the family in question. The investigator is liberated from the need for a full-blown investigation and written report. A modified investigation based on the specific needs and concerns of the parties and/or the children can be presented. It is possible that the investigation may include everything in a litigation-driven investigation. However, it is similarly likely that the investigation may simply include the need to discuss concerns with the children, talk with both parents (either together or apart) and make some recommendations to help the family deal with the changes in the family structure. This advice could include protecting the children from the divorce process itself and developing plans for the future. It may be possible for the entire investigation and recommendations be performed without any written evaluation at all.

When issues arise during the collaborative process which are clearly parenting issues, the attorneys can either work with the clients to address these issues, or refer the parties to the investigator to work independently of the attorneys. As parenting issues are frequently more emotion-based and not "legal" based issues, there is no conflict of interest or failure to represent a client problems. Legal issues, such as the inclusion of .191 restrictions into the plan, can be addressed by the attorneys. Emotional issues, such as returning the children on time, can be addressed by the investigator. A division of labor such as this saves the client money since the attorney is not spending the clients money to discuss pick up/drop off arrangements or similar problems. The parenting investigator is arguably better suited, as a mental health professional, to address some of these issues.

◆ B. Coaches for Parties

It is highly recommended that each party hire a coach to assist them during the collaborative process. In fact, one collaborative model taught requires that the parties each have a coach. Of course, it is not always necessary to have mental health coaching. When, however, the parties wish to engage in the process, but there



LAWLADY, INC.

*Applying Holistic Principles
to the Practice of Law*

exist either emotional power imbalances or poor communication between the parties, coaches can be very helpful.

Coaches can assist parties with communication issues. Often, meaningful discussions or negotiations become blocked because of fault-based dialogue, hurtful comments etc. The coach for each party can benefit the process by working with the client to improve active listening techniques, change the manner of communication and reminders that the discussions should be result oriented and not an opportunity to attack the other party. Further, coaches can provide the client with the place and opportunity to vent anger, express fears and begin to move the client emotionally beyond the divorce to the post-divorce life. This frees the attorney from the need to assist the client in working through the emotional aspect of a divorce and focus on the legal issues present in the case. Thus, the attorney and the coach can work together to keep the client emotionally strong, and in the best place to work on resolution of the legal issues. It is generally recommended that each party's coach be the same gender as the party to provide balance.

◆ C. Other Experts

There is a strong niche in the collaborative process for Certified Divorce Financial planners. These individuals can meet with the parties either jointly or separate, analyze the assets and liabilities and work with the parties to ensure final asset division will meet each party's short and long terms goals. A financial planner hired jointly by the parties can provide great insight into creative solutions to meet both parties concerns and needs.

Additional joint experts could include accountants to value businesses, retirement plans etc., real estate appraisers, and personal property appraisers, to name a few. All experts retained are hired by both parties, thus saving the parties the expense of his expert/her expert costs.

4. Models of How the Process Bloomed in Other Jurisdictions

Collaborative Law is the brainchild of Stu Webb, an attorney in Minneapolis, Minnesota. He began in the late 1980's in a mediation posture, which quickly evolved into the collaborative process. It spread to Northern California in 1993. California today has 19 groups of Collaborative Lawyers. There are currently groups located in 20 states. Canada has at least 10 groups as well.

◆ A. Georgia

The Collaborative Law Institute of Georgia was founded in March 1999. The group worked actively to create a multidisciplinary model in Georgia incorporating attorneys, therapists, financial planners, certified divorce planners, and CPAs. The group worked to create the development of collaborative "pods" (practice and organizational development groups) throughout the state of Georgia to ensure a state-wide program was available. Working through the Institute of Continuing Legal Education in Georgia (ICLE), the group was able to provide information and



LAWLADY, INC.

*Applying Holistic Principles
to the Practice of Law*

mail brochures to the entire legal community in the State of Georgia and establish the initial two-day training. Thus, the entire state Bar was provided with information and the opportunity to explore all aspects of collaborative law, not just limited to the family law bar.

◆ **B. Texas**

Texas has implemented its own Statutory Scheme, effective September 1, 2001. The creation of the statutory scheme was in part a result of the Texas Supreme Court mandate that most civil cases be disposed of within six months. This created the need for rapid and expensive discovery and immediately inserted into the process litigation posturing because of the short time frame.

In the Texas scheme, the parties are required to enter into a collaborative law agreement which requires full and candid exchange of information, suspension of court intervention during the process, joint hiring of experts and confirmation of acknowledgment all counsel with withdraw if the process does not result in settlement of the dispute.

