Barry Law Review

Volume 17
Issue 1 *Fall 2011*

Article 1

2011

Collaborative Law: A Better Way for Families

Alice L. Blackwell

COLLABORATIVE LAW: A BETTER WAY FOR FAMILIES

*Alice L. Blackwell**

In law schools across the country, we teach law students how to be lawyers. Law students are taught that the American system of justice functions best when two lawyers each zealously, yet ethically, represent their respective client's interest in a contested court proceeding, refereed by an impartial judge. Law students spend many classroom hours learning rules of evidence and procedure that apply to the cases they will eventually handle. They learn that the zealous use of the rules of evidence and procedure can procure an advantage for a client and make that client's case successful.

There has been a steady recognition throughout the last half of the twentieth century, that this traditional litigation model is not a good model for cases involving family members. When dissolutions of marriage, paternity actions, adoptions and the like are decided, the litigants must continue with a relationship after the case is concluded, especially when there are children involved. The traditional litigation model—where the parties do not communicate except through their lawyers, where the judge makes the decisions for the family, and where rules and procedures dictate conduct—is a poor model for communication regarding the children after the legal action is concluded. In fact, a hotly litigated case may cause damage to the litigants' relationships which is difficult, if not impossible, to repair after the case is concluded. Despite efforts to handle family cases in a manner different from other cases,[1] the vast majority of family law cases are still handled according to a traditional litigation model.

Family cases are some of the most difficult cases because they deal with the most basic human relationships and provoke the most emotional reaction of all legal disputes. There is no doubt that when the court system is tasked with dividing a family—its children's time, its assets and its debts—the emotional reactions of the parties can be extreme. It is widely acknowledged that there is a grieving process associated with divorce and separation, and that persons going through a dissolution or separation are impacted emotionally in a substantial way. These persons need emotional support as much as they need a legal resolution to their problems. Courts are designed to find facts and apply law correctly to the facts—courts do not provide emotional support and comfort to the parties.

Family law cases were not as prevalent in the early part of the twentieth century in American jurisprudence. Divorce was less common and the spouse

* Circuit Court Judge, Business Court Division, Ninth Judicial Circuit, Orange County, Florida. Judge Blackwell graduated from the University of South Carolina School of Law, has been a Circuit Court Judge since 1991, including seven years in the Domestic Division, and is an adjunct professor at Barry University, Dwayne O. Andreas School of Law, teaching Family Law.

1. *See, e.g., In re* Report of the Comm'n on Family Courts, 588 So. 2d 586 (Fla. 1991).

seeking divorce had to show fault on the part of the spouse being divorced. Beginning in the middle of the twentieth century the number of divorces began to rise significantly. Divorce rates peaked in 1980 and have been dropping slightly in the following years. In 1969, California adopted no-fault divorce[2] and by the end of the century almost every state in the United States had adopted some form of no-fault divorce. Spouses could procure a divorce without having to assign fault or even giving a substantial reason for the dissolution.

Notwithstanding the divorce rate, the majority of men and women aged 25–44 are currently married or cohabiting (i.e., in a sexual union with a partner of the opposite sex).[3] Over the past twenty years, there have been increases in the number of persons who have cohabitated (lived together with a sexual partner of the opposite sex).[4] Cohabitation is increasingly becoming the first co-residential union formed among young adults.[5] As a result of the growing prevalence of cohabitation, the number of children born to unmarried cohabiting parents has also increased.[6] Studies have found that persons who cohabit prior to marriage are more likely to have their marriages dissolve than those who did not cohabit before marriage.[7] These rising divorce rates, followed by the rise in cohabitation and children born to cohabitating couples and single-parent homes, has created huge pressures on family courts to deal with types of cases and an increase in the volume of cases in unprecedented numbers.

