

The Collaborative Law Process: *A Better Way to Resolve Family Conflict*

By Carie P. Mack

I. Introduction

Marriage is a civil contract between two people that affords certain rights to the husband and wife. But to most of us, marriage is much more than a legal relationship – it is also an emotional and spiritual union. Traditionally, the divorce process has addressed only the legal nature of the relationship, not the emotional, spiritual and psychological ramifications of restructuring a family.

The legal purpose of a divorce is to distribute property, divide debts, and assign parenting responsibilities. If there were not emotional, psychological and spiritual ramifications of these divisions, the process itself would be a relatively simple task. But for most people facing divorce, ending their marriage involves more than the practical aspects of who gets what assets. In fact, the issues that are responsible for ending the marriage often present themselves in the divorce process. For example, if one spouse had an affair, there may be a great deal of distrust. If one spouse carried the entire financial burden of the household, there may be a great deal of exasperation. Emotions are intense and greatly affect the decision-making process, not to mention the desire to “get even” or “make the other person pay” when one person feels scorned or betrayed.

The emotional, psychological, and spiritual implications of dissolving a marital relationship can make for extremely painful and expensive legal battles. The adversarial litigation process encourages the spouses to take positions, to gather evidence to support their positions, and to argue their positions in front of a third party, most often a judge or jury. Often times, the positions taken must be supported by evidence that delves into the very intimate and personal details of a person’s life. Even if an individual “wins” round one at the courthouse, there will undoubtedly be more rounds and battles to fight. With every round fought, the odds that these two people will be able to co-parent effectively diminish, and their children end up losing regardless of who is declared by the court to be the “winner.”

After years of seeing the devastation that litigated divorces inflicted upon families, a small group of lawyers began searching for a better way to help families transition through the divorce process. These innovative lawyers sought a process that would resolve conflicts instead of assign blame and that would give the individual spouses more control over the divorce process, empowering them to make choices that are beneficial for them and for their children. These lawyers realized the need for a process that involves additional professionals to contribute their areas of expertise to facilitate communication and empower the parties to make educated decisions. The process that was created is the collaborative law process.

The popularity of the collaborative law process has increased steadily since it was first introduced in Minnesota by attorney Stu Webb in 1990, offering families a way to transition through the legal process of the divorce, with the focus on offering families hope for the future.

II. How does the Collaborative Law Process Work?

The collaborative law process is a non-adversarial dispute resolution process in which the parties work together, with the assistance of their attorneys and other neutral professionals, to resolve their disputes without going to court. The parties may be (and typically are) adverse to one another, but the process does not put them against each other as adversaries. Instead, the parties, their lawyers, and other neutral professionals work together as a team. The focus of the collaborative law process is on addressing the parties' goals and interests in a forward-looking manner rather than punishing the parties for past behavior.

In the event the parties are not able to resolve their issues using the collaborative law process, they may opt out of the process and litigate. Either party may opt out of the collaborative law process at any time. By opting out, the collaborative law process will end, the collaborative lawyers must withdraw, and the parties must hire new litigation lawyers. To preserve the confidentiality of the collaborative law process, none of the collaborative professionals (lawyers, communications facilitators, financial professionals, or other neutral professionals) may testify at any subsequent trial or hearing.

Just as the court follows certain laws and rules, the collaborative law process has its own set of rules and procedures. Experience has shown that following these procedures maximizes the likelihood of a positive outcome.

A. Joint Sessions

In the Collaborative law process, the parties, their attorneys, and the neutral professionals meet in several meetings called "joint sessions." In the first joint session, the parties and attorneys go over important agreements and rules of conduct, as explained in further detail below. Future joint sessions are scheduled at the conclusion of the first joint session. This flexibility in scheduling the joint sessions is a significant benefit of the process – joint sessions are scheduled according to everyone's availability.

B. Written Agreements and Rules of Conduct

The Collaborative law process does not adhere to strict rules of civil procedure or evidence. Instead, the participants rely on good faith and honesty to resolve their conflicts. The participants must therefore make certain commitments to each other and to the process.

At the first joint session, the participants go over the ground rules for conduct in the process which are contained in several different agreements.

(1) The Collaborative Participation Agreement – This is a written agreement entered into between all team members. In this agreement, the parties and their lawyers commit to use the collaborative problem-solving process, agree to utilize interest-based negotiation, and agree to full disclosure of all facts and issues. The parties and their lawyers further commit to communicate effectively and honestly with each other and to hire neutral professional experts as necessary. These experts cannot be called to testify as witnesses in any subsequent judicial proceeding between the parties.

The parties further agree to make a full and candid exchange of information as is necessary to make a proper evaluation of the case, including, but not limited to, full disclosure of the nature, extent, value of – and all developments affecting – the parties’ income, assets and liabilities, and all relevant matters concerning the parties’ children. The parties may make written agreements and file them with the court if they so choose.

