



COLLABORATIVE LAW

THE BEST PROCESS FOR MINIMIZING DAMAGE TO DIVORCING FAMILIES (AND MAYBE ONE DAY ANY CASE WHERE FAMILY IS INVOLVED).

WRITTEN BY CINDI BARELA GRAHAM

Some people refer to collaborative law as the “touchy feely” type of divorce dispute resolution, but perhaps instead it should be referred to as the process most focused on minimizing the damage caused by litigation. And while it has not gotten much traction in non-family law cases even though it could be used in many practices dealing with families such as probate, estates, and guardianships, the Texas Family Code has an entire chapter, Chapter 15, dedicated to this alternative dispute resolution process that is unlike mediation, mini-trials, moderated settlement conferences, summary jury trials, or arbitrations.

The Texas Civil Practice and Remedies Code § 154.002 states that it is the policy of this state “to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship, including the mediation of issues involving conservatorship, possession, and support of children, and the early settlement of pending litigation through voluntary settlement procedures.”¹

Similarly, the Texas Family Code states: “It is the policy of this state to encourage the peaceable resolution of disputes, with special consideration given to the disputes involving the parent-child relationship, including disputes involving the conservatorship of, possession of or access to, and support of a child, and the early settlement of pending litigation through voluntary settlement procedures.”² This section of the Texas Family Code, much like the entirety of Chapter 15, was modeled on the Uniform Collaborative Family Law Act, which has been adopted by 22 U.S. states.³

So how does it work? Here’s the reader’s digest version of how most Texas collaborative practitioners in the family law arena practice it. This will not discuss the specificities of Texas Family Code Chapter 15 as this is just a brief explanation.

And while the Texas Family Code does not require specialized training for the practice of collaborative law process, it is highly advised that lawyers get trained in this process. The Collaborative Divorce Texas organization conducts an annual training each fall and the State Bar of Texas sponsors an annual CLE course each spring.

After determining whether a client is a likely candidate for the collaborative process (domestic violence issues are not appropriate for this process), the collaborative attorney will explain the process to the client. It is a process that does not involve any court hearings or trials by agreement. All negotiations are conducted in private meetings. That explanation will include advice to the client that the opposing party will need to find an attorney trained in the collaborative process. Lawyers not trained in this process have a very difficult time transitioning from a litigious mindset to a problem solving and team approach to cases. Assuming the opposing party agrees to this process, the clients and the collaborative attorneys select a collaboratively trained mental health professional and a collaboratively trained financial expert. Both of these professionals/experts (often referred to as the “neutrals” in the process) maintain neutrality throughout this process and serve together with the attorneys as a professional team. When you include the parties, the entire group is considered the “team.”

Both parties meet with the neutrals separately to help the parties define the party’s goals and interests. This may be considered the “touchy feely” part, but in actuality, it is the narrowing of issues portion of the process. The mental health professional discusses family dynamics and helps the party prioritize the party’s goals and interests. The mental health professional will also meet with the parties separately and discuss the issues of concern to each party. If there are children, the mental health professional meets with the parties to discover parenting styles and histories. If special issues arise with either party, or with regard to the children, the mental health professional can also address those issues with the parties or refer the parties to resources that can help the party best handle the issues.

The financial neutral helps the parties gather financial information, works with the parties on budgets if needed, and assists the parties in arriving at an inventory of assets with agreed values. If needed, the neutral, with the assistance of the lawyers, will educate the parties on the need for appraisals and/or business valuations as well as the character of property. The team

then discusses, and the parties must agree, upon whether to get appraisals and valuations and who to hire. Certainly, this process can take several months. The best part of this process is that the parties, when they committed to this process, agreed to full and candid disclosure of all information, and thus there is no need for formal discovery. While the lawyers are still privy to and review the financial information, the burden of creating an inventory for each side instead shifts to the financial neutral who creates one inventory. Both clients are required to voluntarily gather the financial documentation needed by the financial neutral in completing the inventory that both parties have to sign and swear is a true and correct disclosure of their assets. Admittedly, getting parties to agree upon values is sometimes challenging. However, the financial neutral and the lawyers can often help the parties reach consensus of values. Most of the financial neutrals are certified public accountants and/or certified financial planners, many of whom have done tracing and business valuations during their career.

After the neutrals have gathered the necessary information, the information is then presented to the entire team and the team assesses it. While addressed separately, the issues involving the parties' children (if any) and their issues involving their finances are then discussed. Each party and their lawyers, often with the help of the neutrals, must create options for the final settlement. The parties are encouraged to brainstorm and to consider any option conceived. The idea here is to come up with many options.

After the options have been created, the team assesses the options and looks at the workability of each option, oftentimes, with lists of pros and cons for each. Consider in one case, a divorcing couple who owned a business in which both were equally as important as the other to the functioning of the business and who came up with 14 different options of the resolution of the business issue. Admittedly, some of the options would never have been acceptable to both; but even the discussion of these undesired outcomes is important and plays a role in this process. After considering each option, the clients narrowed the choices down to two separate options and the team rescheduled a team meeting to further discuss those two remaining options. As you may have guessed, the parties then settled that portion of the case on their own. And in doing so, each party felt very good about their decision because every conceivable option had been reviewed and no stone had been left unturned. For those of you who have ever mediated, this is a very different process from mediation as it typically occurs in the family law setting. Whereas mediation in a family law setting usually involves a couple of days at most trying to get the parties to agree and make decisions, often pressured and told horror stories of going to court, the collaborative process involves a much more thorough and thoughtful process leading up to settlement. Because of this, there is much less buyer's remorse in collaborative cases.

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ASSIGNED VIN NUMBER / CHASSIS NO'S

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GRAY MARKET VEHICLE TITLE TRANSFER

BOAT / TRAILER / MOTORCYCLE TITLES

Now, don't think that the lawyers are selling their clients out and that they do not owe a duty of loyalty and confidentiality to their clients—they still do. And as an attorney who has practiced collaboratively for more than 15 years, I assure you that I maintain confidentiality and I also keep my client's interests and rights in mind while working on these cases. The challenge—perhaps mainly for those of us who also still litigate—and test of my skills is learning to replace my innate litigator personality with more thoughtful and creative ideas aimed at helping my client meet their own goals and interests, yet being mindful that we consider the other side's objectives if we hope to help them end the matter amicably.

Of course, after an agreement has been reached, the lawyers draw up the final documents and help the couple complete one of the most difficult and challenging times of their lives. In some respects, the lawyers' job really kicks in at this point. Honestly the collaborative divorce process does require a lot more one-on-one conversations with the clients throughout this process than litigation does.

There are some drawbacks to collaborative. One of the biggest criticisms is that if the parties cannot reach a settlement, both lawyers must withdraw from the process and neither neutral can be called as a witness in the subsequent litigation. While this may seem like the kiss of death, oftentimes by that

point, it is better for each client to find new counsel. And too, those cases often involve a party who cannot move past their desire to punish the other spouse. Most often, those cases will go on to settle at mediation.

If you have clients who have worked their entire lives building a business, consider collaborative as an option. By working together as a team, this process truly strives to minimize the damage to families often caused by divorce. Hopefully too, in the future, attorneys in probate, estate, and guardianship cases will come to understand the wisdom in this process as well. Our laws refer to the public policy of encouraging peaceable resolutions in family matters, because in the end, family is hugely important to the majority of people. **TBJ**

NOTES

1. Texas Civil Practice and Remedies Code § 154.002.
2. Texas Family Code § 15.001.
3. See generally the Historical Background to Texas Family Code Title 1-A.



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