During the 1970s and 1980s, mediation developed as an alternative dispute resolution tool for court cases. Mediation involved an impartial, trained person who met with the litigants and their attorneys in a confidential mediation session. At the mediation session, each litigant could fully and completely discuss the facts of the case and his or her feelings about the case. Mediation was widely regarded as successful because it gave parties the opportunity to be heard and was seen as an opportunity for each litigant to vent his or her feelings about the family's situation. The belief about the success of mediation was that allowing parties to express their feelings about their family lessened the severity of those feelings and produced an atmosphere in the mediation that promoted resolution of the disputes. Courts embraced mediation, and it has become a standard part of a lawsuit, both in family and non-family cases. A separate designation as a certified family court mediator has been developed in the State of Florida, with the mediator receiving specialized instruction and training in working with families and their issues.

As successful as mediation has been for many family law cases, it has also failed families in many ways. The relationship to the mediator was temporary and, typically, the mediator spent only a few hours with the parties during the course of the mediation. Once the mediation was concluded, the mediator had no continuing

2. Cal. Family Law Act § 2310 (West 1969).
3. U.S. DEPT. OF HEALTH & HUMAN SERVS., MARRIAGE AND COHABITATION IN THE UNITED STATES: A STATISTICAL PORTRAIT BASED ON CYCLE 6 (2002) OF THE NATIONAL SURVEY OF FAMILY GROWTH 9 (Series 23 No. 28 2010).
4. *Id.* at 4.
5. *Id.* at 5.
6. *Id.*
7. *Id.*

relationship with the parties nor further involvement in the action. Mediation was still an adversarial process in that the parties negotiated from their own interest and the process was one of trying to reach a resolution based upon the relative positions of the parties. "Shadow" parties, those persons who influence the parties but are not a part of the lawsuit, could not be assessed or neutralized.[8]

In more recent years, collaborative law has developed as a dispute resolution process. Collaborative law or the collaborative law process is a guided resolution process where a team of professionals works with a couple to resolve their issues. When a couple chooses the collaborative process, they hire lawyers who have been specially trained in collaborative law. The lawyers select a mental health professional and a financial professional, each of whom is also collaboratively trained.[9] The mental health and financial professional are neutral experts, that is, they serve each of the parties. The parties and their professionals enter into a contract which has unique features. One feature of a collaborative law case is that the parties agree to share information, including financial information without the need for formal discovery processes. There is usually a confidentiality agreement. Most controversial is the agreement by the parties, the attorneys and the other professionals that, if the collaborative process breaks down and the parties resort to court proceedings, none of the professionals (including the attorneys) will be used for any purpose.

The collaborative case proceeds without being in the court system. No judge guides the case and there are no rules of evidence or procedure which govern. The meetings of the parties and their professionals are held privately, in a conference room or other meeting space, rather than in a public courtroom or hearing room with armed deputies or bailiffs. The parties, through their collaboration agreement, agree that they will fully cooperate with each other to obtain any needed information.

Through a series of meetings, the parties engage in problem solving. Each party's needs and the needs of children are considered and accommodated. Shadow parties are identified and their impact on the process is understood. By engaging in mutual problem solving, the parties develop strategies for conflict resolution and try to reach a complete resolution of the dispute. Before each meeting, the professionals (lawyers, mental health and financial) hold a pre-meeting to plan for the meetings and to set an agenda. After each meeting, the professionals debrief together in order to mutually process the events that occurred during the meeting.

During the meetings, the focus is on determining the needs and wishes of each party and then developing options and strategies to meet those needs. Collaborative professionals are trained to allow the parties themselves to brainstorm options, rather than having options presented by the professionals. Parties are not permitted

8. Shadow parties can be parents of litigants, new spouses, close friends, or others who influence the decisions a litigant makes regarding the current dispute.

9. The author acknowledges that there are several different models for a collaborative case. For purposes of this article, the one mental health/one financial professional model will be described.

in a collaborative case to negotiate in the traditional manner asking for more than the party wants and then negotiating down to an acceptable resolution. Rather, the discussions are interest-based, allowing each party to say what he or she really needs and then seeking to accommodate those needs, if possible.

While each party has his or her own lawyer, collaboratively-trained lawyers function quite differently in a collaborative case than in a traditionally litigated one. Rather than advocating solely for their own client's interest, the collaborative lawyer is fully engaged in assisting both clients to remain faithful to the collaboration agreement, especially to the promises of full disclosure and providing information as needed and requested.

