

Divorce ... without the attitude: Parties reach settlement through 'collaborative' process

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A national movement in family law has made it to Michigan. It's called "collaborative divorce" — a process for a husband and wife who want a divorce, but who don't want an adversarial attitude. It turns the traditional divorce process upside down.

In a collaborative divorce, the parties never set foot in a courtroom. Instead, they negotiate their own settlement with a "team" of professionals, including their collaborative divorce lawyers, and file the divorce complaint after an agreement is reached.

The collaborative approach is particularly successful in divorce cases, attorneys said, because it is family-focused and helps the parties create a settlement that they "own." It also lays a solid foundation for the parties to work together in their new roles as ex-spouses and co-parents.

There is, of course, no guarantee the parties will ever reach a settlement. But one incentive to do so is a participation contract that's signed at the beginning of the process. The parties sign the contract with the understanding that, if negotiations break down, the collaborative attorneys will withdraw their representation, which means the parties have to start over and find new lawyers.

However, while applauding the goals of the collaborative process, some attorneys and judges have concerns about it. In particular, they note the participation contract can be used to "lock out" a certain lawyer or firm from being hired by the other side. It is also asserted that if negotiations may break down and the parties have to get a new lawyer, then they should just use the traditional process in the first place instead of risking a longer, drawn-out process.

In addition, some judges apparently do not favor the approach because there is no statutory or court rule basis for it, and because it removes the courts as the sole decision-maker.

It's just the beginning . . .

According to the Collaborative Practice Institute of Michigan, there are about 70 lawyers in the state who have the required training to be a collaborative attorney.

One of these attorneys is Lori Becker. "Collaborative law is in its infancy in Michigan," the Bloomfield Hills lawyer said. "Very few of us actually do this."

Royal Oak collaborative lawyer Randall Pitler agreed. Michigan has "been a little behind in bringing collaborative law to the people," he said.

Attorneys told MiLW that practicing collaborative divorce law takes more than just going through the required training.

"You need to be dedicated," said Danielle Smith of Bloomfield Hills. "You have to constantly hone your skills. You can't just take the training and hang a shingle saying you're a collaborative attorney. You have to really want to help people."

Smith, who once practiced traditional divorce litigation, said that she turned to collaborative law because she found that litigated divorces would "spin out of control" and "the children would end up as victims." She also said that she practices collaboratively because it "is a forward-thinking process" and the parties don't get bogged down with past issues.

Deborah Bennett Berecz began practicing collaborative divorce law because of a frustrating litigation experience. "I won't disparage divorce litigation, because it has its place," the Grand Rapids lawyer said. "But when I learned that only 2 percent of divorce cases actually go to trial, I asked myself, 'Why am I doing this when 98 percent of these cases can settle?'"

Becker made similar observations. "I used to practice traditional divorce, but it was so toxic and a lose-lose situation for the family," she said. "Once I took the collaborative training, I never looked back. It's the only method that really deals with people's emotions, and divorces are 80 percent emotions. It allows couples to take control. And we can be far more creative with what the family wants, rather than what the court thinks the family needs."

Grand Rapids lawyer Susan Keener said that she enjoys the team aspect that's involved in the collaborative approach. "I like the ability to address the family's issues in a holistic way with a team, where everyone is helping," she said. "Eventually, a happy medium is found."

Developing a new mindset

Collaborative practitioners have "readjusted" their way of thinking, moving from a litigious mindset to a nonadversarial, cooperative approach.

To be a collaborative lawyer, "you need to have a comfort level with actually dealing with people's emotions — not just putting up with them," Berecz advised. "You cannot just go through the motions to reach a settlement."

Berecz said that, with a collaborative attitude, parties do not feel threatened, which means they are more honest, and this helps reach a settlement. "While collaborative law is tough, it doesn't focus on the parties' fears," she remarked. "Instead, it focuses on the solutions ... and there are always solutions. Our task is to find them."

