

The Collaborative Process for Families: A Bridge Over Troubled Waters

Water is the symbol of life. A trickling stream provides a sense of peace. Large bodies of water provide sources of recreation and relaxation. Water nourishes our bodies, and calms our souls. Yet, that same water which gives life, also becomes a powerful force capable of destroying it.

Water serves as an analogy for the dynamics that operate within families. There are times of peace. Yet, there can also be times of torrent waters that sweep families off their feet. All too often, the waters in a dissolving marriage only become more troublesome when the divorce process begins. Foundations are eroded; bricks and mortar crumble. The powerful life-giving force of family, like water, becomes a destructive force threatening a family's stability, security and identity.

Individuals faced with a river of troubled waters have choices to make. Often, people live in a state of denial, pretending the waters aren't rising or the river isn't there. Or, when faced to deal with the fact that the divorce is imminent, individuals may try to avoid divorce – like someone who tries to find another way around the river. Some individuals are willing to submit to the river and get thrown into the rapids. However, there is another option available to individuals that will allow them to build a bridge over the “troubled waters.”

Building Bridges Over Troubled Waters

In the eyes of the law, marriage is an act that unites a couple as a legal entity. For many people, however, marriage is an act that not only unites a couple legally, but also unites them in a spiritual, emotional and physical way. Traditionally, the divorce process has addressed only the legal nature of the relationship. A divorce obtained at the courthouse does not address the emotional, spiritual and psychological ramifications of a failing marriage.

The purpose of a civil divorce is to untie the entangled legal relationships of property ownership, liabilities and parenting responsibilities. If there were not emotional, psychological and spiritual ramifications of this division, the process itself would be fairly simple and streamlined. Indeed, there are some couples, whether not married for long, or having been separated for so long, that disentangling their relationship is in fact a fairly straightforward process.

Yet, for most people facing divorce, disentangling the relationship 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 disentangling 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 disentangling a marital relationship can make for extremely painful and expensive legal battles. The traditional adversarial process encourages the spouses to take positions, to gather evidence to support their positions, and to argue their positions in front of a decision maker. Often times, the positions taken must be supported by evidence that delve 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 diminish, and the children end up losing regardless of who is declared by the court to be the “winner.”

After years of disentangling marriages in a way that only caused more devastation in the lives of these family members, a small group of lawyers began searching for a different way of divorcing that would actually help families transition through the divorce process. Such a process would have to resolve conflicts, instead of simply assign blame for conflicts between the couple. Such a process would have to give the individual spouses more control in the divorce process, empowering them to make choices that were beneficial for them independently and for their children. Such a process would have to involve professionals besides lawyers who could contribute their areas of expertise to aid the spouses in communicating with each other and making educated choices. The process that has emerged is now known as the Collaborative Process. The popularity of the Collaborative Process has increased steadily since it was first introduced in 1997. The Collaborative Process offers families a way to transition through the legal process of the divorce, with the focus on offering families a hope for the future. The Collaborative Process is a bridge over troubled waters.

What is the Collaborative Process?

The Collaborative 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 create a resolution to their dispute without utilizing the court system. The parties may be (and typically are) adverse to one another, but the process does not put them against each other. Instead, the professionals work together as a team. The focus of the Collaborative Process is on addressing the parties goals and interests in a forward-looking manner rather than punishing the parties for past behavior.

Blueprint for the Collaborative Process

A. Joint Sessions

In the Collaborative Process, the parties, their attorneys, and the neutral allied professionals meet in several meetings called “joint sessions.” These joint sessions differ from mediation in several ways: (1) mediation usually occurs after the parties have invested a lot of money in temporary orders, discovery, etc., whereas the collaborative

process avoids the costs of discovery and hearings; (2) everyone is in the same room together; (2) there is no mediator; (3) joint sessions typically last 2 hours; (3) there are typically 4-8 joint session; (4) the parties agree to full disclosure – there is no holding back on important information to use against the other party later on; (5) the sessions can stop at any time if anyone feels that the process is moving too quickly or if more time is needed to gather documents or information; and (6) there is no pressure to resolve the case in one session.

B. Commitments of the parties and all professionals

The Collaborative Process does not follow the 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 which are contained in the Collaborative Participation Agreements and Expectations of Conduct. Each profession has its own participation agreement which must be signed by the professionals and the parties.