The Collaborative Participation Agreement further explains the suspension of court intervention, and limits the attorneys’ representation to the collaborative law process. If the client fails to fully disclose information, or elects to opt out of the collaborative law process, the attorneys will be forced to resign and other attorneys will be hired to represent the clients in litigated proceedings before the court.

(2) Expectations of Conduct – These expectations set the tone for the way joint sessions will be conducted. For example, the Expectations require that the parties focus on the future, not the past, and thereby focus on resolving conflict, not assigning blame. Here again, the parties must commit to focus on each other’s goals and interests. They must further agree to be courteous, patient, honest, and act in good faith. To facilitate effective communication, the participants are required to speak only for themselves, not each other, and to use “I” instead of “you” sentences. And finally, the participants commit to follow the agenda at each joint session.

C. Agendas and Minutes

Agendas and minutes are prepared for every joint session. The purpose of the agenda is to make sure that everyone is prepared for the discussions that will take place, and to protect the spouses from any surprise attacks. Topics that come up during the joint session but are not included on the agenda for that joint session will be postponed until a subsequent joint session. Predictability helps provide the parties with a sense of control and security.

Generally, the attorneys will take turns preparing the agendas and minutes so that the work is shared evenly. The agendas and minutes are important tools to ensure that everyone remains informed about the status of the process and to help move the process along. They are also helpful tools to keep everyone focused in the joint sessions. These documents provide structure and help everyone ensure that the joint sessions stay on track.

III. The Team

To increase the likelihood that complicated and conflicted relationships will be disentangled in a way that addresses the parties underlying interests, the collaborative law process uses a team of professionals from a variety of disciplines and requires the parties to actively participate in the process. The Collaborative Team is comprised of two attorneys, each hired by one of the parties to the divorce, a neutral financial professional, a neutral mental health professional, and of course, the parties to the divorce.

A. Attorneys

Attorneys have a multiple roles in the collaborative law process. They are first and foremost advocates for their clients -- they facilitate interest-based negotiation, advise the parties of the law, and help the parties make reasonable and enforceable agreements. They are responsible for assembling the negotiated agreements made by the parties into a legally binding and enforceable final order.

The attorneys are also the guardians of the collaborative law process itself and work with the parties and other Team members to ensure that appropriate procedures and protocol are followed to ensure that the process remains on track.

B. Financial Professionals

The primary role of the collaborative Financial Professional is to gather information from the parties regarding their assets and liabilities. The Financial Professional speaks from a position of neutrality to help the parties gather sufficient information to identify realistic options and make informed decisions.

C. Communication Facilitator

The Communication Facilitator, also known as a divorce coach, is included in the collaborative law process to help ensure the emotional safety and security of the parties. The Communications Facilitator is a mental health professional such as a licensed professional counselor or licensed social worker whose job is to keep communications productive and keep the parties focused on his or her stated interests. This team member is trained to handle the emotional aspects of the divorce process, thereby creating a safe environment for negotiation. If parties feel threatened, or feel like no one is listening to them, they will not be able to negotiate effectively. The Communications Facilitator is able to diffuse the parties' anger and fear by working with the Team to ensure that the parties' emotional needs are being addressed.

The Communications Facilitator also helps the parties focus on the needs of their children while negotiating parental rights and duties and parenting times. The Communications Facilitator works with the parties in developing a parenting plan that will address the children's needs now and into the future.

D. The Parties

The parties have an active role in the collaborative law process. They identify their goals and interests and provide data and relevant information to help the team create reasonable options. Most importantly, the parties make the decisions that will be included in the final agreement entered by the court.

IV. Interest-Based Negotiation

The key to achieving a successful resolution in the collaborative law process is to keep the parties focused on their interests and how those interests relate to their ultimate goals. Often, parties focus too much on *what* they want without thinking about *why* they want it. In so doing, parties find themselves in the trap of positional bargaining.

Interest-based negotiation consists of the following four principles:

- (A) Separate the people from the problem;
- (B) Focus on interests, not positions;
- (C) Invent options for mutual gain; and
- (D) Use objective criteria.¹

A. Separating the People from the Problem

Family conflict is inherently personal, and most often, stirs up many emotions. When working to resolve a family dispute, it is essential to remember that the parties are people first. The spouses are not just “opposing parties,” but husbands and wives, fathers and mothers. Each spouse has emotions, deeply held values, different backgrounds, and unique viewpoints. It is therefore essential to deal with every participant in the collaborative law process sensitively as a human being and to remember that as human beings, we have human reactions such as anger, fear, frustration, and sadness.

