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Moving Towards a Collaborative Family Law Paradigm: The Struggle to Bring Non-Litigious Divorce to the Masses

MOVING TOWARDS A COLLABORATIVE FAMILY LAW PARADIGM: THE STRUGGLE TO BRING NON-LITIGIOUS DIVORCE TO THE MASSES

Marsha B. Freeman[*]

INTRODUCTION

Despite changes in demographics re marriage, including the fact that fewer people are entering into marriage and more are having children outside of marriage than ever before,[1] United States divorce rates remain consistently high, and dissolution cases a large portion of a family law practice.[2] A large proportion of these dissolutions are procured through traditional litigation,[3] and the original litigation frequently leads to more post-dissolution, as restructured families attempt to refine original custody and support orders.[4]

Family law attorneys have long complained of the negative aspects of litigated divorce, finding it stressful and unpredictable for themselves, and expensive and punishing for their clients.[5] Many family law attorneys have become so disillusioned with their roles in the process that they aspire to change or leave the practice altogether.[6] Family law attorneys recognize that litigation is often an unsatisfactory and

[*] Professor of Law, Barry University School of Law.

[1] Elizabeth F. Beyer, A Pragmatic Look at Mediation and Collaborative Law as Alternatives to Family Law Litigation, 40 ST. MARY'S L.J. 303, 304 (2008).

[2] Id.

[3] Id.

[4] Id. at 304-05.

[5] *See* Susan Daicoff, Collaborative Law: *A New Tool for the Lawyer's Toolkit*, 20 U. Fla. J.L. & Pub. Pol'y 113, 115 (2009) (explaining that the process for divorce for everyone involved is best highlighted through many unflattering terms.).

[6] *See* Thurman w. Arnold III, *The Growing Role of Mediation and Collaborative Law in Family Law Cases*, 2012 WL 2166802 (July 2012), at *1 (describing the story of Stu Webb who has long been known as an official "founder" of collaborative law.).

ineffective model to resolve family disputes, especially divorce and its related issues.[7] The Divorce process has long been recognized to cause emotional trauma second only to the death of a spouse; stages of recovery are comparable to those experienced with the death of a loved one.[8] While enduring these immense emotional upheavals, Clients are nevertheless required to make some of the most important and complex parenting and financial decisions of their lives at what is likely to be some of their worst coping and reasoning abilities.[9] At the same time, children of the divorce need their parents' help in coping with the emotional and perhaps physical changes in their lives that result from changes in the family structure; however, these children are far less likely to get the emotional help needed when the parents are also trying to process these changes and fight a litigious battle.[10] Besides the difficulties of all going through the divorce litigation process, the simple fact is that even after all of these struggles the courts are woefully inadequate to appropriately respond to the emotional needs of the family members.[11] Numerous studies have documented the inability of the courts to satisfactorily resolve the emotional issues for both the children and parties of high-conflict litigated divorce.[12]

Family law cases in general, and particularly those involving dissolution, were long considered similar to any other kind of civil action, with the assumption that the best and most-just results are reached when the parties are represented by adversaries in front of a neutral decision-maker.[13] This assumption unfortunately failed to take into account the inherent differences between family cases and other civil actions: namely, the intensely personal nature of the action.[14] Family law by its very makeup deals with personal, emotional issues, far more so than the average contract claim.[15] While personal injury actions may

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[7] Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 318 (2004).
[8] Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 321 (2004).
[9] Id.
[10] Id. at 322.
[11] Id.
[12] Id.; *See generally* Judith S. Wallerstein and Julia Lewis, *The Long-Term Impact of Divorce on Children: A First Report from a 25-Year Study*, 36 FAM. & CONCILIATION COURTS REV. 368 (1998) (documenting the views of 130 children of divorce over a twenty-five year period, and determining the inability of both parties and the courts to satisfactorily resolve the emotional needs of the children, especially those children whose families utilized the litigation process of divorce.).
[13] Deborah Cantrell, *The Role of Equipoise in Family Law*, 14 J. L. & FAM. STUD. 63, 67 (2012).
[14] Id.
[15] Deborah Cantrell, *The Role of Equipoise in Family Law*, 14 J. L. & FAM. STUD. 63, 67 (2012).

instill similar emotion in the injured party, it is difficult to analogize even that to the intense sense of personal loss, suffering, financial fears and perhaps even humiliation frequently brought on by a divorce.[16] Even the theoretically objective issues raised by a divorce, including custody, visitation and support, are inextricably entwined with the emotional needs and fears of the parties and the children of the divorce.[17]

Even if the courts are theoretically capable of dealing with at least the objective resolution of these issues in the divorce, the courts are sorely ill equipped to adequately resolve the emotional needs underlying them.[18] Making a determination on custody based on objective standards frequently does little to alleviate the pain and fears accompanying the ruling for both the parties and the children.[19] Judges not only acknowledge a lack of training in the social sciences necessary to deal with the underlying trauma afflicting families of divorce, but are often also reluctant to even step into those roles, seeing themselves, rightly so, as neutral decision-makers than psychologists or social workers.[20]

As a result of the intense study of family law litigation and its deficiencies, other means of alternative dispute resolution (ADR), which is frequently used in other areas of law, began to be applied in the family law arena, particularly to divorce.[21] Mediation is one of the facets of ADR most frequently utilized, in some cases required, in family law cases.[22]

In mediation a neutral facilitator, often a lawyer or mental health professional, assists the parties in formulating their own issues,

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[16] Id.

