

# **THE COLLABORATIVE LAW PROCESS: RESOLVING FAMILY DISPUTES WITH DIGNITY**

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The **COLLABORATIVE**  
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The court system's litigation process is often not a "family friendly" or a "child friendly" environment to resolve family disputes such as divorce, custody or child support issues. Parents, spouses, relatives and friends are sometimes forced to take sides in a courthouse dispute that pits the parties against each other in a litigation "war."

Families participating in the court system's litigation process risk the destruction of family relationships, financial destruction and long term emotional wounds as a consequence of bitter courtroom battles.

Over the course of the last ten years, lawyers, mental health professionals and financial professionals have been working to develop the collaborative process as an alternative to the litigation process to resolve emotional family disputes such as divorce, custody and child support issues with as little damage to relationships and family finances as possible. The goal of the collaborative process is to provide a way to resolve family disputes that is more "user friendly" than the traditional litigation process.

While there will always be cases where people will need the power and force of the court system to protect and defend rights, there are many family disputes that can be resolved more peaceably and less destructively using the collaborative process.

## A. WHAT IS THE COLLABORATIVE PROCESS?

In short, the collaborative process is a settlement process that focuses on helping families resolve their disputes without going to court. The collaborative process focuses on creating a safe environment for the parties to express, negotiate and resolve conflict without going to court.

## B. HOW DOES THE COLLABORATIVE PROCESS WORK?

The collaborative process works by using three approaches to resolving family disputes. First the collaborative process has a well defined set of "ground rules" and structure in the form of a written "collaborative law participation agreement" that all parties agree to and sign at the beginning of the case.

Second, the collaborative process follows a step by step "road map" that guides the parties through logical and orderly steps to help the parties define, discuss and resolve their conflict. Third, the collaborative law process often involves neutral mental health and financial experts as part of a collaborative team to provide neutral expert advice and guidance to help the parties and their attorneys more efficiently resolve the dispute.

## C. THE STRUCTURE - THE WRITTEN COLLABORATIVE LAW PARTICIPATION AGREEMENT

A true "collaborative" case is one where the parties and their attorneys have signed a detailed written "collaborative law participation agreement" that contains the following commitments and agreements:

1. A commitment not to go to court to resolve any dispute between the parties. The parties can "opt out" of this commitment in the event either party becomes dissatisfied with the process or in the event of an impasse.
2. Agreements requiring the parties, the attorneys and other professionals to treat each other with civility, dignity and respect in the collaborative process to create a safe atmosphere to express and resolve conflict in a civil manner.
3. A commitment to concentrate on interest based negotiations verses purely positional bargaining.
4. Commitments requiring full and honest disclosure of financial and other information by both the parties and the attorneys.
5. Commitments which create a structure and time line for the resolution process. Schedules are created by agreement rather than mandated from the court.
6. An agreement that if the parties impasse or opt out of the collaborative process, the collaborative lawyers cannot represent either party in litigation between the parties.
7. Commitments from the parties to not spend funds outside the normal and ordinary course of conduct or make major financial changes without notice and agreement by all parties.

8. Agreements to use only mutually selected neutral experts. These experts cannot testify in future litigation between the parties unless the parties so agree.

#### D. THE PROCESS - A PROBLEM SOLVING “ROAD MAP”

A major part of the collaborative process is the step by step “road map” that guides the parties toward a resolution. In a nutshell, the collaborative process has six basic steps that take place during a series of joint meetings in which all parties participate:

Step 1. Establishing Ground Rules. The parties discuss and decide whether or not to use the collaborative law process, discuss and agree to the ground rules of the process and sign the detailed collaborative law participation agreement.

Step 2. Determine the Goals, Interests and Concerns of the Parties. The parties spend time developing each party’s interests, concerns and goals and the shared interests of both parties. The parties also discuss the interests of the children if children are involved.

Step 3. Handle Temporary Issues. The parties discuss and negotiate resolution of any immediate temporary matters that need to be addressed.

