

Welcome to the Future!

An Alternative Approach to Resolving Disputes

By NOEL S. SANDOMIRSKY, Q.C. AND R. BRADLEY HUNTER

Welcome to the future of family law and to a new approach to handling family law matters. Collaborative law, as it is now known, has arrived. Collaborative law involves the fundamental shift in the attitude adopted by our profession towards resolving disputes. Lawyers as adversaries become lawyer as colleagues.

Hallmarks of Collaborative Law

A collaborative case involves certain basics. First, the lawyers must have received specific training in the concepts of collaborative law and the idea that the lawyers and the clients work together towards common goals based on interest based negotiation.[\(endnote 1\)](#)

As well, at the start of a collaborative law file, the clients and the lawyers sign an agreement that should the matter fail to settle, both of the lawyers and their law firms are disqualified from acting further on the case. This is probably the one key factor that fundamentally shifts the attitudes of lawyers on collaborative files and fundamentally changes the dynamics of the process. The threat of one party going to court is gone. The lawyers contemplate only settlement and are driven towards settlement since that is their role in the process. The lawyers attitudes on handling the case are fundamentally shifted to a new and constructive point of view.

This helps alleviate some of our underlying beliefs and assumptions about how to resolve disputes. At least during the settlement process the "or else" of negotiation is gone.

Another fundamental aspect of collaborative law is that the lawyers adopt common procedures, documents and approaches to resolution of cases. Since the clients are receiving similar information and advice about the process and the goals the parties start out with a feeling that the negotiations are starting fairly. This process does not diminish counsel's responsibility to articulate the client's interests, but it does bring to bear a focus on reasonable and fair solutions which accord with the applicable principles of law.

The Process

A typical collaborative case follows a process as follows:

The clients would have an initial meeting with their respective lawyers.
Alternatives presented to clients would include the following:

mediation;

collaborative law process;

the court process;

interest based negotiations with litigation in aid

The client would be asked to think about the process they wish and would let the lawyer know after they have had due opportunity to consider the various alternatives. The vast majority of parties opt for collaborative law.

If the parties agreed to the collaborative law approach, a standard form contract would be executed by the parties and by the lawyers with the following critical elements in the contract:

that the parties would agree to be bound by the process, act in good faith and follow throughout the process;

that the lawyers would limit their involvement in the case to the collaborative law process and their firms would be excluded from further involvement should the matter litigate;

that neither party would take precipitous or unilateral action during the course of negotiations; and

that there would be a series of four way meetings in which negotiations would take place.

Once the contract was entered into, the next step would be a meeting between the two lawyers to discuss their perceptions of the issues and how the case might proceed from there. This can simply be by telephone and can be done on quite an informal basis.

The parties would then hold a series of four way meetings with the lawyers and the clients. The rules are that there is complete candour, complete disclosure and that the parties bargain on the basis of "interests". This is the interest based negotiation discussed in books such as **Getting to Yes** ([endnote 2](#)). The first stage of the negotiations involves an understanding of what the issues are. The next phase is disclosure of information. Both parties must be fully informed as to relevant facts. As lawyers, this would be our discovery process.

The next phase is the development of the options available to the disputes parties. Far more options are available by agreement than a court has available. It is at this stage that ingenuity and experimentation may arise, tailored to the uniqueness of the family's dynamics. The inputs can be received from other professional disciplines making the collaborative process multi-disciplinary. The opportunity for a therapeutic dynamic arises that escapes the adversarial process. The final phase is the actual preparation of an agreement and the fulfilling of that agreement.

If the case is settled collaboratively, a joint petition would be filed with the court if dissolution of a marriage or if some of the outcome of the action would be needed to be dealt with by way of court order.