One of the most useful features of the collaborative process is the inclusion of the mental health professional. He or she interviews each of the parties at the outset of the collaborative process to identify the emotional issues each party is experiencing. The mental health professional reports back to the team members so that the emotional issues of the parties can be addressed as well as the legal issues. The mental health professional assists the parties in their discussions with one another, identifies emotional issues that impact the collaborative process and can be instrumental in assisting the attorneys in communication as well. The mental health professional can also assist with child development milestones in the creation of a timesharing plan.

Much like the mental health professional, the financial professional gathers the information from the parties that he or she needs in order to assist the family in marshalling and dividing assets and debts. The financial professional identifies the financial needs of each party and the needs of children or others who depend upon the family for support. Either the mental health professional or the financial professional can recommend the hiring of other experts where needed in individual cases.

The collaborative process is uniquely suited to resolving family cases. First, the collaborative process teaches conflict resolution skills that the parties can apply after the case is concluded. The traditional litigation model is that of two opposing parties, represented by attorneys who zealously represent the interest of their respective clients before an impartial judge or jury. In family law, however, this approach polarizes the parties and teaches them to oppose each other and to turn to a third party for a decision when they cannot agree. This approach, while ideal for criminal cases, where the parties in interest will not have continuing relationship, is destructive to the trust and cooperation necessary for the parties to co-parent or cooperate with each other once their dispute is resolved. The collaborative process teaches people to identify issues and work toward a resolution that is mutually acceptable to each person and that respects the needs of all people who are impacted by the decision.

Secondly, the emotional needs of the parties can be met through use of the collaborative process. Each family law case is unique because each family is unique. Many cases share common issues of law and fact. Each case that comes before the family court also shares another common characteristic—the litigants, their children, and their extended families are going through a major emotional

upheaval as a result of the dissolution, paternity action or other family court case. Unlike traditional litigation, the collaborative process has built in the assistance of a mental health professional who not only can deal with emotional issues that inevitably arise in family cases, but also can anticipate and lessen the emotional impact of the case on the parties and their children. This feature of collaborative practice puts the emotional issues on equal footing with the legal issues. This is of great value since the emotional issues in family law cases are often the most difficult and persistent issues to resolve and the issues with which the court system is least equipped to handle.

Non-traditional families can be accommodated through collaborative practice, as well. Cohabiting couples, gay and lesbian couples, and other non-traditional families can access collaborative law without having to file an action in court. Many states, pursuant to the federal Defense of Marriage Act, refuse access to the courts for divorce, adoption, and other family law matters where couples fall into these non-traditional categories.[10] Because collaborative law techniques are not necessarily court-annexed, these parties can turn to collaborative techniques in order to resolve disputes which would not be allowed in most state courts.

Finally, the collaborative process places the control of parties' lives and the lives of their children where the control should be: in their own hands. Because the collaborative law process has the parties define problems and solve those problems themselves, the solutions are not imposed by a judge or other independent arbiter, but rather the parties themselves help to formulate the solutions. Not only does this ensure that the result is the best that can be reached for that family, but it should help with compliance by the parties with the final parenting plan or other final agreements. In a collaborative case, as in all cases, the final agreement of the parties must be submitted to the court for approval and the entry of a final judgment thereon. Where the court hears the case and decides the outcome, it is often true that the post-judgment proceedings can be as difficult, timely, and expensive as the pre-judgment ones. Issues of enforcement, modification, and contempt can be raised, and often are raised, in the months and years following the entry of a final judgment of dissolution or paternity by the court. In collaborative cases, however, it is much less likely that the parties will have to seek enforcement since they have participated in the final decisions and agreed to the outcomes.

Of all restorative justice and alternative dispute resolution techniques, the collaborative law process offers the most promise for producing a healthy outcome in contested family law cases. By dealing with family law cases as legal and emotional events, by teaching healthy conflict resolution skills, and by removing cases from a traditional litigation model, collaborative practice offers the best hope for preserving family relationships and lessening the stress and turmoil of family disputes.

10. Defense of Marriage Act, 110 Stat. 2419 (1996); *see also* 1 U.S.C. § 7 (1996); 28 U.S.C. § 1738C (1996).