Step 4. Gather Information. The parties gather and exchange whatever information is necessary for the parties to develop and evaluate possible settlement options.

Step 5. Brainstorm Options. The parties discuss and develop as many possible solutions and options to resolve the conflict as possible.

Step 6. Evaluate the Options. The parties discuss and evaluate the consequences of the available options and solutions and select from those options the best available option that both parties can agree is acceptable.

#### E. MORE THAN JUST LAWYERS - A TEAM APPROACH TO SOLVING FAMILY DISPUTES

The collaborative law process often stresses and encourages the use of a “team” approach to resolving family disputes. The team approach attempts to make the best use of each team member’s area of expertise.

*1. Attorneys.* The collaborative “team” will always include an attorney for each of the parties. The collaborative process requires an attorney for each party - one attorney cannot represent both parties. For the process to be successful it is important that both attorneys be trained in the collaborative process. The attorneys participating in the collaborative process serve as legal advisors and advocates for their clients but try to participate in the process more as negotiators, educators and facilitators than gladiators or litigators. Because neither collaborative lawyer can ever appear in court against either party, the lawyers are free to be more candid and conciliatory in their discussions in the collaborative meetings.

*2. Neutral Mental Health Professionals.* Part of the collaborative process team is often a collaboratively trained mental health professional who serves as a “communications facilitator.” The communications facilitator is a mental health professional trained and experienced in helping people manage their emotions and communicate constructively in an emotional atmosphere. There is a saying or concept that “men are from Mars and women are from Venus.” When men and women get divorced and when there are emotional issues in that divorce, husband and wife or mom and dad may communicate as if they are a lot further away from each other than Mars and Venus.

Lawyers have little or no formal training in how to help people deal with overwhelming emotions. Much of what lawyers do as a matter of routine affects people in an emotional way that is often unintended by the lawyer. For years, lawyers have been struggling to help clients through an emotional process while for the most part being untrained and unqualified to address emotional issues that confront and at times overwhelm clients.

Some say family law is ten percent legal/financial and ninety percent mental/emotional. If this is so, why not bring someone into the settlement process who is actually trained and skilled at managing the emotions of the parties and their lawyers in the negotiating process?

Having a neutral communications facilitator involved in the joint collaborative meetings can be invaluable. They can serve to enforce the communications and behavioral ground rules, help the parties manage emotional eruptions that develop during the collaborative process and help both the parties and their lawyers

communicate and negotiate more effectively with each other.

*3. Neutral Financial Professionals.* Another common collaborative process team member is a collaboratively trained neutral financial professional. The financial professional's role is to provide neutral financial advice and financial planning to the parties, help the parties gather financial information and help the parties create and evaluate optimal financial solutions to their problems. Many times using a neutral financial expert can help avoid situations where legitimate, useful settlement options are rejected simply because the idea is "his" idea or "his lawyer's" idea. Sometimes a spouse can better hear a financial idea or financial reality if it is delivered by a neutral voice instead of from one of the parties or their lawyers. Using a neutral financial expert can also help resolve or reduce arguments concerning financial issues such as the value of assets, the character of assets as separate or community property or tax issues in a cost effective manner.

*4. Neutral Child Experts.* In the collaborative process, the parties routinely involve a collaboratively trained mental health professional with expertise regarding children and divorce to help the parties come up with a workable parenting plan for the children. This neutral mental health professional cannot testify for or against either party. Having a neutral, nontestifying child expert helps reduce emotions by creating an atmosphere that is less blame oriented and more solution and problem solving oriented. The neutral child expert helps the parties focus on finding a plan that will work for the children rather than focusing on each party's faults or assessing blame for the situation with the children.

#### F. ADVANTAGES OF SETTLING FAMILY DISPUTES IN THE COLLABORATIVE PROCESS VERSUS THE LITIGATION MODEL

There are numerous dispute resolution processes available for people to use to resolve their family law disputes. They range from getting things worked out at the kitchen table to having a full blown jury trial at the courthouse. Regardless of the dispute resolution process used, most family law cases settle without ultimately going to court.