[17] *See generally* Marsha B. Freeman, *Reconnecting the Family: A Need for Sensible Visitation Schedules for Children of Divorce*, 22 Whittier L. Rev. 779 (2001) (noting that the changing roles in the family cause tremendous upheaval for all involved.).

[18] Cantrell, *supra* note 13, at 67.

[19] Id.; *See also* Wallerstein and Lewis, *supra* note 12, at 368.

[20] *See* Marsha B. Freeman, *Love Means Always Having to Say You're Sorry: Applying the Realities of Therapeutic Jurisprudence to Family Law*, 17 UCLA WOMEN'S L.J. 215, 230 (2008) (discussing one of the definitive commentaries to the idea of moving towards a therapeutic approach to family law, especially dissolution, that came from Pauline H. Tessler in her article *Collaborative Law: A New paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL'Y AND L. 967 (1999). Stu Webb is credited with formally originating the concept of collaborative divorce in the early 1990's, however; Tessler's article took it to a widespread viewership and greatly spread the idea among divorce attorneys and other allied professionals.).

[21] Margaret B. Drew, *Collaboration and Coercion*, 24 HASTINGS WOMEN'S L.J. 79, 79-80 (2013).

[22] Id. *See also* FLA. STAT. 44.1011 (requiring mediation before the dissolution case comes before a Circuit Court judge for settlement.).

prioritizing them and reaching conclusions on them.[23] In many ways, this gives parties the ability to direct their own case and make their own decisions, hopefully preferable to a judge with no real knowledge or understanding of them or their children.[24] Since so many couples today go into dissolution proceedings *pro se*, without counsel, due to costs or other reasons[25], this is a generally lower cost method of resolution that also allows for more control by the parties.[26] Although positively received in many instances, mediation nevertheless has its own problems, particularly where parties are unrepresented by counsel and may not be cognizant nor strong enough to stand up to a domineering partner or even mediator.[27]

Mediation may not be the panacea, but litigated divorce has long been found to be not just anathema to the idea of truly resolving personal issues, but a frankly inadequate method on many practical levels. One commentator describes litigated divorce in the United States as "war by proxy."[28] Yet, while a number of ADR methods such as mediation have been utilized, the legal profession has been slow to move away from litigated divorce, despite knowing its severe limitations.[29]

Over the past couple of decades, the concept of collaborative law has grown as an attempt to overcome deficiencies of litigation in family law while still allowing the parties the ability to forge their own agreement on their own terms.[30] In its most formal configuration, collaborative law includes an agreement among the parties and attorneys that the case will be settled without resort to litigation, and encompasses a disqualification agreement that bars the attorneys from representing the parties in any subsequent litigation.[31] The purpose of the agreement is to

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[23] Marsha B. Freeman, Divorce Mediation: Sweeping Problems Under the Rug, Time to Clean House, 78 U. DET. MERCY L.REV. 67, 78-9 (2000).
[24] Id. at 68.
[25] Arnold, *supra* note 6, at 3.
[26] Freeman, *supra* note 23 at 73 (explaining that arbitration is basically a private form of litigation with less formality and cost. Arbitration is also another ADR method used less often in divorce cases, likely because those seeking an alternative to courts want more control over their own case.).
[27] Id.
[28] Constance Ahrons, The Good Divorce, Harper Collins Publishers, New York 1994, at 178 (likening litigated divorce to the hiring of gladiators (litigators) to battle for the parties. These warriors treat the spouses as angry enemies who above all need protection from their spouses, and promotes a system which destroys the potential for future cooperation.)). (cited in Terri Breer: has the Family Law System Reached a Tipping Point?, 51 MAR. ORANGE COUNTY (CAL.) LAWYER, March 2009, at 23.).
[29] Breer, *supra* note 28, at 23.
[30] Gary L. Voegele, Linda K. Wray and Ronald D. Ousky, *Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes*, 33 WM. MITCHELL L. REV. 971, 974 (2007).
[31] Id.

motivate all parties involved to settle in a collaborative setting; with the attorneys presumably not wanting to lose the case and the parties hopefully unwilling to start all over again with new counsel.[32]

Many proponents of collaborative law promote and follow this formal iteration, convinced that the motivations of the agreement are necessary to further its results. Others are willing to allow for variables, and in fact promote any and all alternatives to litigation, starting with pure negotiation and moving into mediation and cooperative law.[33] In many ways, this less formal non-litigation methodology may well help bring collaborative law to the masses, allowing for less costly alternatives than its more formal relation.