Becker said that, for many lawyers, the most difficult part of the collaborative process is "stepping aside" and letting the clients talk openly and create their own settlement. "Attorneys aren't used to not being in control," she said. "In the collaborative approach, the attorneys and the other team members are simply there to facilitate the process."

Pitler agreed. The process is "completely opposite" of what is taught in law school, he said. "It can be difficult to slow down the process and find out what's behind the parties' positions, and then talk openly and honestly and about it."

Participation contract

The collaborative lawyer represents the interests of the client and, at the same time, works within the parameters of the collaborative process. The attorney must handle numerous responsibilities, such as counseling the client, managing conflict, developing the team, acting as a case manager and helping to reach a final agreement.

The process begins when the parties meet with the collaborative attorneys and discuss their options. They then make a decision about what is best for them. If it is agreed the collaborative approach should be used, everyone signs the participation contract.

The contract basically requires the parties to exchange all financial information, keep things confidential, reach a written agreement on all the issues and avoid adversarial procedures or threats.

"The participation agreement accomplishes several things," Becker explained. "First, everyone agrees they will not go to court. Second, everyone agrees to full and open communication and transparency through the process. And third, everyone agrees that, if the process breaks down, the attorneys must withdraw and the parties must find new attorneys."

Berecz noted that negotiations rarely, if ever, break down. "We realize that people do not come into this process donning a halo," she remarked. "But if anything is done that is contrary to the purpose of the agreement, such as refusing to disclose something important to the settlement terms or actually filing an action in court, then we must withdraw our representation."

Collaborative concerns

Bloomfield Hills divorce attorney Richard Victor told Michigan Lawyers Weekly that he has some concerns with the collaborative process, particularly the standard participation contract that must be signed. He said that he is familiar with the collaborative approach, having learned about it over the many years he has been practicing family law, and also because his law partner (and son) has been through collaborative training.

According to Victor, his concern with the contract is that it can be used to effectively "lock out" the other party from using a particular lawyer or firm, especially in higher-end cases.

"For example, let's say the husband really does not want his wife to use Richard Victor as her lawyer," he explained. "Yet we all agree to the collaborative process, sign the participation agreement and go into the negotiations. But then negotiations break down. This means that I now have to withdraw my representation."

However, "what if the wife has an established legal relationship with me?" Victor asked. "What if I handled a prior divorce or some other matter for her? The husband has now effectively 'locked out' the wife from using the firm or the lawyer that she wants . . . and trusts. You should not be able to use the collaborative process to lock out the firm or the lawyer that your spouse was going to hire in the first place."

To avoid such a "lock out," Victor noted that some collaborative lawyers have redesigned the participation contract to meet their own needs. "We pretty much agree that we won't be locked out if the negotiations break down," he stated. "Basically, it's a 'hybrid' version of the typical collaborative process and contract."

Victor said another concern is situations where there has been domestic violence in the relationship, or where it's fairly obvious that one spouse wields some type of "power" over the other spouse.

"It's not a level playing field when domestic violence has been involved," even if the violence occurred many years ago, Victor explained. He asserted that, once there has been intimidation in a relationship — whether through violence or another way — it lasts a long time. "Usually an abused spouse feels like he or she deserved it, and that feeling can last for 20 or 25 years, or even more," he stated. "So, in my opinion, these types of cases should not be handled in the collaborative process."

Where's the court?

After the participation contract is signed, the parties meet in sessions with their collaborative team and work toward a settlement. Every issue — from property division to child custody to support — is discussed. And the parties always have access to various professionals, like financial and mental-health experts, all of whom have specialized training in different areas.

When the parties finally reach a settlement, that's when the divorce complaint is filed. Berecz said the parties are still subject to the mandatory 60-day waiting period for a divorce judgment if no children are involved, and the six-month period when children are involved. However, a judge may waive the statutory waiting period, she noted.

Wayne County Circuit Judge Richard Halloran has signed judgments in collaborative divorces. He said that he usually recognizes a collaborative settlement because the attorneys have asked for a conference or it is designated on the complaint.

