

The Collaborative Process: Divorce with Dignity

By Sherri Goren Slovin

Collaborative family law, now more often called collaborative practice (CP), is a revolutionary approach to divorce that has quickly spread throughout many areas of the United States, Canada, Great Britain, Australia, Switzerland, and Austria. The International Academy of Collaborative Professionals (IACP: www.collaborativepractice.com), the professional association that provides support to collaborative professionals and information to the public about collaborative practice, reports having more than 2,000 members, with membership doubling each year since 1999. Although the vast majority of its members are lawyers, the organization is interdisciplinary and includes significant participation from mental health professionals and financial planners. CP is now taught in a number of law schools in the United States and Canada. Three states have rendered opinions regarding the ethical considerations and CP, and each has determined that CP does not violate a lawyer's ethical obligation, so long as certain criteria are met. (James K.L. Lawrence, *Review: Retooling the Practice of Law Through Collaborative Law*, DISPUTE RESOLUTION MAG., Spring 2002 at 27. See generally PAULINE H. TESLER, *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation*, American Bar Association, 2001.)

CP is a continuation of the trend that began with mediation to empower participants in the divorce process. The trend recognizes that in many cases, the court system does not adequately meet the conflict resolution needs of couples who terminate their marriages. Family cases share the same basic adjudicatory structure as criminal cases, commercial civil disputes, constitutional challenges, and negligence actions, yet family disputes are inherently different. Unlike the plaintiff in a negligence action who sits

across a courtroom from a stranger-defendant he will never see again, the plaintiff-father in a divorce action sits across a courtroom from a defendant-mother with whom he will, by necessity, continue to have contact. Although day-to-day parenting is often not the issue for older clients, high-conflict divorce detrimentally affects adult children, and older divorcing clients continue to share the future life cycle events of children and grandchildren. The court system, by its adversarial nature, does not foster the goodwill and cooperation necessary for continuing familial relationships.

This article will provide an overview of the basic principles and choreography of CP.

Collaborative Family Law/Collaborative Practice Defined

By definition, a CP case requires that a husband and wife each be represented by counsel trained in interest-based negotiation, the choreography and structure of CP, and conflict resolution communication skills. The lynchpin of the process, and the most revolutionary concept, is found in the terms of a contract executed by both lawyers and their clients. The contract, often called a participation agreement, precludes either lawyer from representing his or her respective client in the event the case reaches impasse or in the event either party chooses to withdraw from the CP process. The participation agreement also contractually prevents the signatories from disposing of assets or changing the financial or custodial status quo. In the event either party violates the contract by his or her action, or in the event either party chooses to end the process, the case is transitioned to new counsel for litigation.

The road map of the process requires that the participants focus on the interests of the divorcing parties, gather sufficient information to ensure that decisions are made with knowledge, create options for settlement, and make decisions based on the consequences of those options. The structure, along with the skill of counsel, creates a problem-solving atmosphere with a focus on client empowerment. Lawyers continue to provide information about the law and potential court outcomes; however, clients are encouraged to focus on creative options.

In some jurisdictions, the CP case is not filed in court until all issues are resolved and the marital or separation agreement is executed. In other jurisdictions, especially those with long predivorce waiting periods, by agreement, one lawyer files with the court to begin the statutory waiting period. In these cases, collaborative counsel are prevented from proceeding on contested issues in court during this period. Issues of temporary support and parenting must be resolved in the CP process without court intervention. In order to circumvent “fast track” requirements, some jurisdictions have adopted a local rule of court to provide for stays of varying length. (DIVORCE MAG., March 4, 2002.) (For example, Hamilton County, Ohio, Rules of Court, Rule 43.) Texas and North Carolina have adopted collaborative law statutes that allow for court stays in collaborative law cases. (Texas Family Code 6.603 and 153.0072.)

In many states and provinces, the CP model has expanded to provide for a team approach. This indicates recognition that divorce can be a difficult financial and emotional transition and is often not simply about a “deal” rooted in the law. Cases are assessed to determine whether the needs of the family best can be met with lawyers only, or whether the family would benefit from the assistance of other professionals. In those cases, financial planning and mental health professionals join with lawyers to assist families in making the transition through the divorce process. These associated professionals are trained in the collaborative process and are also contractually precluded from court involvement.

Neutral financial planners with skills in divorce-related financial issues assist by gathering financial information, creating budgets, providing alternative spousal support scenarios, and reviewing the long-range financial implications of settlement options.