While the negative effects of litigated divorce, especially those in the high conflict realm, are felt over all socio-economic spectrums, there is no doubt that some of them are more likely to hit those in the lower classes even harder. Children who already will have a harder time climbing out of poverty or overcoming other financial hardships will be faced even more so with the necessity of the primary custodian parent, often mom, having to work harder and longer hours to make ends meet, or perhaps being out of the house far more than she previously was.[34] Children who were used to coming home after school may now be required to attend before and/or after school care, taking them away from their routines and their friends.[35] Non-custodial fathers may not have the time or inclination to be with their children, often resenting the money they now have to turn over for child support.[36] Children, who lose the guidance of their fathers, and in many cases mothers, often have a harder time dealing with life issues.[37] Children of divorce have traditionally been found to engage in delinquency more often, become pregnant as teenagers, marry younger, use more drugs, and divorce earlier and in higher numbers.[38] In these cases, the nuclear family is not just

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[32] Id.

[33] *See generally* Freeman, *supra* note 20 (describing cooperative law as allowing the possibility of judicial involvement, however with this possibility comes some restraint such as the judge's acceptance in a role of mover rather than the decision-maker.). *See also* Marsha B. Freeman & James D. Hauser, *Making Divorce Work: Teaching a Mental Health/Legal Paradigm to a Multidisciplinary Student Body*, 6 BARRY L. REV. 1, 5 (2006) (explaining that in a cooperative scenario, the parties may seek the aid of the court in resolving or helping with specific issues, but all agree that the final outcome should ideally be an amicable agreement between the parties. The judge in these cases sees his or her role as more of a facilitator, with the weight of the court behind him or her, rather than a traditional decision-maker.).

[34] Wallerstein & Lewis, *supra* note 19, at 368.

[35] Freeman, *supra* note 20, at 230.

[36] Wallerstein & Lewis, *supra* note 19, at 368.

[37] Id.

[38] Freeman, *supra* note 20, at 230.

reorganized, but very possibly destroyed by the sheer volume of worry and financial hardship faced by both parents and the lack of available energy and supervision for the children.[39]

Part II of this article will discuss the state of collaborative law today and the need for it over all classes of parties. It will also look at the barriers to instituting collaborative divorce based primarily on the cost factors incurred. Part III will discuss the ethical problems in both divorce litigation collaborative divorce, and will show the need to provide financially feasible collaborative alternatives for middle and lower income families. Part IV and the conclusion will present proposed methods of bringing collaborative family law into the mainstream.

II: COLLABORATIVE DIVORCE TODAY

While collaborative law began as a fairly small and sometimes informal movement in the United States in the 1980's and 90's, it has had an oftentimes far greater application in other nations, including England, Australia and Canada.[40] The Canadian government commissioned a well-documented three year study of the method in 2001,[41] and Canada and other nations still rely in far greater part on collaborative law in family cases than does the Unites States.[42] In other nations, as well as the United States, collaborative law has been used extensively in the areas of juvenile law, incorporating the concept of restorative justice, where offender and victim are often urged to work out the issues in a collaborative manner with the goal of benefitting both.[43] In the United States, collaborative family law has had a historical basis in interdisciplinary work, with one model, used in many areas, adding mental health professionals and financial analysts to the mix,[44] while

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[39] *See*; *e.g.*, Straley v. Frank, 585 So. 2d 384 (Fla. Dist. Ct. App. 1991), 650 So. 2d 628 (Fla. Dist. Ct. App. 1995); Rosen v. Rosen, 386 So. 2d 1268 (Fla. Dist. Ct. App. 1980), 528 So. 2d 42 (Fla. Dist. Ct. App. 1988), 576 So. 2d 308 (Fla. Dist. Ct. App. 1990), 696 So .2d 697 (Fla. Dist. Ct. App. 1997); Young v. Hector, 740 So. 2d 1153 (Fla. Dist. Ct. App. 1998), 833 So. 2d 791 (Fla. Dist. Ct. App. 2002); Sibley v. Sibley, 833 So. 2d 847 (Fla. Dist. Ct. App. 2002) (explaining that in many cases, the litigated divorce is literally 'never-ending,' at least until the children are grown. And, that in many cases the parents fight over custodial and support issues for years, until literally they don't exist any longer.).

[40] Voegele, *supra* note 30, at 975.

[41] Id.

[42] Freeman, supra note 20, at 230. See also Julie Macfarlane, Experiences of Collaborative Law: Preliminary Results from The Collaborative Lawyering Research Project, 2004 J. DISP. RESOL. 179, 180 (2004).

[43] *See generally* Deborah J. Chase & Peggy Fulton Hora, *Drug Court Judges Get to Color Outside the Lines*, 37 CT. REV. 12, 12 (Spring 2000).

[44] Voegele, *supra* note 30, at 976.

others, based on the original Minnesota model, rely mainly on the attorneys-only format.[45]

The reasons for the spread of collaborative family law have their roots in lawyer dissatisfaction as well as an ever-expanding understanding of the negative impact of litigation in family law cases, especially dissolution.[46] Family court judges, as well, are frustrated by the inability of the court to make a satisfactory impact on the emotional needs of the family, recognizing that better outcomes result from agreement reached between the parties, outside of the judicial litigation process.[47] In many cases, this can be achieved through nothing more than planned negotiation between the parties, or the parties plus attorneys. It is only where greater conflict occurs that cases move forward in litigation. It is these perennially high conflict cases that have spurred the movement towards the use of collaborative family law as an alternative to the failures of litigation.