A question that confronts both lawyers and their clients is – if the case is likely going to ultimately settle,

which process is better to use to achieve the settlement, the collaborative law process or the litigation process handled with the primary goal of settling?

In many cases it may be more advantageous for the parties to attempt to settle using the collaborative law process. In other cases, abuse or family violence issues, the stubbornness of the opposing party or their lawyer, the existence of an emergency, the viciousness of the dispute or other factors may dictate that the best course for a party lies in staying in the litigation process and keeping the courthouse more accessible.

Collaborative law is one of many dispute resolution options available for parties to resolve their disputes. The best dispute resolution option to use for each case will depend on the facts, finances, goals and personalities involved in each dispute. No one dispute resolution process will be right for every case.

However, in many cases the collaborative law process will have many advantages over trying to resolve the dispute in the litigation process. The following is a list of advantages that are often found in comparing the collaborative law process to the litigation process.

##### 1. In the Collaborative Law Process the Focus is Solely on Settlement.

If most cases settle, why not use a settlement process rather than a litigation process to settle the case? The collaborative law process is designed with the principle goal of helping people increase the chances that they will reach a settlement and settle in a way that is less destructive financially and emotionally to the parties and any children that may be involved. In the litigation process the whole process, in some fashion, is arranged in and around preparing for a trial that ultimately may not occur. Settlement is certainly a part of the litigation process but settlement is not the core principle which grounds the numerous rules and procedures that govern the litigation process.

##### 2. In the Collaborative Law Process Everybody is More Likely to be on the Same Page

Perhaps one of the greatest benefits of the formal collaborative law process is that when the formal collaborative law participation agreement is signed there is no doubt that the parties and their lawyers are serious

about settling the dispute. Signing a formal collaborative law participation agreement commits the parties to obligations of full disclosure and commits the lawyers to withdrawing in the event the process is terminated. This is a serious commitment to attempt to settle from both the parties and their lawyers. In the litigation process, each party's commitment to settling the case may be different, undisclosed or misperceived.

### 3. The Collaborative Law Process Creates a Road Map for Settlement vs. a Road Map to the Courthouse.

The collaborative process follows a six step process to resolve conflict: 1) establishing ground rules by signing the collaborative law participation agreement; 2) determining each party's goals, interests and concerns; 3) gathering information each party may need or want in order to be in a position to negotiate; 4) addressing temporary issues; 5) brainstorming settlement options and solutions; and 6) evaluating those options and solutions and selecting from the available options the one that best meets as many of the parties' shared and competing goals as possible and that both parties can accept.

In the litigation process, there is no formal "road map" or process to follow for settlement discussions. Settlement discussions in the litigation process usually happen when one party or the other decides to communicate a willingness to discuss settlement or the parties are ordered to mediation by the court. The lack of a settlement "road map" can lead to problems in the settlement process because the parties are not "on the same page" about even how or when to approach settling the dispute. This can lead to misperceptions, misunderstandings and problems. Sometimes it is helpful for parties in distress to know what is going to happen and when things are going to happen. Having a road map for settlement helps people know what to expect and when to expect it.

### 4. The Collaborative Law Process Creates a Less Emotionally Volatile Atmosphere.

In the collaborative law process the parties commit to follow written "expectations of conduct" aimed at keeping communications during the collaborative process civil, respectful and constructive. The effect of even having these rules and discussing them between the parties helps defuse the emotional

atmosphere in the dispute. In the litigation process, discussing or agreeing to such rules if done at all is usually done in a less explicit manner.

### 5. The Requirement that the Collaborative Lawyers Cannot Later Litigate Defuses the Settlement Atmosphere Dramatically.

