

Choosing Collaborative Family Practice

By David M. Rosoff

With the advent of Collaborative Family Practice, marital dissolution can be accomplished through three distinct processes. The litigation alternative was joined by family mediation in the early 1980s and by collaborative practice in the early 1990s (the genesis of Collaborative Family Practice is found in the work of Stuart Webb, a family lawyer from Minneapolis, Minnesota). With the establishment of viable collaborative alternatives throughout the United States, including New York, the threshold decision for divorcing parties has become the choice of process rather than the choice of lawyer. This article will highlight the elements of the newest alternative – Collaborative Practice.

What is Collaborative Practice?

There are at least six practice groups in New York State, including Rochester, Syracuse, Ithaca, New York City, and the counties of Westchester, Rockland, Nassau, Putnam, and Dutchess. Collaborative Family Practice encompasses a spectrum of variations on the following themes:

1. The parties and professionals enter an agreement — called a “participation agreement” or “disqualification agreement” (Tesler, P. *Collaborative Law*, American Bar Association Section of Family Law, 2001, at 6-8) — that they will resolve the issues without litigation. If there is an impasse and litigation ensues, the collaborative professionals will withdraw and cannot participate;
2. The process will rest upon full disclosure, non-adversarial representation, creative problem solving and attention to the needs and interests of the parties, and especially, to the needs and interests of the children;
3. The clients are present at all negotiation sessions and play an active role in expressing their goals, assessing options and generating solutions; and
4. The overall goal is to provide the family with both the framework and the resources to establish a successful future.

Practitioners of the collaborative method find that the benefits go far beyond a settlement of the discrete issues of custody, support and finances. Collaborative Law takes advantage of lawyers’ skills as problem solvers. The active participation of four or more individuals in a process that values creativity has the synergistic effect of producing astounding solutions. As difficult as the issues may be, the collaborative process can provide the parties with insight into their own behavior, that of their spouse, and the ability to overcome the dysfunctional aspects of that behavior. The communication and negotiation that occur during the collaborative sessions can be the training ground for ensuing years of successful communication and negotiation concerning their children. For the children of divorcing couples this is an invaluable result.

The Options

Collaborative practice models fall into two general categories. Both collaborative models differ from mediation in that each party has an attorney as legal representative, and there is a true attorney-client relationship. One protocol, referred to as the Legal Model, consists of the two parties and their respective attorneys. This type of collaborative case is most often initiated by one client's visit to a collaborative lawyer, followed by a suggestion by the client to the spouse to consider the collaborative option. The other protocol, referred to as the Interdisciplinary or Team Model, consists of the two parties, two lawyers, two client coaches, and a child expert or financial expert as needed. Any member of the team can be the referring source, although the use of a party's treating therapist as a coach is disfavored.

The Legal Model

In the Legal Model, each party is represented by counsel, and all four participants enter into a participation agreement. A series of four-way negotiation meetings will then address the marital and family issues. The attorneys meet with their clients as needed and meet with each other when appropriate. Neutral mental health and financial experts can be enlisted into the process to help with custody and other child-related decisions, or to value assets and suggest financial strategies. The end product of the process is a legally binding separation and settlement agreement, and, where applicable, an uncontested divorce.

The lawyers who engage in Collaborative Family Practice have, for the most part, been trained in mediation, collaborative law and family law. Many have served as mediators, litigators, or both, before entering Collaborative Practice.

The foregoing summarizes the external attributes of the collaborative process. It can be described by the simple phrase "settlement-only lawyering." MacFarlane, J. *Final Report of the Collaborative Lawyering Research Project*. Proceedings of 2004 Annual Networking Forum, International Academy of Collaborative Professionals. However, the pivotal factors are internal to the process and encompass the attitudes of the participants, the manner of communication and the definition of success. Interviews with collaborative lawyers indicate that, within the basic parameters of the collaborative participation agreement, there is significant variation in the role of the attorney. MacFarlane, J. at p. 3. The lawyer can function as a legal adviser with a commitment to cooperation and creative negotiation that goes beyond the legal framework. There may be outcomes that differ from the usual or expected court determinations. Tesler, P. at 71-72. In a less traditional approach, the lawyer's primary focus is to provide a supportive environment in which the parties can overcome the emotional and psychological obstacles to a successful resolution. MacFarlane, J. at p. 3. Most of the lawyers interviewed were working to balance the role of legal adviser and that of facilitator.