Although the use of methods of collaborative dissolution has expanded dramatically over the past couple of decades,[48] one major

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[45] Id.

[46] See generally Janet Weinstein, And Never the Twain Shall Meet: The Best Interest of the Children and the Adversarial System, 52 U. MIAMI L. REV. 79 (1997).

[47] Drew, *supra* note 21, at 79. *See also* Freeman, *supra* note 20, at 230 (arguing for an expansion beyond the precepts of collaborative family law to that of a therapeutic jurisprudence approach in family law cases. And, also that while the collaborative approach clearly pushes the parties to participate in a more civilized and hopefully amicable manner, therapeutic jurisprudence takes the proceedings beyond conduct to include a greater attempt to understand and address the underlying emotional issues of the parties. Also, that the purpose of the article was not to attempt to delve into therapeutic jurisprudence, and instead focuses on moving the collaborative concept from merely an alternative to litigation for the wealthier to more affordability for lower income and even indigent clients.

And last, that while a number of states have taken steps to promote or even require aspects of collaborative divorce (Beyer, supra note 1, at 306-07); Nationally, the Uniform Law Commissions adopted the Uniform Collaborative Law Act (UCLA) in 2009. The Act provides a number of provisions and recommendations, and urges adoption by all the states. To date, while many of the states have taken up the Act and promoted a number of its articles, only have formally adopted it in whole or in part.)); Some states have adopted collaborative family law statutes aside from the UCLA, including Texas and California (see California Family code 2013(b), calling for all parties and allied professionals hired by them to attempt to resolve the case "on an agreed basis" but without setting forth specific protocols for doing so. A number of the California Superior Courts have enacted rules designed to provide more substance to the statute. See Strategies for Family Law in California, 2012 Edition, Leading Lawyers on Understanding developments in California Family Law; See also Frederick J. Glassman, *The State of Collaborative Law: Past, Present and Future*, 2012 WL 2166808 (July 1 2012).

barrier, other than simply changing the mindset of those involved in divorce litigation, remains. That is the cost of the process itself. While collaborative divorce is promoted as a cost efficient alternative to litigated divorce, the reality is not always apparent. While collaborative divorce with a "small C", as this author likes to call it, can be as simple as negotiated settlement or perhaps include fairly low cost mediation, the more formal iteration of collaborative divorce, or that with a "Capital C", involves the aforementioned formal agreements and generally comprises a panel of experts in addition to the parties and lawyers, said panel consisting of a mental health professional, a financial expert, and often a coach, and sometimes adding in children's therapists as well.[49] While there are set fees here instead of hourly billing, and the result should theoretically be less costly than a drawn-out litigation battle, it is speculative how much is really saved. A 'typical' cost of a litigated divorce, combined, has been estimated to be almost $75,000 for both parties, combined.[50] While the cost of the panel may be lower, it is still unlikely to be within the means of most middle-class families, let alone those in the lower economic classes. And while the litigated divorce will likely be drawn out, a negative factor in many ways, its costs will also be derived over time, not all at once, which could actually be a help in meeting them. The collaborative divorce, however, with its emotionally preferred shorter time span, requires payment in a short time frame as well, perhaps making it even more financially inaccessible than litigation for those with fairly limited means.[51]

Of course, for those without extensive resources needed to pay these kinds of fees, both of these types of dissolution may be beyond them. *Pro se* divorces are said to make up approximately 70-80% of filings in many jurisdictions,[52] no doubt in many cases due to the desire not to have traditional litigation make the emotional situation worse, but also undoubtedly due to the staggering costs involved. But because lower income families cannot afford traditional litigation or collaborative divorce, doesn't mean they wouldn't and shouldn't benefit greatly from it. Their children will not only have serious resentments and emotional strife from the divorce, but are also more likely to suffer the consequences outlined above.

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[49] Daicoff, *supra* note 5, at 117-118.
[50] Beyer, *supra* note 1, at 305.
[51] There is not as much data on the costs of collaborative divorce, since the practice is more varied and widespread. Estimates however range from $5000-$10000 up *per panel member*, depending on their level of experience and expertise in the field, which can drive the costs upwards of $50,000. (Author's own knowledge.).
[52] Glassman, *infra* note 72, at *1 .

Collaborative law is founded on a problem-solving, rather than adversarial, approach.[53] It allows the parties to determine their needs and interests, rather than having a court define and decide them.[54] Rather than the court responding to openly adversarial positions, collaborative law encourages the parties to deal with each other in a more respectful way, keeping in mind their goals of putting their children and their futures first.[55]

Rather than courts superimposing their view of a functioning family, the collaborative divorce allows the parents to recognize the different interactions of the children with the parents and define for themselves the preferred changes in the family structure.[56] The child's own 'microsystem,'[57] consisting of their family unit and the interactions within it, will best define the child's development. The parents, rather than a stranger court accustomed to deciding adversarial issues, are best able and allowed to determine their children's present and future needs.[58] Research shows that marriages ending in more amicable divorce are likely to have less negative, possibly even positive or at least neutral, effects on the children.[59] Parties going through a more civil collaborative divorce, defining issues and making decisions for themselves, are more likely to learn how to deal with each other better in the future and inflict less harm on their children while doing so.[60]

