WHAT EVERY THERAPIST SHOULD KNOW ABOUT COLLABORATIVE LAW

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I. INTRODUCTION

Collaborative Law is a relatively new process in Texas divorce. In this process the husband, wife, and both attorneys agree to resolve all issues in their case without involving court intervention, except to approve the final papers and grant the divorce. The process is often interdisciplinary, involving mental health professionals as advisors, communication coaches, or ombudsman for the children. Divorce planners and other financial experts can be utilized to analyze and evaluate the property and financial interests of the parties. Collaborative lawyers and other professionals receive special training to assist clients in utilizing the techniques of interest-based negotiations to resolve the issues in their divorce.

II. HISTORY AND FOREWORD

A. A Brief History

Collaborative law, began as an idea first outlined in 1991 by Minnesota attorney Stuart Webb in a letter sent to a Minnesota Supreme Court Justice describing the process generally, and seeking an opinion about its merits. In thirteen years since then, collaborative family law has captured the imagination of family lawyers across the nation, not only for its efficacy as a dispute resolution tool but as much for its promise of extending the meaningful professional life span of its practitioners. It has crossed our northern borders into Canada with astonishing success, has adherents in Europe, and even "down under" in Australia and New Zealand. Practice groups exist in most major metropolitan areas in this country, and new groups are being added constantly.

The Texas experience indicates this growth potential in a uniquely "Texan" way. Dallas lawyers John McShane and Larry Hance brought collaborative family law to Texas in January 2000, by inviting Stuart Webb and Pauline Tesler, a California attorney, to introduce approximately 60 lawyers to this exciting new concept. The potential power of collaborative family law was immediately recognized by the lawyers who attended, and Pauline Tesler was persuaded to return to Texas in August to present collaborative family law to a broader audience at the Advanced Family Law Course in San Antonio. In November of that same year, by popular demand, Stuart and Pauline traveled to Houston, where they conducted both an "intermediate" training for those of the initial 60 who could attend, and another basic collaborative family law training for an additional hundred plus lawyers from all around Texas, as well as from surrounding states such as Louisiana and Oklahoma. Since that time, a number of other collaborative family law trainers of national reputation have also been invited to conduct training

sessions, with the result that currently Texas family lawyers with training in this new set of skills now literally number "in the hundreds." There have also been several trainings for mental health professionals interested in working in collaborative law in Texas, and more are on the drawing boards.

In 2001 a group of collaborative lawyers in Houston perceived that Texas could benefit from a statute both recognizing the efficacy of this new process, and creating an environment in which it could have its best opportunity to grow and flourish. The result was Sections 6.603 and 153.0072 of the Texas Family Code, which are attached to this article.

The Collaborative Law Institute of Texas, a statewide non-profit organization, has committed enormous resources to supplying the leadership, energy and expertise needed to make available effective and affordable collaborative law training at convenient locations throughout the state, promote and coordinate communications among collaborative professionals, provide education , establish, and maintain the highest professional standards for collaborative practice, and to execute a marketing campaign certain to educate the public and create a demand for collaborative law services. Membership in The Collaborative Law Institute of Texas, and participation in its work is an absolute must for every Texas family lawyer, mental health and financial professional who see the vision that collaborative family law hold for the future.

B. THE PARADIGM SHIFT

For years mental health professionals have been telling attorneys that the adversarial approach is not necessarily the most rational approach to the resolution of family law issues. The movement towards a new approach is also consumer-driven, as clients demand a more humane and less expensive method for sorting out the issues of the dissolution of their marriage. To provide that method, collaborative lawyers must make a paradigm shift in the way their view their professional roles. Of course, the attorney's duty of loyalty to his client is fundamental and remains unchanged. But attorneys must realize that they do not have to automatically assume that in all issues of life that include judicial recognition and confirmation of legal rights the legal perspective must be the dominant lens through which to view the issue. For instance, they can revise their views of some of the most basic presumptions of family law. They can ask themselves, for example, if it might be possible that paying more than guidelines child support might be something other than an act of generosity on the part of the payor spouse for which he should expect gratitude? Could it instead reflect a practical recognition of the fact that child support guidelines are some third parties' largely irrelevant opinion on the subject, and that for this parent, the assurance that the children will have an equally appropriate standard of living with each parent, and the sense of emotional security and self esteem that provides, is a far more valuable objective to pursue?