Consultants and Collaborative Law

There are other interesting aspects of collaborative law. One is the ability to bring in consultants who would otherwise be dealt with as "expert witnesses". For example, if there was an issue over the valuation of a business, a business valuator, commercial real estate agent or someone else could be retained by both parties for the purpose of reviewing the value of the business. Given the informality of

the process, formal appraisals can likely be avoided in most cases resulting in significant cost savings to the parties. An opinion of value of the business may only cost \$2,000.00. A formal appraiser can cost \$10,000.00 and significantly more.

The consultant could be invited to a meeting to better discuss their opinions with clients.

Several different types of consultants can be used from financial advisers, accountants, appraisers, other valuers and the like to psychologists, social workers, counsellors and mediators. One can easily envisage a collaborative law case being dealt with in parallel to and in consultation with a counsellor trying to resolve the other conflicts that exists between parties.

Even a lawyer could be a consultant. For example, if there were a major legal issue dividing the parties as to the status of the law in a particular area, nothing would prevent them from drawing in a senior practitioner or a highly regarded practitioner on the issue to give basic guidance as to how to resolve the issue.

Does collaborative law actually work?

Since the history of collaborative law is not a long one, the question needs to be answered on the basis of anecdotal evidence. But the lawyers and clients who have been involved indicate that they find that the whole process far more constructive and far more successful in resolving disputes compared to cases that settle in the normal process or go to court. The anecdotal evidence supports collaborative law.

There are a few specific examples of great successes. One is the City of Medicine Hat. In that city 90% of the family law bar has received training in collaborative law and is trying to practice that way.

Court lists have dropped from approximately 15 or 20 cases in a family law Chambers each week to one or two. Lawyers report that they are highly successful and very few cases are leaving the collaborative process. Those that have left usually arise from issues of one party acting unilaterally or taking exceptional action that directly violates the initial agreement made by the parties. In another case of a "failure" was that the parties reconciled once and established better communication patterns in the collaborative process.

In larger communities usually only a small percentage of the lawyers have collaborative training and has not to this point become the dominant method of practice. The key to a successful collaborative law project is the commitment of senior family practitioners and leaders of the Bar who both provide the system with a large volume of cases and provide reassurance to junior members of the Bar that this system, in fact, works.

Is collaborative law going to happen?

Most definitely yes. There are a number of factors driving collaborative law forward. One main factor is the number of family law lawyers who want to practice collaborative law. The stress of practising family law is high. The reaction by most family law lawyers to being presented the alternative of collaborative law is if they have seen a vision on the road to Jerusalem. It presents a rational and reasonable alternative to dealing with cases and that is what most lawyers are looking for. There is a direct perception that the stress of handling a file is far easier on the lawyers if they pursue in a collaborative way. If nothing more as a lifestyle choice, many lawyers will opt for collaborative law to be a part of their practice.

But more important than the lawyer's personal lives are the needs and desires of our clients. We challenge you to talk with somebody who has been through a divorce about collaborative law and whether they thought that the process would have made things better. Anyone of your clients who has spent any time in court will tell you almost immediately that the collaborative process was something they would have opted for.

As well, there is a general perception that the courts are a poor place to resolve family disputes. This is not a criticism of the courts. Many judges in the Court of Queen's Bench have stated that the courts are the last place that cases should be resolved and should only be resolved in court if all other reasonable alternatives to settlement have been attempted. The courts recognize the damage of confrontation of court, its costs, delays and uncertainties. Judges are supportive of alternative measures.

Of course, much is inherent in the way the courts approach matters. Our court system was developed in England over the last 500 years and it involves a process designed to deal with the resolution of one time issues between parties who are generally not related to one another and who have little or no ongoing contact. Historically, the courts dealt with criminal issues and financial or property issues. Until the last 30 years, family law cases were rare in the judicial system.

The system may work reasonably well for resolving one time disputes but the kind of dispute in a family law case is far different. First, resolving custody disputes in court is something the courts were never designed to do. An ultimate arbiter may be necessary. Power vested in someone acting as a judge may be necessary in a few cases but the process adopted by our system is slow, cumbersome, expensive and incomplete. As well, such ultimate arbiter should be well-schooled and long on experience in family law.