III: THE ETHICAL PRACTICE OF FAMILY LAW MANDATES A MOVE TO COLLABORATIVE DIVORCE FOR ALL

At present costs, collaborative divorce is for all practical purposes a substitute for litigated divorce only for those with the resources to pay for either one. It is not, for the most part, accessible to those with more modest means. Theoretically, couples with limited

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[53] Tessler, *supra* note 20, at 967.
[54] Barbara A. Babb, An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective, 72 IND. L.J. 775, 775 (1997).
[55] *See generally* CONF. OF STATE COURT ADM'RS, POSITION PAPER ON EFFECTIVE MANAGEMENT OF FAMILY LAW CASES (2002), ttp://cosca.ncsc.dni.us/WhitePapers/EffectiveMgmtFamlyLaw.pdf. (last visited Sept. 6, 2013).
[56] Babb, *supra* note 119, at 788 (citing to studies by Professor Urie Bronfenbrenner on the ecology of human development); see also Freeman, *supra* note 20, at 230.
[57] Id. at 789.
[58] Id. at 790-91.
[59] Victoria Clayton, *Divorce Doesn't Have to Destroy the Kids*, MSNBC, Dec. 11, 2007, http://msnbc.msn.com/id/21474430/ (last visited Sept. 6, 2013) (citing research done by nonprofit organizations).
[60] Id.

income are no more likely to be able to afford collaborative divorce than they could a costly litigated one. If they litigate, they are more apt to opt for a *pro se* divorce rather than be represented by counsel, a disadvantage in a litigated setting in many cases, especially if only one of them is unable to afford an attorney. Yet they are unlikely to be able to take advantage of the collaborative process as an alternative, as it too carries a hefty price tag. Yet costly or not, lower income families have just as much need, perhaps in some ways more, for collaborative divorce than their wealthier neighbors.

As noted, children of divorce have generally higher rates of teen drug use, pregnancy, marriage, and delinquency.[61] Children of divorce from lower income families are already likely struggling with less supervision and financial issues even before the divorce, and will be affected that much more by the kinds of stress and changes taking place during and after it. Lower income families have just as much need for, and deserve the ability to access, collaborative divorce as their higher income counterparts. Since society as a whole is affected by these types of issues[62], it is incumbent upon us to make the collaborative process as accessible as possible for those in the lower income brackets, as it is for those in the higher.

While the advantages to clients of all incomes are fairly obvious, lawyers representing parties in a collaborative divorce setting are likely to recognize possible ethical concerns in the practice. And while some of these concerns may be dealt with more easily in cases involving private, higher income parties, there may be unique concerns when translating these practices to lower income forums, such a Legal Aid office.

The Colorado Bar Association, for instance, took aim at the confidentiality arrangements incorporated into the collaborative divorce practice, finding that they impede a lawyer's obligation to provide undivided loyalty to his/her client.[63] The ABA Ethics Committee responded by recognizing the benefits inherent in the collaborative process as long as the clients are fully informed of its requirements.[64]

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[61] Freeman, *supra* note 20, at 230.

[62] When lower income children get pregnant, become delinquent, use drugs, it is frequently going to be the state footing the bills in terms of legal, judicial and medical needs, rather than private funds. (Author's own knowledge.).

[63] Model Code of Prof'l Responsibility Canon 7 (1980).

[64] *See* American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 07-477 (August 9, 2007) (explaining that the ABA approved the use of collaborative law agreements as long as the client is sufficiently advised of the benefits and risks of the process, and that the lawyer cannot continue with the case if the parties proceed to litigation.). *See also* Freeman, *supra* note 20, at 230 (describing the ABA's attempts to protect the professional integrity of the legal process while advancing the collaborative movement.).

While this theoretical problem may be satisfied by the simple fact of private representation of both parties, in a lower income setting that may not be as feasible, and there may well be thoughts as to whether it is feasible to provide a collaborative setting without the costs of two attorneys. That alone would represent a major concern for professional ethics.[65]

In another attempt to define new ways to deal with difficult issues re divorce representation, the American Academy of Matrimonial Lawyers[66] produced "The Bounds of Advocacy,"[67] a collection of rules termed 'aspirational' since they have not yet been incorporated into the Model Rules of Professional Responsibility. These aspirational rules attempt to recognize and educate lawyers about both the special place of attorneys in family law as well as recognize needed changes in the field. The Bounds recognizes these needed changes for both parties and lawyers, promoting the ability of family law attorneys to practice in less confrontational, more holistic setting, envisioning a therapeutic, even multidisciplinary, system that will not jeopardizing careers.[68] 'Zealous' representation in the family law setting is redefined to one harmonious with the goals of a collaborative, or even therapeutic result, while still protecting the legal rights and obligations of the clients.[69]

While some states have adopted the Bounds as an aspirational tool for family law attorneys,[70] lawyers may well remain troubled that following such aspirational goals could find them in noncompliance with the adopted Rules. States must find a way to protect attorneys while also moving toward a problem-solving model of family law. The American Bar Association has recognized this need in endorsing the confidentiality requirements of collaborative practice.[71] Finding ways to move toward

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[65] MODEL CODE OF PROF'L RESPONSIBILITY Canon 6 (1980) (explaining that another tenet of the rules is the admonition to forego conflicts of interest inherent in dual representation.).

