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COLLABORATIVE FAMILY LAW: AN OXYMORON OR A STROKE OF GENIUS?

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There is an exciting development in Family Law that has spread to Ontario via the US and Western provinces. I am speaking about a non-adversarial option for separating or divorcing couples that blends the skills of mediation, with the problem solving skills of lawyers. It has much to offer to clients whose lawyers are adequately trained and willing to follow the Rules of Conduct.

What is ***Collaborative Family Law***? First and foremost it represents a paradigm shift from the traditional role of a lawyer. Fundamentally, a collaborative lawyer uses his or her skills to model and teach clients how to be effective interest based negotiators. Collaborative lawyers act as legal advisors, respectful role models and coaches for their clients. The clients are encouraged to take the primary role in negotiating agreements that they believe will meet their own and their children's needs. The lawyers' knowledge and creative problem solving skills are directed at reaching an integrative solution that everyone can say 'yes' to and that the parties feel committed to uphold. This process has many similarities to mediation; namely; it allows opportunities for the parties to gain a greater understanding of each other's needs, to build trust, and promote agreements that are fair and will last. The process is designed to encourage greater buy-in to the resolution.

What Collaborative Law is NOT, is adversarial or litigation focused. In fact, both parties and their lawyers must sign a Retainer contract at the outset, agreeing **not to litigate** if an impasse is reached. 100% of the lawyers' and clients' effort is directed at finding a win-win solution. Should that not be possible, the lawyers **must** withdraw and turn the matter over to counsel from a different firm. Collaborative lawyers are bound by Rules of Conduct to encourage constructive problem solving and discourage hostile correspondence, angry affidavits, threats of litigation, take it or leave it offers or other intimidating or power based tactics.

What are the benefits of a collaborative process for lawyers? From the lawyer's perspective, the practice of family law would likely become far more appealing. Few members of the Bar experience pleasure knowing they have "won" a case, and in the process done significant harm to future relationships with children, grandparents and friends. Also, Family Law is very stressful for most lawyers. Clients, who are extremely unhappy and fearful about their future, often take their lawyers along on the roller coaster of emotions that is exacerbated by an adversarial system.

Also, an increasing number of families cannot afford the cost of litigating. The Family Courts are filled with unrepresented litigants who have despaired of affording legal assistance for the multitude of steps (motions, case conferences, cross examinations, settlement conferences, etcetera) they are required to take on the path to trial. If the lawyers were directing all their efforts toward reaching an agreement satisfactory to all, the process would be streamlined, much more affordable and less emotionally

draining.

What are the benefits to the client of taking a collaborative approach? First, mediation and Collaborative Law recognize that when relationships will continue, such as when there are children, the less adversarial the approach, and the more control by the parties themselves, the more likely the settlement will last. Second, Collaborative Law offers many of the benefits of mediation, but with the additional safeguard of the lawyers' presence for high conflict separations. The presence of collaborative lawyers adds an additional element of containment to potentially volatile cases. While aspects of the case, such as the details of a parenting plan, the involvement of extended family or new partners, may still be worked out with a mediator, many aspects of the case can be negotiated in a 4 way meeting between lawyers and clients.

Third, if special expertise is needed, such as a pension valuator, a business appraiser, a counselor for the parents and/or children, these can be agreed upon in a non-adversarial manner, saving the client money. Fourth, financial disclosure completed in a collaborative manner is likely to be more efficient and cost effective. One of the guidelines requires that the parties make full disclosure of all relevant information at the earliest opportunity to ensure a fair and expeditious settlement. The emphasis on constructive problem solving is both efficient and reassuring to clients who already feel their lives are out of control.

What concerns are typically raised about this approach? Lawyers in particular express concern about the requirement to withdraw if a matter reaches an impasse and is headed to court. Lawyers argue that it is unfair to clients to change lawyers. Also, they point out that considerable time was spent building rapport and it would be stressful – and expensive, for clients to begin a relationship with someone else. The reply is that if lawyers and clients know that the lawyer must withdraw if the case goes to litigation, everyone will have a strong incentive to settle. Finally, not every client, and not every case is suitable for a collaborative approach. If a case is precedent setting or if the clients are at risk of harm, a traditional process will likely be preferable.

Collaborative Law is not intended to replace traditional approaches, but rather to add a creative choice to the menu of options available to clients. While this approach has begun in family cases, it has considerable appeal for all cases involving ongoing relationships.

Note: Dr. Barbara Landau, President Cooperative Solutions, is a psychologist, lawyer and mediator who offers training and conflict resolution for family and workplace disputes. She is a member of the Toronto Mandatory Mediation Roster, a Charter Mediator and a Certified Comprehensive Family Mediator. She received the "Award of Excellence" from the OBA - ADR Section.

This article is adapted from one that appeared in the December 15, 2000 issue of The Lawyers Weekly and the Law Society's program on Collaborative Law, Dec. 2000.