In the collaborative law process, the lawyers involved cannot litigate against each other or the parties. This requirement has the effect of enormously defusing the emotional and egotistical tension in the room. Although tensions and egos can get strained in the collaborative process, the collaborative lawyers will never be able to actually fight each other or attack the other party in court. This has the general effect of making both the lawyers and parties approach each other in a more collaborative and conciliatory fashion. Additionally, because the involved lawyers will not be able to personally carry out any courtroom strategy or tactic, when courthouse options or likely results are discussed, they are discussed in a less personal and less emotionally threatening way.

### 6. The "Team" Approach to the Collaborative Law Process is Better Engineered for Dispute Resolution.

Many collaborative law attorneys encourage their clients to use the "team" approach to the collaborative law process. Under the team approach, a neutral mental health professional serves as a "communications facilitator" and a neutral financial professional serves as a neutral financial expert for the case. Using these neutral professionals provides the process with a neutral voice and perspective throughout the process. The presence of a neutral voice in the process often helps avoid or resolve impasses and helps redirect and diffuse conflict away from the parties involved and at the problem that is in dispute.

The usual role of the neutral mental health professional is to manage the emotional issues of the case, keep the parties and lawyers communicating constructively and help the parties work through issues involving their children or other emotionally charged situations.

The usual role of the neutral financial expert is to gather, analyze and explain financial information, prepare inventories, prepare spreadsheets, assist the parties in

evaluating the short and long term financial effects of settlement proposals and help in generating financial solutions. Sometimes financial information that has been prepared by a neutral financial expert will be more easily accepted or trusted because the information is coming from a neutral perspective instead on one of the parties or their lawyers.

Because these professionals are neutrals they provide the collaborative process with a neutral voice throughout the process. Many times a solution can be seen or suggested by a neutral that cannot be seen by the parties who are engrossed in their own perspectives. Additionally, sometimes a suggestion for resolving the dispute can be more easily heard by the parties when it comes from a neutral voice rather than one of the parties or their lawyers.

#### *7. The Collaborative Law Process Has More Solution Oriented Tools and Processes for Children's Issues.*

In the litigation process, when mental health professionals work with the parties or their children in either a therapeutic or forensic capacity, they are likely to be called as a witness for or against one of the parties if the case ends up going to court. This can often interfere with therapy or problem solving because the parties may be more focused on painting the other side as bad or themselves as good rather than focusing on finding solutions to their children's problems. In a litigation environment, establishing who is to blame for problems is often the central focus of a dispute.

In the collaborative law process, the focus is not on establishing blame – the focus is on solving problems. Because neutral child experts in the collaborative law process cannot be called to testify for or against anybody, the parties and the therapist are better able to focus on problem solving instead of fault finding. The role of a therapist working with children's issues in a collaborative case is not to function as a judge or jury but to function as a facilitator.

The problem solving orientation of the collaborative law process is often especially helpful where children are concerned. In the litigation process, because the parties are never more than a few days away from a possible courthouse confrontation, they have to be constantly concerned on some level about how they are going to attack their opponent and defend themselves.

This blame oriented mentality is often tremendously distracting from trying to find solutions for children in distress.

#### *8. The Collaborative Law Process is a Less Destructive Dispute Resolution Process for Businesses.*

\_\_\_\_\_The litigation process can be very detrimental to the financial health of a family business. Sometimes the expense of litigation, the overwhelming demands for voluminous document production, the effects of having employees being compelled to testify in trials or depositions and other fallout from the litigation process can literally destroy the business the parties are arguing about.

The collaborative process aggressively attempts to help the parties resolve their conflict without having the process destroy or diminish the value of the family business.