[66] *See generally* The American Academy of Matrimonial Lawyers, http://www.aaml.org/about-aaml. (The American Academy of Matrimonial Lawyers was founded in 1962.).

[67] Id. "The Bounds of Advocacy is an aspirational set of rules which recognizes the particular role of the family law attorney. While not yet required in any state, it does seek to guide family lawyers in their representation of clients, especially recognizing the need for collaborative settings."

[68] Id.

[69] Id.

[70] Florida has promoted the idea of the Bounds as an appropriate way to deal with issues of representation in all areas of family law. (Author's own knowledge.).

[71] *See* MODEL CODE OF PROF'L RESPONSIBILITY (1980). *See also* American Bar Association MODEL RULES OF PROF'L CONDUCT (2002 ed.) (Preamble, Scope and Terminology: 3 In addition to these representational functions, a lawyer may serve as a

such family law practices is a necessity if we are to ensure the best solutions for all families, including those in the lower socioeconomic classes. This in turn will hopefully help to stem the negative statistics for children of these divorces.

IV. TALK IS CHEAP, DIVORCE IS NOT

With at least theoretical choices available today to obtain a divorce using either litigious or non-litigious means, many believe family law attorneys have at least an ethical obligation to be proactive in advising prospective clients of these differing avenues.[72]

Courthouses are still often seen as extensive waiting rooms, with litigants and oftentimes professional witnesses spending hours waiting (and running up bills).[73] That may well be because even where clients may be aware of alternatives to litigation, there are not necessarily trained and willing attorneys ready to take their cases- at least not in ways that are affordable to most people. A significant number of those litigants waiting in the courthouse will be *pro se*, perhaps harming themselves professionally but saving money by necessity. Many might well be interested or even anxious to utilize a collaborative system instead, but do not have the resources to do so- which as noted can cost

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third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or *See*, ***e.g.***, Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who law or to are not active in the practice of practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. *See* Rule 8.4. Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral; a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.)).

[72] See Frederick J. Glassman, Strategies for Family Law in California, 2012 Edition: Leading Lawyers on Understanding Developments in California Family Law; The State of Collaborative Law: Past, Present and Future, 2012 WL 2166808 (July 1 2012) (explaining that in actuality, the fact is that many family law attorneys are either unwilling or untrained to participate in collaborative proceedings. And, that there are areas where those trained in the practice will only work with other attorneys also formally trained, especially in those cases using the formal collaborative agreements. Also, that it limits the number of lawyers available for collaborative law and makes those litigators untrained in it loath to send their clients off to one who is.); see generally Marsha B. Freeman, Comparing Philosophies and Practices of Family Law Between the United States and Other Nations: The Flintstones vs. the Jetsons, 13 CHAP. L. REV. 249 (2010) (noting the far greater strides other nations have made in moving towards a collaborative family law paradigm.).

[73] Breer, *supra* note 28, at 23.

close to a professionally led litigated divorce with the additional downside of the fees being due up front.[74]

Collaborative family law, along with other ADR formats, has been seen as a positive step for resolving family disputes for a number of years.[75] Parties are expected to remain in charge of both the direction of the case and its settlement.[76] They are given an opportunity to eschew costly depositions and formal discovery, as well as make the final determinations about the futures of them and their children.[77] They can avoid the costly and lengthy logjam in the family court system,[78] knowing that they have the opportunity to keep control over their family's future. Lawyers, as well, see this as a way to avoid working in a constant state of crisis in their clients' lives, and instead are able to share the process, even empower the clients to take much of the responsibility.[79] But the fact remains that collaborative family law, in most cases, remains on a par, if not equal, to the costs of an attorney-led litigated divorce.[80]

The question then becomes: if a collaborative divorce will save time, energy and cost, and will hopefully help to diffuse or reduce the emotional toll of the divorce process, if not the divorce itself, how do we make this available to those who may well need it as much as or even more than others, but who can least afford it in its present state? Large numbers of middle and lower income parties who litigate their divorces opt for *pro se* representation, at least for one of the parties, not because they likely see themselves as more capable than an attorney, or even because they long to try the case themselves, but simply due to the extensive costs involved in hiring attorneys.[81] With the excessive costs of

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[74] Id.

[75] The author notes that Webb and Tessler along with other commentators have been promoting the use of collaborative law and other non-litigious divorce processes since the early 1990's, although the practice likely was around before that, just not recognized formally.

[76] Frederick J. Glassman, A Way to Resolve with Respect: Exploring the Benefits and Opportunities of Collaborative Family Law in California, 2010 WL 1976215 (May 2010).

[77] Id.

[78] Id. at 3 (describing that there are over half a million new family court filings and petitions in the California court system each year.).

[79] Strickland, *supra* note 73, at 980. See also Nanci A. Smith, *Empowering Clients with Collaborative Family Law*, 2011 WL 587388 (Feb. 2011).