Further under the Texas scheme, if the court is notified 30 days before trial that the parties are using the collaborative divorce process, the court is not allowed to set trial, impose discover deadlines, require compliance with scheduling order or dismiss the case. The parties must provide the court with information verifying whether a settlement has been reached or provide a status report within 180 days after filing an agreement to use the process. Within one year after the filing of the initial written agreement, the parties must provide a second status report along with a motion for a continuance.

If, within two years of the filing of the agreement, there is still no settlement, the court can either set the case back on a trial calendar or dismiss the action.

This process allows the parties significant opportunity to resolve the issues in their divorce outside of the Court process while still allowing the Courts to retain jurisdiction over the matter and to re-insert the litigation process back into the system if there is no agreement reached.

The collaborative process is very popular among the judges in Texas. The implementation of the collaborative process allows cases to be removed from their usual docket. In fact, in addition to being used in the dissolution arena, Texas also has collaborative law statutes with respect to suits affecting the parent-child relationship. §153.0072.

◆ **C. Canada**

In Medicine Hat, Canada, the family law bar had the unique opportunity to implement a complete collaborative system into their area. In that locale, there were 20 family law lawyers. 19 attended the training and became excited about the process (the 20th lawyer was apparently in the hospital at the time and unable to attend the training session). As a result of the nearly complete training and acceptance by the family law bar, the attorneys in Medicine Hat were able to introduce



LAWLADY, INC.

*Applying Holistic Principles
to the Practice of Law*

the process to all litigants engaged in family law litigation in that area. As a result of this introduction, the Medicine Hat attorneys were able to eliminate the weekly motions calendar from the court system due to the lack of litigated cases.

5. Where Collaborative Law is Going in Washington State

◆ **A. Creation of NW Collaborative Law**

Since the summer of 2002, the NW Collaborative Law group has been meeting and working to create a viable collaborative law group in Seattle, Washington. We have had meeting with non-legal professionals who are excited about becoming involved in the collaborative process. These individuals include many of the well-known parenting investigators, financial planners, accountants and others. We have developed many of the forms which we encourage our group to use. We are in the process of putting together a series of smaller training CLEs for attorneys interested in pursuing the collaborative divorce model. Currently, our members have several collaborative cases. We will begin marketing efforts this summer and anticipate an on-going increase in the number of collaborative cases as more clients become aware of the process and more attorneys become involved as collaborative lawyers.

I. Are you the personality type to do collaborative law

II. What lawyers say about satisfaction of the practice after "conversion"

◆ **B. Goal to Have Network of Groups Throughout State**

Interest in this model is growing rapidly in Washington State. I have been in touch with attorneys located in Vancouver, Port Angeles, Wenatchee, Bellingham, Spokane, all of whom are interested in collaborative law. The goal would be to have a series of "PODS" similar to those in the Georgia model to provide state-wide networking and training opportunities. Additionally, we are working with the Bar CLE section to prepare and provide a training seminar later this year. Members of the group are already working with the ADR section and in fact have provided information at a recent ADR CLE.

◆ **C. Support from the Bar**

Paul Lehto, a member of the Board of Governor's, has expressed strong interest in having the Bar support and assist the creation of collaborative law groups throughout the State of Washington. In February, 2003, Bar President Dick Manning included a section of his monthly "President's Corner" article to the creation and implementation of collaborative law. Though the focus of NW Collaborative Divorce is collaborative family law, the collaborative law model is being expanded to include other areas of civil litigation. Bringing collaborative law to Washington State, in any area of law, will be bringing Washington State current with other states' creation of alternate conflict resolution programs.



LAWLADY, INC.

*Applying Holistic Principles
to the Practice of Law*

◆ **D. Possible Alternate Track Case Schedules**

For the counties that have case schedules, as the number of collaborative law cases increase, the need for an alternate track will become more pronounced. With NW Collaborative Divorce, we are requesting members file with the Court and Stipulation and Agreed Order to Proceed with Collaborative Divorce negotiations. Although this currently will provide no benefit to the parties, it is our hope to use this data for tracking purposes at the Courthouses. This tracking will make it easier to explain the need for alternate track case schedules. Removing a collaborative case from the case schedule will eliminate the litigation pressure of a trial schedule and the filings which accompany the case schedules.

Alternate track case schedules would likely provide periodic updates to the Court every 90 days to six months. If, after a specified time period, there is no resolution, the action could be placed back on a trial calendar, or the action dismissed (along the provisions of the Texas Statute).

◆ **E. Statutory Guidelines**

Finally, as collaborative law becomes more accepted and a more popular alternative to family law conflict resolution, statutory guidelines could be implemented. Again, these guidelines would provide statewide coordination of case tracking in the Courts, agreements as to how the process will be handled and procedures to be implemented if the process does not result in resolution of the issues in the dissolution.