The Collaborative Participation Agreement between the attorneys and the parties requires the parties to commit to a collaborative problem-solving process which utilizes interest-based negotiation and full disclosure. The parties 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 Process. If the client fails to fully disclose information, or elects to opt out of the Collaborative Process, the attorneys will be forced to resign and other attorneys will be hired to represent the clients in litigated proceedings before the court.

C. Expectations of Conduct

At the first joint session, the participants must also review and commit to the Expectations of Conduct ("Expectations"). The 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.

D. Written Communications Authorization

The Written Communications Authorization (“Authorization”) is an agreement signed by the individual parties, their attorneys and the allied professionals. The Authorization sets out the guidelines for communication among everyone involved, and allows the parties to communicate with one another. In the Collaborative Process, open communication is a necessity. That is not to say that parties cannot have privileged communications with their attorneys – certainly they still have that right. However, procedural-type communications such as agendas, minutes, drafts of documents and orders must be sent to all team members.

The attorney-client privilege remains for communications solely between the attorney and client, but a party can waive the privilege and allow the attorney to distribute communications to the entire team about substantive issues if he/she so chooses. A party can communicate directly with opposing party’s attorney only under certain conditions: if the communication is solicited as a correction to agendas, minutes, drafts of documents and orders, or if the party is responding to a communication from the other party’s lawyer. The other party’s lawyer may only communicate with the client on procedural-type matters, and must be copied to the client’s lawyer. Any responses from the client to the other attorney must also be sent to the client’s attorney. In the event an opposing party communicates directly with the opposing attorney, that attorney must forward the communication to the other attorney immediately.

The parties themselves may communicate with each other without copying their attorneys or the team. However, if one party forwards the communication between the two parties to their attorney, that attorney must forward the communication to the opposing attorney.

Attorneys and allied professionals may communicate “off the record” by email without informing the parties. Clients should be advised, however, that if the Collaborative Process terminates, the written email will become part of the file and may be forwarded to new counsel as such.

E. Agendas & 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 handling these tasks 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.

Interest Based Negotiation

The key to achieving a successful resolution in the Collaborative 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.

Consider this example:

The parties agree that they have a shared goal of wanting the divorce to impact their three children as little as possible. During the discussion of distribution of property, wife insists that she has to have the Cadillac Escalade. Her reason for wanting the Escalade is to have a vehicle large enough to take the kids to school and various after school activities. The parties agree that the kids should continue all their activities so that their lives will be disrupted by the divorce as little as possible.

The wife's *position* is that she has to have the Escalade, but her *interest* is to have a reliable vehicle large enough to take the kids to their activities.

Identifying the reason why the wife wants the Escalade opens up discussion of options:

1. Can she afford to keep the Escalade?
2. Should she trade the Escalade for a vehicle that she can purchase outright or have lower monthly payments on?
3. Should she trade the Escalade for a more fuel-efficient/lower maintenance vehicle?
4. Is there a better way to satisfy this interest and still meet the party's shared goal of impacting the children's life as little as possible?

Using interest based negotiation provides the parties with an opportunity to make decisions that are truly in line with their interests. In the traditional adversarial model of divorce, decisions about who gets what are typically made by courts interpreting the rules outlined by the legislators. In the Collaborative Process, decisions are made by the parties based upon their own unique set of circumstances and their underlying interests.

The Roadmap to Resolution

In order to ensure that the parties are negotiating based upon their “interests,” and not their “positions,” the Collaborative Process utilizes a format for negotiation known as the Roadmap to Resolution (“Roadmap”). The Roadmap provides specific steps that are to be followed in order, 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:

1. **Identify Interests:** As discussed above, identifying interests asks the parties to assess their motivations behind their positions. Typically, the lawyer will work with their client before the first joint session to help the client begin to think in terms of interests. During the first joint sessions, both individuals 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.

Examples of interests include: minimize the disruption on the lives of the children; children should have a positive relationship with both parents; have financial security and independence; not spend every dime on the divorce process itself.