[80] Beyer, *supra* notes 1, 50, at 305.

[81] When this author was in practice it was not unusual for parties to agree that one will hire an attorney and the other will be *pro se*, in the hope that having at least one attorney will guide them through the process better. Today, far more opt for both parties to represent themselves, with numbers ranging as high as 70-80 percent of litigants being *pro se*. There is little doubt that the spiraling costs of represented litigated divorce in addition to the severe economic downtown of the last few years has added to this number, and will likely continue to do so for some time to come.

even a 'typical' litigated divorce even middle income litigants are hard-pressed to be able to afford counsel.

It is likely many of these litigants would like to use a non-litigious, less costly route to divorce. Yet they are literally caught between a rock and a hard place. If they litigate, they can control the costs dramatically by eschewing lawyers in total. This still entails, unfortunately, the rest of the negative aspects of litigated divorce, most noticeably having to take an adversarial stand and try to move forward from there, and without counsel.[82] It does, however, also give them the protections afforded by a court overseeing the case and making decisions where necessary.[83] If the parties desire a non-litigious route, however, they find themselves in the unique position of having few places to turn. Mediation will cost far less generally than litigation[84], but an unrepresented mediation may not be easily resolved or may take more time, equaling more costs, and can lead to other problems based on the ability of each of the parties to adequately participate.[85] Lower income parties are just as aware of the negative effects of litigated divorce, from cost and time factors to the emotional toll taken on themselves and their children.[86] Those who want to try the collaborative route, trying specifically to avoid these pitfalls and eager to do the right thing for themselves and especially for their children, are likely to find great difficulty in finding the right route.

Because the formal collaborative agreement requires representation, lower income parties are in the uncompromising position of not even being able to take advantage of the process vast numbers of attorneys, clients and the courts consider far preferable for divorce dissolution.[87] Unable to represent themselves in any type of formal collaborative agreement, they are trapped with having to either hope they can reach agreement through informal negotiation between themselves, or avail themselves of the court process through *pro se* representation. Since many will likely need this protective cloak of the court, they will

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[82] The mere starting of a litigated action can be the cause of friction between the parties, as the moving party will need to lay out an offense in the motion and the other will be forced automatically to defend it. (Authors own Knowledge).
[83] Freeman, *supra* note 20, at 230.
[84] Elizabeth Kruse, ADR, Technology, and New Court Rules-Family Law Trends for the Twenty-First Century, 21 J. AM. ACAD. MATRIM. LAW 207, 208 (2008).
[85] *See generally* Marsha B. Freeman, *Divorce Mediation: Sweeping Conflicts Under the Rug, time to Clean House*, MCELROY LECTURE SERIES, 78 UNIV. DET. MERCY L. R. 67 (2000) (discussing a number of the problems inherent in *pro se* mediation, including that of the 'uneven playing field.').
[86] Weinstein, supra note 46, at 79.
[87] Kruse, *supra* note 84, at 211.

often be forced back into the very litigation system they would like to escape and which would be a far better route for their family.

Knowing that the collaborative process is fundamentally better for divorce litigants, the question remains how to structure a collaborative family law system that will allow lower income clients to participate. Until that happens, there is little chance of collaborative family law becoming the accepted paradigm for divorce; the vast majority of parties will simply have no means to access it and will remain by default in more costly and emotionally damaging litigation.

Although most middle income parties likely will not have access to legal aid representation due to being unable to meet the extremely low income threshold for representation, many lower income parties seek help from these state and federal funded programs.[88] Legal aid services, conceptualized in the latter part of the twentieth century by a Congress far more attuned to providing help for the poor, has been gutted on both the state and federal levels over the last few decades,[89] and their local offices have had to downside dramatically. In addition, these sources of funding are needed to provide all types of legal services to the poor, beginning with constitutionally mandated defense of counsel.[90] Family law cases, like other civil actions, do not have the same priority, and are among the first to be cut where necessary. Yet family law services remain the most in demand.[91]

There are more than just idealistic ideals of a better system for family law access for the poor. Lawyers have a long-standing dedication to public service, both to provide services to those who cannot afford them and to support and improve laws and legal institutions.[92] This last

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[88] Louise G. Trubek, Context and Collaboration: Family Law Innovation and Professional Autonomy, Conference on the Delivery of Legal Services to Low-Income Persons: Professional and Ethical Issues, 67 FORD. L. REV. 2533, 2533 (1999).

[89] Id. (explaining that the vast majority of these services are provided through the Legal Services Corporation (LSC), which has seen its funding drastically cut by Congress in recent years. Also, that another source of funding for poor clients is Interest on Lawyer Trust Accounts (IOLTA) funded by required attorney dues in most states. And, that this funding cannot make up for the drastic cutbacks in LSC. Further, that attorney pro bono services are another method of providing services to the poor, and theoretically an attorney could provide the legal representation part for a client on the collaborative panel. And, that in essence to truly make this accessible to lower income parties, both lawyers would theoretically have to provide pro bono services, a not altogether unheard of idea. Last, that while most states make pro bono representation optional, a few are moving towards a mandatory requirement.)).