#### *9. The Full Disclosure Assurances of the Collaborative Law Process Help Reduce the Risk of Making a Bad Deal.*

Collaborative law participation agreements are required by statute to include provisions providing for the "full and candid exchange of information between the parties and their attorneys..." Tex. Fam. Code 6.603(c) and 153.0072(c). The form collaborative law participation agreement approved by the Collaborative Law Institute of Texas has numerous provisions requiring full disclosure. Included in that form collaborative law participation agreement are provisions that:

- Require a party's attorney to terminate the collaborative law process if a party insists on refusing to disclose relevant information.
- Awards to the innocent party 100% of any community assets that are later found to have been intentionally not disclosed.

In the collaborative process, the requirement of full disclosure exists without having to be triggered. In other words, even if the other side does not ask for the information, the information must be disclosed if a party putting him or herself in the other party's shoes would want to know the information prior to making a settlement decision.

In the litigation process, there are rules governing disclosure but they are vastly different than in the collaborative law process. Full disclosure is not an assurance of the litigation process. In the litigation process, full disclosure often depends on first complying with the rules of discovery and procedure. In the litigation process, parties are required to disclose information that has been requested in the proper manner and is not subject to some procedural or evidentiary objection. Parties trying to settle in the litigation process often forgo formal discovery and without formal discovery, there are usually no affirmative duties of full disclosure imposed or required of the parties unless other agreements are made.

The full disclosure obligations of the collaborative process do not guarantee absolute full disclosure in all cases; however, on the whole, the obligations and assurances of full disclosure required by the process create an atmosphere where the parties are attempting to insure they have provided full disclosure. In the litigation process, a goal of at least one of the parties may sometimes be to search for legal and ethical ways to avoid being required to fully disclose critically relevant information.

#### *10. The Collaborative Process Often Leads to a Better Quality Deal for the Parties.*

The collaborative law process expressly focuses on interest based negotiations. A significant part of the collaborative process involves probing the parties to understand their goals, interests and concerns. Discussions and negotiations are centered on trying to achieve settlement options which best serve the shared and competing goals, interests and concerns of the parties.

An example often used in the collaborative process to illustrate this point is the story of two ladies fighting over a dozen oranges in the town market. A wise old Judge appears and quickly solves the dispute by awarding each lady six oranges. Both ladies then become furious with the wise old Judge. Before dividing the oranges the judge did not take the time to ask the ladies why they were fighting over the oranges. It turns out that one of the ladies wanted the meat of the oranges to make juice and one lady wanted the rinds of the oranges to make a pie. Had the judge simply asked each of the ladies what their goals, interests and concerns were he

would have quickly been able to arrive at a solution where both ladies were totally satisfied.

While interest based negotiations are often a part of negotiations in the litigation process, the collaborative law process embraces this concept as a core concept of the entire process. Many times by focusing on the differing interests and concerns of the parties, a “win/win” resolution can be more easily discovered than by focusing on what a court or jury will or will not do with a certain set of facts.

#### *11. Legal Fees Are More Efficiently Used.*

In the collaborative law process, the parties do not pay their lawyers to comply with all the procedural rules that govern discovery and the rules of evidence required by the litigation process. The parties do not spend money for their lawyers to interview witnesses, prepare direct and cross examinations or practice opening and closing statements that never get used.

The money that the parties do spend on their attorneys is all oriented towards actions related to trying to settle the case. The parties do not pay for trial preparation expenses that may never be used.

Overall, experience has shown that the legal fees associated with collaborative cases are substantially less than the legal fees associated with a fully litigated case in the litigation process.

#### *12. The Collaborative Law Process is More Private than the Litigation Process.*

Because there are no court hearings, depositions or document requests to third parties in the collaborative law process, there is a better chance the parties’ dispute will stay private and confidential. Privacy is a huge concern for many individuals and the confidentiality provisions of the collaborative law participation agreement and the private nature of the process itself help the parties better achieve the privacy they often desire.

#### *13. The Collaborative Process Has a Better Schedule.*

Meetings in the collaborative process are all scheduled by agreement. There will never be a situation where a judge is ordering a mediation or

hearing during a party's family vacation or during a party's important business meeting. The scheduling of meetings in the collaborative process are agreed upon by all parties and their attorneys.