As well, in the past the court simply did not have to worry about the effects of their decisions upon the litigants afterward. In a normal civil dispute, if one of the litigants is unhappy with the outcome the reaction may be a simple "so what" to their concerns. There are winners and there are losers in normal civil disputes and the parties will rarely have ongoing relationships with one another. Unhappiness by a party with the way matters were resolved was simply unimportant.

Family law is much different. A dispute that is not properly resolved is not over. This is most obvious in cases concerning custody and access where a judge's determination as to the living arrangements of a child is often the start of much greater problems rather than the end of the problems that existed. The

courts are quite rightly concerned about their inability to deal with cases in an ongoing way. There is general recognition in the public as to the destructive nature of the way family law disputes are resolved. A conservative estimate is that 60% of the cases heard in Saskatchewan in the Court of Queen's Bench today are family law cases.[\(Endnote 3\)](#) More people will be involved in a family law case than any other area of the law (possibly with the exception of criminal law) and are advisedly concerned about how their disputes are resolved. There is a general recognition in the public that the current process is expensive, very frustrating and does not succeed in providing adequate decisions.

Unless the system reforms itself through methods such as collaborative law, legislative reforms will be sought and pursued.

It should also be recognized that even the cases that are litigated are usually settled. Very few family law disputes make it through to trial.

Less than 1% of the cases actually proceed to a full-blown trial over all issues. 95% of cases are settled completely by the parties and another 5% are settled on the basis of some court determination. If 19 out of 20 cases are already settled does not a more enhanced and streamlined settlement process ultimately make sense?

The future of the legal profession requires many changes to be made. In a paper published in the last edition of the Saskatchewan Law Review, Volume 64(1), 2001 Professor Roderick A. MacDonald poses a striking proposition to members of the legal profession.... "Let our future not be behind us". Though the proposition seems rhetorical at first, a little reflection shows that lawyers too often succumb to this mentality. We have seen too many instances of late where political and social pressure is brought to bear upon our legislators to "fix the system". We end up with no fault insurance, child support guidelines and mandatory mediation as a few examples of the legislative response to public displeasure with the justice systems as it has prevailed. Professor MacDonald urges lawyers to be more innovative and to take charge of their profession's future. Anyone who has practised family law long enough should eventually come to the realization that the adversarial approach often fails to resolve family disputes. In Canada we, as a profession, have not begun to tap our potential for leadership to initiate meaningful reform.

Collaborative lawyering presents a significant alternative to adversarial law - and we believe the legal profession should initiate and provide this progressive and humane option to resolving conflict. The institution of the family is changing as a reflection of our rapidly changing society. That is why we presently see an increase of social activism in some of our high courts and in law reform. Be awake to the changing times. As lawyers you should accept that a healthy future is in your hands ... family lawyers can define the future that lies ahead of them in part by embracing collaborative law as another arrow in their quiver of dispute resolution.

The writers are strongly committed to the use of collaborative law process in the resolving of family law disputes.

Similar processes are already used but the refinement and commitment to settlement that collaborative law involves should and will assist significantly in resolving disputes with far fewer casualties. Men and women who go through long divorce proceedings suffer. Often, their children suffer more. Even lawyers and judges suffer from the current process. Perhaps some of this can be put to rest.

Is collaborative law for everyone?

Obviously not. There are certain intractable people and situations that give rise to cases that must litigate. But the vast majority of cases that are now dealt with can now be settled and the chances for improvement are great. Many more cases are likely to be diverted from the litigation system and processes as time goes on.

Endnotes

1. Interest based negotiation involves the parties avoiding positional bargaining and focuses not on the winning and losing of a negotiation but the mutual benefits of the successful conclusion of a negotiation.
2. **Getting to Yes : Negotiating Agreement Without Giving in** by Roger Fisher, William Ury, Bruce Patton
3. Estimate by Local Registrar's Office, Regina