The paradigm shift involves accepting the possibility that at least some of the people in our society really do value honesty and integrity, dignity, privacy and discretion, more highly than silver and gold. If they ask, attorneys might find that there some individuals among their clientele who are smart enough to realize that a divorce may well end a marriage, but only an idiot would think it ends all the relationships that were created because of the marriage. They might take the time to discover just how important to their clients is the quality of the

relationships they have helped create and may enjoy. Pre-school open house or high school graduation: just how important to the child are these memories, and how important is it to the parent that they be happy ones? Should grandparental influence enrich precious young lives, or conflict them further? Weddings? Funerals? Christenings and baptisms, bar mitzvah and bat mitzvah? The parties may want to divorce, but the attorney might ask himself what responsibility do professionals involved in that process have to mitigate the future impact of that decision.

Trained collaborative lawyers grant themselves permission to give divorce clients the opportunity to achieve their legitimate goals in an environment that honors their paradigms, not the attorneys', and encourages them to address the vital issues in their lives within their chosen environment, if indeed that is their choice. Collaborative lawyers know that all the clients may need is information, and the lawyers' example, in their role as mentors, to give them the first clues as to how they are supposed to act in this strange and stressful time.

III. THE COLLABORATIVE LAW CLIENT

It is probably too early in the history of the process in Texas to expect clients to walk through the attorney's door asking for collaborative law. The process of educating the public about this new alternative to the traditional litigation model has just begun. Although there has already been some extremely positive press coverage, collaborative law is not yet a household word. Those who have been practicing in this area for awhile tell us that collaborative law clients self-select -- once they learn about the process. Mental health professionals can make a great contribution in this effort by learning themselves about the various routes that their own clients can take in pursuit of a divorce, so the client can seek out an attorney who is willing to approach their representation in the matter most suitable for their needs.

A. Explaining Collaborative Law

Collaborative law should be presented to the potential divorce client as part of an entire spectrum of approaches to resolving family law disputes. At one end of the spectrum is the "kitchen table" approach, in which the parties resolve, between themselves, all of the outstanding issues that must be addressed, and the attorney is used as the drafter of documents that will effectuate their agreements. If the client uses this approach, it is the attorney's responsibility to inform him (or her) of his (or her) rights under Texas law before they commit to any agreements with their spouse.

Next on the spectrum to be explained to the client is early intervention mediation, a model in which the spouses attend mediation without their attorneys in attendance, and communicate with their attorneys between sessions, if needed. Most jurisdictions have individuals who are trained in early intervention mediation, and the most good family lawyers know the ones who practice in their locality. Not all are attorneys. Some are therapists, some financial planners, some are extremely well trained and skillful, and some have virtually no training or qualifications.

Moving up the spectrum in attorney involvement is collaborative law, and it is best explained by contrasting it to the traditional litigation model.

1. The Attorney's Role

In the litigation model, the attorney is the gladiator, going into battle on behalf of the client
with the goal of "winning" as much as possible in the property division, or parenting rights, or support, or other such divorce "booty" as possible. In collaborative law, the attorney's role is that of counselor and guide, leading the client through the process while modeling behaviors and approaches that the client can emulate when problem-solving in the future. Although the attorney still advocates for the client as effectively as possible in the collaborative law process, there is no posturing, no threatening, and no deception utilized to reach the most satisfactory conclusion for the client.

2. Gathering Information

In the litigation model, "hiding the ball" is often the unstated goal, with elaborate rules governing a discovery (information gathering) process that often fails to produce the needed information for the client. In collaborative law, the attorneys assist the clients in determining what information both sides need in order to be comfortable beginning negotiations, and then instruct them to gather it all together as quickly and expeditiously as possible. No requests for information are denied, no desire for documents is treated as unreasonable. Each party's questions and concerns are respected and addressed in a reasonable and dignified atmosphere. And since gathering information is the core activity of the litigation process, if the parties are unable to settle in collaborative law, the parties can insure that very little of the time and money expended in the collaborative law information gathering process is wasted in the event the process fails.