B. Focus on Interests, Not Positions

Interests are what motivate a person -- they are what cause a person to assert a position. In order to identify a party’s interest, the first question to ask is “why?” followed by “why not?”

Consider the following example: in a divorce negotiation, the wife may argue that she wants to keep the marital residence. When asked why she wants to keep the house, she asserts that (1) she wants the children to remain in the same neighborhood so that they can attend the same school and be near their friends; (2) she wants to live close to where she works so that she

¹ *Getting to Yes: Negotiation Agreement Without Giving In*, Roger Fisher and William Ury, and for the Second Edition, Bruce Patton, Penguin Books, 1981.

will be able to get home quickly in the evenings to take the children to various after-school activities, and (3) she wants to remain close to her friends and extended family for support after the divorce because she will need help taking care of the children as a single parent.

Her *position* is that she wants to keep the house, but her *interests* are to be able to take care of the children and for their lives to be disrupted as little as possible after the divorce. Once the wife's interests have been identified, the Collaborative Team has the opportunity to consider these interests and brainstorm different options to satisfy them in the best possible way.

C. Invent Options for Mutual Gain

One of the greatest benefits of the collaborative law process is the opportunity to be creative. In litigation, the court's powers are limited by the law. The lawyers are required to follow the rules of civil procedure and evidence, and the judge is required to apply the law as set forth by the legislature in the Texas Family Code. The court does not have the time or liberty to consider every detail of the parties' marriage and family life. Instead, the court must rely on the law and impose judgment based on the limited facts presented by the attorneys at trial.

The collaborative law process, however, provides the parties, their lawyers, and the neutral professionals freedom to gather necessary information, identify everyone's interests, brainstorm options, evaluate the consequences of those options, and make informed decisions based on thorough consideration of the facts and circumstances. The Collaborative Team is not limited by the rules of evidence or civil procedure, nor is the team limited by the Family Code. This freedom allows the Collaborative Team to explore a myriad of options so that the parties can make decisions that allow for mutual benefit of the parties.

D. Use Objective Criteria

While the Collaborative law process allows the parties to creatively problem-solve and consider options beyond what is permitted by the Family Code, the collaborative law process certainly does not ignore the law. It is obviously essential for the Collaborative Team to have as much information as possible in order for the parties to make an educated decision. For example, as part of the information gathering process, it is helpful to know the market value of the marital residence, the parties' automobiles, and the value of any business interest. It is equally helpful to consider the parties' moral or religious standards and family tradition, if relevant. Along these lines, it also may be helpful for the parties to explore the law regarding possession schedules and child support.

The neutral Financial Expert can be an excellent source for evaluating the values of certain assets. Sometimes, however, identifying objective criteria may require that an additional expert be hired. In the collaborative law process, all experts are "neutral" and are hired jointly by the parties to present a single, unbiased opinion. Neither party may hire an expert to challenge any issue without first disclosing that such expert will be hired. Such disclosure is essential to maintain the trust that is so important to the collaborative law process.

V. The Roadmap to Resolution

In order to ensure that the parties are negotiating based upon their “interests,” and not their “positions,” the collaborative law process utilizes a format for negotiation known as the Roadmap to Resolution (“Roadmap”). The Roadmap provides specific steps that are to be followed, so that the parties are equipped to make fully informed decisions about the division of assets and liabilities, and responsibilities. The Roadmap involves a five step process:

A. Identify Interests

Identifying interests requires the parties to assess their motivations behind their positions. Typically, the lawyer will work with his or her client before the first joint session to help the client begin to think in terms of interests. During the first joint session, both parties will take time to identify their interests. This is a critical point in the negotiation process. As the negotiations unfold, it is often helpful to refer back to the identified interests. Additionally, it is not at all uncommon for the spouses to find that they share common interests.

Common examples of interests that parties share during a divorce include minimizing the disruption on the lives of their children, wanting their children to have a positive relationship with both parents, wanting to have financial security and independence after the divorce, and not wanting to spend all their money on the divorce process itself.

B. Generate Options

This is the brainstorming session where everyone tries to identify the universe of possibilities. During this step, it is not uncommon for the parties to make judgments about the options available. However, the parties should be dissuaded from evaluating the options at this stage. Everyone should be encouraged to come up with options, regardless of how outrageous some options may seem. By keeping an open mind, the parties may stumble across the perfect solution that they might not otherwise have discovered.

C. Gather Information

After the parties have spent time identifying the universe of options, they are then sent on fact-finding missions to gather information that will be necessary to evaluate the options. For example, it may be necessary for one party to have his or her vehicle appraised for trade-in value and research other cars available for purchase or trade. Or, it may be necessary for one of the parents to contact the children’s school and find out how the school schedules are determined so that the parties can plan for future years.