Mental health professionals assist as child specialists and as coaches. The child specialist informs parents about common reactions children have to divorce, discusses developmental and practical considerations important to making parenting arrangements, and assist parents in developing realistic parenting plans. Additionally, the child specialist can provide continuing assistance to a family as the needs of the children and the family change.

Other mental health professionals may serve as coaches for the parties. The goal of coaching is to help clients manage their anxiety, loss, and conflict so that they can effectively communicate and work in the collaborative context and after divorce. Coaches help clients learn new communication and relationship skills and assist with problem solving. In some cases and in some jurisdictions one coach is used. In others, each party has a coach.

Whether a couple uses a lawyer-only model or a model expanded to include associated professionals, the critical distinction in the collaborative law case is the commitment of the professionals to solve problems outside of the court system to generate creative options that meet the needs of the divorcing couple.

The Distinctive Collaborative Family Law Choreography

Prior to a client’s selection of the collaborative process, it is incumbent upon counsel to screen for domestic violence and substance abuse. Although this screening should be standard in all domestic relations cases, it is especially important when a client chooses CP. Issues of duress and personal safety must be addressed before a client at risk chooses a process that involves direct contact and negotiation. In these cases, it may be appropriate to insist upon the participation of coaches.

A shared choreography provides a

road map of the process and creates predictability and an atmosphere for efficient negotiations. The basic choreography entails the initial lawyer-client consultation, preparing the client for a meeting with both lawyers and both clients (the four-way meeting), the attorney-to-attorney consultation to create an agenda and prepare for the collaborative meeting. Meetings generally take place in two-hour sessions in which the majority of the CP substantive work is done. If other professionals are engaged in the process, it is usually done at an early stage. Meetings with the associated professionals usually take place separately from the meetings, although the professionals are in contact to ensure a smooth process, and the professionals may participate together as needed.

The meeting is the heart of the CP process. The initial meeting sets the stage for a problem-solving atmosphere. The clients find comfort in the knowledge that they have both been similarly briefed by counsel. Both are prepared to articulate their interests and goals. Both know that they have been given the same communications rules, and both are aware that the lawyers will provide a safe framework in which they can negotiate in their own best interests. At the meeting, the agreement is reviewed and discussed to ensure that clients are fully apprised of the basics of the process. The lawyers articulate their full commitment to resolving the process through settlement.

In the absence of formal discovery, information gathering in the CP is critical. Without information, options are limited and participants are not in a position to create rich, meaningful settlements. In the CP context, a party who has concerns or questions about hidden assets, misspending, or marital trace issues has opportunity to obtain records and information. To ease concerns, parties may execute affidavits of full disclosure at the conclusion of a case.

Why Is CP “Divorce with Dignity”?

Experienced lawyers unfamiliar with CP often say, “I negotiate most of my cases anyway. How does this process differ from two reasonable lawyers negotiating a case?”

The differences lie in the fundamental concepts of client empowerment, the impact of having lawyers and clients sit down with a shared choreography, and the impact of negotiation when the litigation club is removed from the negotiation table.

Metaphorically, for the participants in a CP case, the lawyers and clients are sharing a boat that they all must row together in order to move forward. They know that they will hit choppy water, and there is comfort in knowing that they have equipment aboard when they encounter difficulties. Most important, the clients have the biggest paddles on the boat. They control where they go and how and when they get there. There is shared mutual advantage to staying the course. In cases in which other professionals are involved, there is recognition that a divorce is not only about reaching the “deal.” It is also about how families transition into healthy future relationships.

Giving up the “court club” is often initially frightening for lawyers. They worry that in doing so they will have to abandon a client who has sought assistance at a vulnerable time. With skilled professionals, however, impasse is rare. While no formal research is available, anecdotal reports have impasse as less than 10 percent of cases. Creative options to resolve impasse include provisions for a limited-purpose private judging, impasse mediation, or a rotating “mentoring panel” to assist in resolving impasse through consultation.

For an older couple involved in terminating their marriage, the choice of CP can be the beginning of client empowerment. Clients assess the value of an efficient process to gather necessary information, a communication model that requires that they listen to one another, and lawyers committed to producing a full range of options in order to reach a meaningful settlement. Although for many, the prospect of entering into a process that might mean lawyer withdrawal is a concern, the benefits of the process outweigh the concerns. Clients have the opportunity to assess the circumstances, evaluate options, understand the consequences, and choose a process. For these reasons, CP can often facilitate a marriage termination that is

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more amicable and less rancorous than other options. CP provides an opportunity for both lawyers and clients to engage in what has come to be known as “the good divorce.” It is an opportunity worth exploring. ■