3. Experts

Although it is not unheard of for parties using the litigation model to agree on using a neutral expert, it is not the norm. In collaborative law, it is not only the norm, it is one of the requirements of the process. It is often shocking to the appraisers and other experts called in to the collaborative process to learn that they are working for "the family" to assist them in evaluating their estate for the purpose of settlement, but they quickly adapt, and often will adjust their fees when they find that they will not be required to produce elaborate reports and face cross-examination regarding their opinions. Clients should be told what a "battle of the experts" can cost, and how it is often resolved
by a compromise that is often unrelated to market realities.

Mental health practitioners, when brought into the litigation process, often find themselves being asked to predict future behavior of the parties involved, or advocate the position of their patient in the guise of determining the "best interest of the child" – an uncomfortable role for any ethical therapist. In collaborative law, the mental health practitioner is a team member, assisting the couple and attorneys in determining a parenting plan that is

optimal for the developmental and emotional needs of the children, and addressing the children's special needs.

4. Privacy

One of the most attractive aspects of collaborative law for many clients is the fact that it is conducted in private, with the exception of the final "prove up" of the divorce. In the privacy of the attorneys' offices, the parties can discuss issues of importance to them and their children that they might prefer not to air in the public arena of the courtroom.

5. Pace

Thanks to a Supreme Court docketing order, family courts are under pressure to dispose of their cases as quickly as possible. Older attorneys can still recall the time when attorneys controlled the dockets by waiting to set cases until they were "ready", often giving the parties sufficient time to reconsider whether divorce is the best option, after all. The collaborative law statute has revived that ability for the parties and attorneys, moving only as quickly as the parties feel makes sense in their case, giving them time to emotionally deal with the divorce, or experiment with different periods of possession, or sell a home, or do whatever they feel needs to be done before they finalize their divorce. Interestingly, although the statute offers a two-year window for settlement, most of the collaborative law cases seem to be settling in three to eight months.

6. Future Relationships

It's almost a guarantee that an adversarial battle will further taint the already strained relationship of the parties. This is especially a problem when the parties are expected by the law or their own grudging agreements to work together in co-parenting and decision-making in the future. Collaborative law offers the parties an opportunity to learn interest-based negotiating techniques that will facilitate their ability to cooperate with each other in the future. Given the opportunity to craft more creative property and custodial arrangements than the adversarial process allows, the parties can address methods of resolving disputes as they arise that will keep them out of the court system and minimize the possibility of future conflicts.

7. Costs

Collaborative law is not bargain-basement law. The four-way sessions can last from two to four hours, and the average case involves at least three, and frequently four or more sessions. However, contrasted with highly-adversarial cases, costs still can be reasonable, but the client should not be misled to believe that costs will be minimal.

8. Flexibility

When parties are committed to settlement and litigation is not considered as an option, creativity and flexibility in problem-solving becomes the norm. In the litigation model, mediation in most jurisdictions is almost invariably conducted caucus style and is usually the only form of alternative dispute resolution utilized. In the collaborative law model, if the parties

feel that bringing in a third party would be helpful, then can utilize the services of a mediator for a session, or bring in an arbitrator or case evaluator to break the logjam of a knotty issue that is blocking settlement. Many attorneys bring in a family therapist to assist in dealing with the emotional issues that are interfering with communication, or hire a financial planner to assist in budgetary considerations for both parties. The possibilities are limited only by the imaginations of the parties and their commitment to settlement.

B. Helping the Client Sell Collaborative Law

Your belief in collaborative law and your enthusiasm for the process can convince the right client to opt into the program. But it takes "two to tango", as the old song goes. Unless your client has already told you that his or her spouse has already selected a trained collaborative lawyer and wants to participate in the collaborative process, your client must now be sent out to proselytize to the spouse. Although it is often possible after a case gets started in a traditional way to convert it to a collaborative law case, it's always preferable to start out that way, with a couple who are *both* committed to settling their differences with dignity, integrity and self-respect. Marriage and family therapists can help this process by recommending to clients that they both select attorneys who are trained in collaborative law. Collaborative lawyers, mental health professionals and financial advisors trained in collaborative law can be found on the website of the Collaborative Law Institute of Texas (www.collablawtexas.com). Mental health professionals who would like to be trained and work with collaborative lawyers are highly sought in the legal community.