2. **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 try to make judgments about the options available. However, the parties should be dissuaded from evaluating the options at this stage. Rather, everyone should be encouraged to come up with options, regardless of how ludicrous some options may seem. By keeping an open mind, the parties may stumble across the perfect solution that they might not otherwise have discovered.
3. **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 the husband to have his car appraised for trade-in value, and to research other cars available. It may be necessary for one of the parents to contact the school, and find out how the school schedules are determined so that they can plan for future years. The more work the parties are willing to do at this stage, the less money they will have to spend paying professional fees.
4. **Evaluate Consequences:** After the information has been gathered, the parties can begin to evaluate the outcome of certain options. They will have the information to determine what happens to Wife’s financial future if she keeps the house. What would happen if she sold the house, and

bought the house down the street that is significantly less expensive? This is the point where the parties are encouraged to consider the outcomes of certain choices and whether those outcomes are acceptable.

5. **Make Choices:** At this stage of the process, the individuals will negotiate and will make choices that most align with their interests. After following the steps laid out above, they are informed about their choices and the impact their choices will make on their futures. The process results in a better decision making process, with choices that are far more satisfactory to the parties. Choices made out of anger and resentment, or under duress, do not have the same enduring effect as fully informed choices made freely.

Professional Bridge Builders

To increase the likelihood that complicated and conflicted relationships will be disentangled in a way that addresses the parties underlying interests, the Collaborative Process uses professionals from a variety of disciplines, and relies on the clients to actively participate in the process. The team of people used in the Collaborative Process is similar to a team of people used to build bridges. The team of professionals is comprised of two attorneys, each hired by one of the parties to the divorce, a neutral financial professional and a neutral mental health professional.

A. The Architects – Financial Professionals

Architects are designated with the task of building a bridge that aesthetically appealing, while functional at the same time. Our financial professionals are like the architects. The financial professional is responsible for educating the parties about their financial situation. Often, one of the parties will enter the divorce process with a more sophisticated understanding of the family's financial situation, while the other party may have played a more passive role and may require more attention and education in the process. The financial professional can speak from a position of neutrality, and help the parties gather sufficient information to make informed decisions.

The financial professional can also help generate options and evaluate consequences regarding financial decisions. The financial professional is in an excellent position to help the parties plan for the future, and make decisions that make sense. While one of the parties may enter the process determined that he wants to keep the house, he may later decide with the help of the financial professional that keeping the house is not really in his best interest since he will be bankrupt in three years. The financial professional provides an essential role in helping the parties make smart and informed decisions regarding the marital assets.

B. The Engineers – Mental Health Professionals

Engineers are responsible for ensuring that the bridge is safe and enduring. In the collaborative process, the Mental Health Professionals are the professionals responsible for the safety and security of the parties. The Mental Health Professional plays an essential role in the Collaborative Process by facilitating communication between the parties, and among the team members. The Mental Health Professional is equipped with experience and training 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. More likely, they will be overwhelmed by anger and fear. However, the Mental Health Professional can diffuse much of the anger and fear by working with the team members and the parties to make sure their emotional needs are being addressed.

The Mental Health Professional is also effective at working with the couple regarding their children. The Mental Health Professional provides advice on informing the children about the divorce and can help the parents focus on the needs of the children while negotiating parental responsibilities. The Mental Health Professional will work with the parents in developing a parenting plan that will serve the children's needs now and into the future. The Mental Health Professional brings incredible value to the team during the process, and even more value to the parties after the divorce as they continue to co-parent their children together.

C. The Construction Crew – Attorneys

The Construction Crew is responsible for putting the bridge together according to the specifications. In the Collaborative Process, the lawyers representing their clients are responsible for assembling the negotiated agreement between the parties into a legally binding and enforceable agreement. The lawyers facilitate the interest based negotiation, as the parties identify their interests and evaluate their options. The lawyers work with the clients to manage conflict, and to keep discussions on track. If the bridge begins to collapse, the construction crew will be terminated and a new crew will be hired by the clients.

D. The Project Managers – Parties

The project managers are responsible for coordinating the delivery of supplies, defining what the goals of building the bridge, and setting out the timeline for its construction. In the Collaborative Process, the parties serve in the role of project managers.