Halloran explained that some judges do not favor the collaborative approach because it has no statutory basis and it removes the courts from the decision-maker role. But he disagrees with this viewpoint.

"The courts are here as a service to the public," Halloran told MiLW. "If the public chooses not to use them, then that's fine. I'm not sure why we [judges] should be so concerned when the resolution has been reached already. It's really just a better way for the public to come into the court system, with their problems already resolved."

And some judges also do not like the concept because it forces parties to get new lawyers if negotiations break down, Halloran said. "These judges say, 'If these people may have to get new attorneys, then why not just use the traditional process in the first place?'" But he said that he doesn't see it this way, calling the process "very worthwhile."

Wayne County Circuit Judge Eric Cholack, who has undergone some collaborative training himself, agreed the courts are an option of last resort. "The parties know each other better than the judge does, so if they can work things out beforehand, then that's great," he said.

Halloran also pointed out the courts benefit because the docket isn't tied up with evidentiary hearings and motions. But he did note the court still retains supervisory authority over the matter when children are involved.

"While collaborative divorce may have the potential to reduce some of the volume and congestion in the family court, what is far more important in my opinion is the potential benefit to the parties and their children," Cholack told MiLW. "And parties are much more receptive to creating their own agreements, than having one imposed on them by the court. It's a win-win solution."

Client benefits

According to collaborative lawyers, the biggest benefit is that, when children are involved, their interests are always at the forefront. "The child specialist works with the children directly and does not represent one parent or the other," Becker explained.

"The specialist is a neutral person and brings the child's voice into what's going on."

Berecz agreed. "Unlike the traditional process, there is no custody evaluation performed in the collaborative divorce," she explained. "We try to get at what these kids really need and want. The child specialist is able to look beneath the surface of what's being said to what's really going on in a family. You can't deal with what you don't recognize."

When asked how a child specialist differs from court-ordered counseling or therapy, Berecz explained the child specialist enters the picture at the beginning, rather than later. "We are being proactive and dealing with issues up front," she commented.

Another advantage is that the parties feel in control of their future and, as a result, there is usually better compliance with the settlement down the road.

"Parties have ownership in the settlement," Becker said. "This leads to fewer post-judgment problems because the parties have learned there's a better way to resolve their issues."

Other benefits include the fact that the divorce is private, there is less stress and animosity, and past differences and behavior patterns are set aside. "It allows the parties to move

forward when it's all over," Pitler explained. "They have learned how to communicate. This means they are more likely to talk about issues that come up, instead of running to court."

Collaborative efforts may also reduce the overall time and cost of a divorce, depending on the circumstances. This is due to several things, including that parties resolve issues amicably rather than through a lengthy fact-finding process. The overall cost largely depends on how long it takes the parties to settle — and keeping costs low is a powerful incentive to negotiate in good faith and reach an agreement.

"Collaborative divorce is not always the least expensive approach, by any means," Berecz acknowledged. "We use the services of other professionals, and that obviously costs money. But if you look at the therapy that people often need during and after the traditional divorce process, and factor into that the number of post-judgment motions and disputes, in the long run the collaborative divorce could end up costing less."

Professional pluses

Those who practice collaborative law told MiLW they are happier and more fulfilled than they were in traditional practice.

"Attorneys don't naturally gravitate toward this type of law," Becker said. "I know this may sound a bit cliché, but the real reward is watching people gain a sense of peace."

For Pitler, he said that he now feels like he is "really helping" his clients. "I'm working much closer with them and I'm helping them get a settlement that meets their needs and goals, and that's rewarding," he stated.

Berecz said her enjoyment is seeing people get to a "different place" in their lives.

"When I handled traditional divorces, the parties rarely spoke to each other," Berecz noted. "In fact, I recently finished a collaborative divorce — and we all hugged each other at the end. It's a fascinating, rewarding field and it has been a game-changer in my own practice. I put my head on the pillow at night feeling that I might have played a part in making a real difference for an entire family's future. That beats 'winning' every time."

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