The clients assume a much more active role than they would in litigation. While there may be lawyer-lawyer and lawyer-client meetings to prepare and debrief, both parties and their attorneys are present at all negotiation sessions. The substantive departure is that the collaborative clients are encouraged to propose, evaluate, revise and adopt their own solutions to the problems attendant to divorce.

The Interdisciplinary Team Model

The Collaborative Family Law process can take the form of an interdisciplinary team comprised of attorneys, mental health professionals and financial experts. Cameron, N. *The Collaborative Process*, The Continuing Legal Education Society of British Columbia 2004, pp. 173-177. Thompson, P., Alexander, D., Nohr, R., and Gehl, K., *Coaches and Child Specialists in Five-Way Meetings*; Carmody, J. Hoffman, A., Lissard, C., Matthews, L., McManus, J., and Neathamer, S., *The Advantage of Multiple Professionals in the Divorce Process*. Proceedings of the International Academy of Collaborative Professionals 6th Annual Networking and Educational Forum (2005). MacFarlane, J. 8-9. In this model, each party is "coached" by a mental health professional during the collaborative sessions. The coach may also meet separately with the client, or in four-way meetings of coaches and clients. The role of the coach is to address the emotional and psychological issues that may become impediments to progress toward resolution. A child specialist, also a mental health professional, can play the pivotal role of providing the team with information and suggestions concerning the needs of the children. Schroeder, J., Clark, L., Barczak, C., and Arbetter, F., *Child Specialists: Giving Children a Voice — Now and in the Future*. Proceedings of the International Academy of Collaborative Professionals 6th Annual Networking and Educational Forum (2005).

The financial specialist can provide essential information on income, valuation and support issues, and has the unique opportunity to provide a range of proposed solutions from a neutral perspective. Cameron, N. *The Collaborative Process*, at 173, 176-177, 223-232. Daigle, C. and Hill, M. *The Neutral Financial Professional*, The Collaborative Review Vol. 7 Issue 1, pp. 11-21. The team is assembled early in the process and continues throughout, as opposed to the lawyer-lawyer model where experts are called in on an as-needed basis. MacFarlane, J. at 2.

Client Choices

Interviews with collaborative practice clients reveal that they place a high value on the role of the lawyer as legal representative and legal advisor. MacFarlane, J. at 11. Consequently, they may be uncomfortable with a perception that their attorney is more committed to the collaborative team than to their individual interests, or that the attorney is giving therapeutic counseling rather than legal advice. Some may find that the process is more lengthy and costly than they anticipated. These sources of client dissatisfaction can be addressed through: 1) Creating a balance between the commitments to the client, to professional colleagues, and to the collaborative process; 2) Providing the client with a clear understanding of the underlying values of the process, the scope and nature of each step, and the possible outcomes, including those that are unexpected or problematic; 3) Remaining flexible about the form of collaborative practice in order to adjust to the clients' needs and preferences; and 4) Recognizing that there are cases that are not appropriate for the collaborative approach (*ie*, there should be screening for such issues as readiness, emotionality, domestic violence, substance abuse, and psychiatric diagnoses. Tesler, P. At 94-95. Shields, R., Ryan, J., and Smith, V., *Collaborative Family Law: Another Way to resolve Family Disputes*, Thomson/Carswell 2003). MacFarlane at 11.

The Collaborative Legal Model (the clients and their two lawyers) and the Collaborative Team Practice approach (lawyers, coaches, child specialist, financial specialist) both rely upon the principles of cooperation, full disclosure, active participation by the parties, creative problem-solving and disqualification of the professionals in potential litigation. The client-centered nature of all Collaborative

dispute resolution would seem to dictate that the parties themselves should choose the resolution model. This implies that the collaborative professionals should carefully explain the options without incorporating their preferences. For example, the clients who seek to limit time and costs should not find themselves in a protracted interdisciplinary team process merely because the retained professionals consider that process optimal. Conversely, where it is clear that the parties need and want additional professional assistance in overcoming anger, fear or ineffective communication, the lawyers should not let their own practical or theoretical reservations concerning team practice predominate.