The Value of Building Bridges

Building a bridge is not inexpensive. However, it can be less costly than not crossing the bridge, or getting swept away by the rapids. The goal of the Collaborative Process is to help the parties achieve the best resolution possible to their dispute.

In a traditional adversarial divorce, much of the work that is done by the professionals is done without the client's involvement. Therefore, 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 several hours only to have the case postponed for another date. In the Collaborative Process, the client is actively involved with the lawyer in every step of the process. The costs are fairly predictable, in terms of the time the lawyer will spend outside of the joint sessions. Certainly, it is impossible to predict what issues will arise during the joint sessions, and how many joint sessions will be required. Therefore, it is virtually impossible to estimate how much a particular divorce will cost in legal fees. Nevertheless, the client has far more control over the fees that are spent in the Collaborative Process than the client has when a case is litigated.

In the traditional litigation method, the parties each hire their own experts and then battle it out in front of a judge. In the Collaborative Process, the parties agree on using only one mental health expert and one financial professional and then rely on that professional's expertise and neutrality to help the parties come up with a solution that satisfies their goals and interests. Professionals from other disciplines, such as real estate appraisers, may be retained by the parties in the Collaborative Process. However, only neutral experts will be used. 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 advise the parties on various alternatives. While it is difficult for many lawyers to admit, the truth is that neutral professionals are better skilled in their areas of expertise than attorneys doing that same task.

In the traditional litigation model, it is not uncommon for parties, especially parties who have been embroiled in contentious divorce proceedings, to have to return to the courthouse for enforcement issues and to modify the terms of the divorce decree. The possibility of trying to work out a resolution outside of the courtroom is only minimized by the litigation process. However, in the Collaborative Process, the parties have spent time learning new negotiation skills. Not only that, but they have actually made an investment in the choices. Therefore, the chance of having to incur legal fees for additional legal proceedings is minimized. If the parties do 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 Process.

Risks and Rewards

Of course, there are risks associated with utilizing the Collaborative Process. But the risks of using the litigation process are arguably much greater.

In family matters, lack of trust between the parties is very common. The parties may have a hard time believing that they can trust their spouse to be honest and forthcoming, and there is always a risk that one or both of the parties will not participate in the process in good faith. In the Collaborative Process, however, everyone is required to participate in good faith, and if either attorney believes that his/her client is not acting in good faith, and the attorney is unable to convince the party participate in good faith, that attorney must withdraw from representing that client.

The parties always have the option to opt-out of the Collaborative Process and proceed to court and litigate their case the old-fashioned way. If that happens, both parties must hire new attorneys and start over. The parties may then be subject to written discovery, depositions, hearings, and even a full trial on the merits. As most lawyers know, there is a great amount of risk involved whenever a matter is presented to the court for consideration.

Most collaboratively trained lawyers would agree that rewards reaped by a family that has successfully completed the Collaborative Process greatly exceed the risks. The rewards are virtually infinite. 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 dealt with, issues are resolved, interests are met, and new problem solving skills are learned. Dignity is preserved, privacy is maintained, and the parties have closure.

Choosing Collaborative Professionals

The Collaborative Process may not be right for every case. However, the Collaborative Process can effectively be used to help many families transition through the divorce process. In order to maximize the likelihood of success, and minimize the risks, it is essential that professionals who are engaged in the Collaborative Process are adequately trained, and are committed to ongoing education in the Collaborative Process.

There is no question that the Collaborative Process requires a mental “shift” among experienced attorneys. One of the biggest differences between litigation and the Collaborative Process is that in the Collaborative 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 clients.

Because trust is such an essential part of the Collaborative 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 at all 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 Process, and

has dedicated time and resources to developing skills that are essential in Collaborative Practice.

Final Thoughts

In the midst of turbulent times, families facing divorce need a way to transition through the divorce process that provides them with stability, safety and security. Just as a bridge provides a means for crossing the troubled waters, so the Collaborative Process provides couples with a means of getting through the divorce process and on to the rest of their lives. The Collaborative Process is not always the easiest or the least expensive means of getting a divorce. Yet, it can be the beneficial process for all members of the family unit. The Collaborative Process acknowledges the limitations of divorce: while the divorce process is effective at terminating the marital relationship, it does not terminate the ongoing familial relationships. Individuals considering divorce need to consider the Collaborative Process.