C. Who is the Target Client?

Collaborative law is not appropriate for every client who walks through the door. According to the more experienced practitioners in other states, approximately 25% of divorce are appropriate for this model. It is fairly safe to say that collaborative law is usually not possible when there is serious substance abuse or family violence, although there are practitioners in the interdisciplinary model who report using collaborative law in cases where there has been physical abuse in the marriage.

So who is the target client? An informal poll among the more active practitioners reveals a high level of education, psychological sophistication and relative affluence in the typical collaborative law client. Surprisingly what seems not to be a problem are a high level of anger over the divorce, adultery or a spouse perceived as being "controlling." What is absolutely necessary for the process to be successful is a real commitment to settlement and a desire to make the divorce process as amicable as is possible under the circumstances. The welfare of the children and the parties' desire to successfully co-parent after divorce are often major considerations in making the decision to take the collaborative rather than adversarial route. It is imperative in presenting the concept of collaborative law to these clients to make sure that they are fully aware of both the advantages and disadvantages of the process, so they can make a reasoned decision.

IV. JOIN THE CLUB

At the moment, collaborative lawyers are enthusiastically working to spread the word that "there *is* a better way" for families to restructure after divorce. Their obvious allies in this crusade are the professionals who deal with the damage done to families in the adversarial process - the therapists who are faced with the task of helping the combatants heal their wounds and go on with their lives. We hope that the mental health professionals who are reading these words will take the time to educate themselves about collaborative law by visiting websites and reading the available literature, and then will join their colleagues in the legal profession who are dedicated to bringing peace and sanity to the divorce process by taking collaborative law training themselves and joining us in the effort.

Websites of Interest:
International Academy of Collaborative Professionals - www.collaborativepractice.com
Collaborative Divorce - www.collaborativedivorce.com
Renaissance Lawyer - www.renaissancelawyer.com
Collaborative Law Institute of Texas - www.collablawtexas.com

Houston Area Practice Groups:
Alliance of Collaborative Family Lawyers - www.civilizeddivorce.org
Collaborative Family Lawyers of Houston - www.collaborativelawyer.org

Publications

Alan Reid, SEEING LAW DIFFERENTLY: VIEW FROM A SPIRITUAL PATH, (Borderland 1992). Available at www.amazon.com for $10.95

Benjamin Sells, THE SOUL OF THE LAW, (Element Books 1996). Available at www.amazon.com for 14.95

Deborah Tannen, THE ARGUMENT CULTURE: STOPPING AMERICA'S WAR ON WORDS (Ballantine Books 1999). Available at www.amazon.com for $11.20

Pauline H. Tesler, COLLABORATIVE LAW ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION (ABA Publishing 2001). Available at www.ababooks.org for $119.95

Robert H. Mnookin et al., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES (2000). Available at www.amazon.com for $20.85

Roger Fisher et al., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (2d. ed Penguin Books 1991). Available at www.amazon.com for $11.20

Steven Keeva et al, TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN THE LEGAL LIFE (Booklist 1999). Available at www.amazon.com for $11.87

William Ury, GETTING PAST NO – NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION (1993). Available at www.amazon.com for $10.47

Sec. 6.603. COLLABORATIVE LAW.

(a) On a written agreement of the parties and their attorneys, a dissolution of marriage proceeding may be conducted under collaborative law procedures.

(b) Collaborative law is a procedure in which the parties and their counsel agree in writing to use their best efforts and make a good faith attempt to resolve their dissolution of marriage dispute on an agreed basis without resorting to judicial intervention except to have the court approve the settlement agreement, make the legal pronouncements, and sign the orders required by law to effectuate the agreement of the parties as the court determines appropriate. The parties' counsel may not serve as litigation counsel except to ask the court to approve the settlement agreement.