D. Evaluate Consequences

After the information has been gathered, the parties can begin to evaluate the outcome of their options. They will have the information to determine what happens to each party’s

financial future if each wants keeps the marital residence. At this stage, the parties are encouraged to consider the outcomes of their options and whether those outcomes are acceptable.

E. Make Choices

At this stage of the process, the parties will negotiate and will make choices that most align with their interests. After following the steps established by the Roadmap, the parties are able to make educated decisions.

VI. The Value of the Collaborative law process – Beyond Dollars and Cents

A common concern of people facing divorce is cost. Divorces are often emotionally exhausting and financially devastating to many families. To the extent the parties enter the collaborative law process in good faith, work hard to focus on their goals and interests, and work with the Team to reach a feasible outcome, the collaborative law process may be a less expensive alternative to a litigated divorce, both financially and emotionally.

In a litigated divorce, the majority of work is performed without the client's involvement. The client has little control over how much time the lawyer spends drafting pleadings, preparing for hearings, corresponding with other professionals, negotiating agreements, and waiting at the courthouse for a court appearance. By contrast, the parties in a collaborative case are actively involved with their lawyers in every step of the process. Certainly, it is impossible to predict what issues will arise during the joint sessions or how many joint sessions will be required before the final decree is signed. But, because the parties are intricately involved in the collaborative law process, they can see the value of the work that is being done.

Often times in the litigation process, experts are required to review documents, interview the parties and their children, and offer testimony before the court in the event of a hearing or trial. In the collaborative law process, the parties agree on which neutral experts to hire to help them with their issues and rely on the expertise and neutrality of those professionals to help them come up with solutions that satisfy their goals and interests. Time is spent working to a mutually acceptable solution rather than attacking the credibility of each other's "hired gun." The neutral professionals add a great deal of value to the process by educating the parties, and helping counsel the parties on various alternatives.

It is not uncommon for parties, especially parties who have been embroiled in contentious divorce proceedings, to return to court for enforcement issues or modification of the terms of the divorce decree. By contrast, in the collaborative law process, the parties learn negotiation skills and have actually made an investment in the choices. Often times, the parties are able to utilize the dispute resolution skills they learned during the collaborative law process to resolve their future disputes without having to contact their lawyers for assistance. Of course, if the parties have an issue that they are unable to resolve, the Team can be reassembled, and the parties can resolve any subsequent disputes using the collaborative law process.

Most collaboratively trained lawyers would agree that rewards reaped by a family that has successfully completed the collaborative law process greatly exceed the risks. No value can be placed on a successful restructuring of a family in which both parties believe that the distribution of property and assets are fair, and they are able to successfully co-parent their children together. Emotions are addressed, issues are resolved, interests are met, and new problem solving skills are learned.

VII. Choosing Collaborative Professionals

In order to maximize the likelihood of a successful collaborative divorce, and minimize the risks, it is essential that professionals who are engaged in the collaborative law process are adequately trained and committed to ongoing education in the collaborative law process.

There is no question that the collaborative law process requires a mental “shift” among experienced attorneys. One of the biggest differences between litigation and the collaborative law process is that in the collaborative law process, the lawyers *must* trust each other. The lawyers must put aside their desire to play a win-lose game and must instead adopt a “collaborative attitude” that will allow them to be a member of a team working together for the benefit of both parties.

It is imperative that collaborative professionals undergo proper training. There is no special certification or requirement to qualify a lawyer as “collaborative.” Organizations such as the Collaborative Law Institute of Texas provide training programs and educational seminars for lawyers, mental health professionals, and financial professionals who practice collaboratively. Since there is no degree or certification for a collaborative professional, it is important that clients interview their lawyers to learn the extent of their training and commitment to the collaborative law process.

Because trust is such an essential part of the collaborative law process, attorneys and professionals have joined together in “practice groups” to devote time to studying the process, enhancing their collaborative skills, and building relationships with other collaborative professionals. Members of practice groups are not restricted in their ability to participate in a collaborative case with other professionals who are not members of their group. However, membership in a practice group is an important factor in assessing whether a professional understands the nature of the collaborative law process and has dedicated time and resources to developing skills that are essential in collaborative practice.

VIII. Resources

The Collaborative Law Alliance of Collin County
www.northtexascollaborativelaw.com

The author is a member of this practice group.

Global Collaborative Law Council (“GCLC”)

www.collaborative.us

The Collaborative Law Institute of Texas, Inc. (“CLI-TX”)

Two Lincoln Center, Ste 626

Dallas, Texas 75240

972.386.0158

www.collablawtexas.com

The International Academy of Collaborative Practitioners (“IACP”)

11811 N. Tatum Blvd. #3031

Phoenix, Arizona 85028

602.953.7881

www.collaborativepractice.com