[90] *See* U.S. CONST. AMEND. VII (providing that there is a right to counsel for certain classes of crimes and potential sentences; The United States Supreme Court has interpreted this as a right to counsel to those unable to provide for themselves.).

[91] Trubek, *supra* note 88, at 2533-2534.

[92] Id. at 2534.

duty directly contradicts the inability of lower income families to access what is acknowledged by many in the legal profession, including the American Bar Association, to be the methodology of choice in dissolution cases. Instead of keeping collaborative processes inaccessible due to high fees and mandatory panels, there needs to be a shift to a more accessible framework for middle and lower income parties. Attorney organizations, social service agencies and other organizations dedicated to providing legal access for the poor have made inroads in developing new programs to try to meet these needs.[93]

Law schools, too, have joined in the effort to provide legal services to the poor; the vast majority if not all law schools today require some hourly commitment for pro bono services.[94] Clinical and externship programs exist in virtually all law schools for the purpose of providing legal help for indigent clients.[95] The idea that requiring pro bono hours in law school will carry over to practice seems to hold forth; well over 100,000 lawyers participate in pro bono programs sponsored by their Bar organizations and LSC.[96]

Such programs have engendered thoughts on ways to bring legal programs such as collaborative family law to lower income clients. One such avenue of representation is the clinics and externships that exist within virtually all law schools.[97] The University of Virginia created a Family Alternative Dispute Resolution Clinic ("the Family ADR Clinic" or "clinic") to teach mediation and collaborative family law methods to law students.[98] Students in the clinic learn mediation and collaborative law skills, the idea being to train them to move from an adversarial mindset to a collaborative one.[99]

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[93] Id. at 2535.

[94] The author's law school, Barry University School of Law, requires students to complete forty hours of pro bono work over the course of the students' legal education; however, many complete far more. The author's law school also requires students to complete twelve hours of professional responsibility hours as a prerequisite for graduation. In this respect, the reported hours are well above and beyond the traditional Professional Responsibility doctrinal course(s).

[95] Trubek, at 2546.

[96] Id.

[97] The author's law school, Barry University School of Law, aspires to develop an externship program whereby students are placed in collaborative law firms, and learn all the collaborative processes from the attorneys. The author's law school also aspires to create a Collaborative Family Law Clinic similar to the one discussed throughout this article.

[98] Kimberly C. Emery, Assisting Indigent Families in Conflict: A Pro Bono Test Drive for a Family
Alternative Dispute Resolution (ADR) Clinic, 34 WASH. U. J.L. & POL'Y 239 (2010).

[99] Id. at 239-40 (explaining that since attorneys frequently enter negotiations with an adversarial mentality, the hope is to train future attorneys as students to move to a non-adversarial mindset.).

The collaborative aspects of this clinic included the disqualification agreement required in formal collaborative family law settings. The idea is to allow the students to look at the process strictly from a settlement standpoint; utilizing this formal agreement takes away any reason to think about other strategies.[100] One of the drawbacks to the clinic setting however was the inability to bring the other professionals typically found on the collaborative family law panel into the process; instead the clinic relied on a lawyer-lawyer approach, similar in real practice to a negotiated settlement but without the ability to proceed to litigation.[101]

While the idea of providing low income collaborative law representation through a law school clinic setting seems ideal, in reality it has faced challenges. Because collaborative family law, unlike mediation, is not required in Virginia, the school has had a difficult time recruiting enough low income families to participate, and more extensive outreach is deemed necessary to educate the public to its benefits and availability.[102]

It has also been a challenge to channel the immediacy needs of lower income families to the more formal process of the collaborative method, where the parties have the bulk of the responsibility for determining the issues and providing the settlement choices.[103]

V. CONCLUSION

While it is disappointing that the clinic experiment described above has not sufficiently drawn in lower income parties to its collaborative family law trial, this type of program remains one of the best ways to expand the methodology to lower income parties. Programs that pair attorney, mental health and even financial expert pro bono hours, as well as law school clinical settings, offer an opportunity to provide such services that are simply not available through public funding.[104] Until and unless we are able to truly expand to these groups,

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[100] Id. at 243.

[101] Id. at 244. (explaining that one of the problems with pro bono or low income panels is that: one would have to find not only attorneys, but mental health and financial professionals willing to provide the services. And, that the school did attempt to draw in the Psychology department to become part of the "team," but has not made sufficient headway in that yet.).

[102] Kimberly C. Emery, Assisting Indigent Families in Conflict: A Pro Bono Test Drive for a Family Alternative Dispute Resolution (ADR) Clinic, 34 WASH. U. J.L. & POL'Y 239, 257-58 (2010).

[103] Id. at 258.

[104] Id. (explaining that although the financial expert is considered an integral part of the collaborative family law panel, it is debatable whether it is needed in all cases, especially those involving lower income participants. And, that this is way to save money, by

and thereby provide collaborative family law services to the masses, litigation, with all its negative qualities for family law cases, will remain the default mechanism. It is imperative that we move towards a new collaborative law paradigm to bring all our families the ability to better resolve their conflicts and help their members.

allowing parties to determine the actual need for all the members of the panel, although the financial expert would be the most logical to be an option.).