(c) A collaborative law agreement must include provisions for:

(1) full and candid exchange of information between the parties and their attorneys as necessary to make a proper evaluation of the case;

(2) suspending court intervention in the dispute while the parties are using collaborative law procedures;

(3) hiring experts, as jointly agreed, to be used in the procedure;

(4) withdrawal of all counsel involved in the collaborative law procedure if the collaborative law procedure does not result in settlement of the dispute; and

(5) other provisions as agreed to by the parties consistent with a good faith effort to collaboratively settle the matter.

(d) Notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule or law, a party is entitled to judgment on a collaborative law settlement agreement if the agreement:

(1) provides, in a prominently displayed statement that is boldfaced, capitalized, or underlined, that the agreement is not subject to revocation; and

(2) is signed by each party to the agreement and the attorney of each party.

(e) Subject to Subsection (g), a court that is notified 30 days before trial that the parties are using collaborative law procedures to attempt to settle a dispute may not, until a party notifies the court that the collaborative law procedures did not result in a settlement:

(1) set a hearing or trial in the case;

(2) impose discovery deadlines;

(3) require compliance with scheduling orders; or

(4) dismiss the case.

(f) The parties shall notify the court if the collaborative law procedures result in a settlement. If they do not, the parties shall file:

(1) a status report with the court not later than the 180th day after the date of the written agreement to use the procedures; and

(2) a status report on or before the first anniversary of the date of the written agreement to use the procedures, accompanied by a motion for continuance that the court shall grant if the status report indicates the desire of the parties to continue to use collaborative law procedures.

(g) If the collaborative law procedures do not result in a settlement on or before the second anniversary of the date that the suit was filed, the court may:

(1) set the suit for trial on the regular docket; or

(2) dismiss the suit without prejudice.

Sec. 153.0072. COLLABORATIVE LAW.

(a) On a written agreement of the parties and their attorneys, a suit affecting the parent-child relationship may be conducted under collaborative law procedures.

(b) Collaborative law is a procedure in which the parties and their counsel agree in writing to use their best efforts and make a good faith attempt to resolve the suit affecting the parent-child relationship on an agreed basis without resorting to judicial intervention except to have the court approve the settlement agreement, make the legal pronouncements, and sign the orders required by law to effectuate the agreement of the parties as the court determines appropriate. The parties' counsel may not serve as litigation counsel except to ask the court to approve the settlement agreement.

(c) A collaborative law agreement must include provisions for:

(1) full and candid exchange of information between the parties and their attorneys as necessary to make a proper evaluation of the case;

(2) suspending court intervention in the dispute while the parties are using collaborative law procedures;

(3) hiring experts, as jointly agreed, to be used in the procedure;

(4) withdrawal of all counsel involved in the collaborative law procedure if the collaborative law procedure does not result in settlement of the dispute; and

(5) other provisions as agreed to by the parties consistent with a good faith effort to collaboratively settle the matter.

(d) Notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule or law, a party is entitled to judgment on a collaborative law settlement agreement if the agreement:

(1) provides, in a prominently displayed statement that is boldfaced, capitalized, or underlined, that the agreement is not subject to revocation; and

(2) is signed by each party to the agreement and the attorney of each party.

(e) Subject to Subsection (g), a court that is notified 30 days before trial that the parties are using collaborative law procedures to attempt to settle a dispute may not, until a party notifies the court that the collaborative law procedures did not result in a settlement:

(1) set a hearing or trial in the case;

(2) impose discovery deadlines;

(3) require compliance with scheduling orders; or

(4) dismiss the case.

(f) The parties shall notify the court if the collaborative law procedures result in a settlement. If they do not, the parties shall file:

(1) a status report with the court not later than the 180th day after the date of the written agreement to use the procedures; and

(2) a status report on or before the first anniversary of the date of the written agreement to use the procedures, accompanied by a motion for continuance that the court shall grant if the status report indicates the desire of the parties to continue to use collaborative law procedures.

(g) If the collaborative law procedures do not result in a settlement on or before the second anniversary of the date that the suit was filed, the court may:

(1) set the suit for trial on the regular docket; or

(2) dismiss the suit without prejudice.