*14. The Parties and Their Emotions are More Removed from the Courthouse.*

Because the parties cannot rush to the courthouse when they run into impasses this allows for a cooling off period to allow parties to more fully consider their options instead of making an emotional decision that puts them in front of a judge three days later. Sometimes family law disputes are set on an irreversible course of destructive litigation because of a temporary hearing that started over a small fire that quickly dissolves into a raging forest fire.

*15. The Collaborative Law Process Creates a Better Atmosphere for Creative Brainstorming.*

In general, the negotiating atmosphere created in the collaborative process is by design less volatile and less threatening. A goal of the collaborative process is to create a safe process to express and resolve conflict. In general, there is a greater possibility of creative thinking and creative problem solving when people are working in a calmer, more emotionally stable atmosphere than an unstable one.

Negotiations in the litigation process can be more fear based. In the litigation, process the threat of a courthouse showdown or a confrontational deposition is more imminent. There is virtually nothing about the litigation process that causes people to feel more relaxed, less vulnerable or safer. While fear based negotiations can certainly inspire settlement to avoid confrontation, possible creative solutions may be overlooked in a more heated emotional environment.

When attempting to settle in the litigation process, the language the lawyers and parties use is often very different than in the collaborative process. In the litigation process, negotiations are more likely to be conducted with an "us vs. them" or "gotcha" attitude and using battlefield metaphors and language. This adversarial attitude and mentality is often polarizing and can make achieving settlement more difficult. While the parties in the collaborative process are adversaries and have competing interests, the process itself attempts to encourage cooperation and

collaboration to discuss and solve problems. The litigation process by its nature is adversarial and negotiations in that process are more likely to become polarizing.

*16. In the Collaborative Law Process the Parties are in Control of the Dispute, Not the Lawyers, and There is Less Risk of a Fight Between the Lawyers Overshadowing the Fight Between the Parties.*

In the collaborative law process, the parties by design are put in ultimate control of the process. In the litigation process, the court's imposition of litigation oriented deadlines may by necessity create situations where the parties lose control of the litigation process and the lawyers are forced to make decisions which may limit or diminish the control of the parties over their dispute.

Additionally in the litigation process, one lawyer is more likely to get in a disagreement with the other lawyer that gets dealt with by bombarding that lawyer and his or her client with discovery requests, temporary hearings or procedural motions. In such a situation, the parties may feel trapped in a dispute that is more between their battling lawyers than it is between the parties themselves.

**G. DIFFERENCES BETWEEN MEDIATION AND THE COLLABORATIVE LAW PROCESS**

In the litigation process, the parties often either agree or are ordered by the court to attend mediation. Mediation is another popular settlement alternative to resolving a dispute by going to court. In most mediations, the main negotiator is the mediator instead of one of the attorneys or the clients. In the mediation process, the people with the best command of the facts and their interests, the parties and their lawyers, are usually not allowed to negotiate directly with the other party. As in the children's game of telephone, much is lost in translation.

In the collaborative process, discussions are held in joint meetings with direct communication between all parties and their lawyers and the chances for misunderstanding and miscommunication are greatly reduced. Further the parties are allowed to negotiate directly with the decision makers instead of through an intermediary with limited understanding of the dispute.

Mediations are often a “one-time” marathon settlement conference. Mediation is typically an event rather than a process. In the collaborative process, the discussion and negotiation of a settlement is typically done over the course of several meetings instead of all at once. This allows parties and their attorneys to think things through and give careful consideration to options instead of making important, binding decisions when the parties may be tired and under pressure.

encountered when family members litigate against each other in open court.

Lastly, in the litigation process, mediations are often held when trial is imminent. This means the parties may have already incurred substantial legal fees and trial preparation costs and these fees and costs can make resolving the already difficult conflict even more challenging. Trial preparation costs are not part of the collaborative process.

#### H. MORE INFORMATION ABOUT THE COLLABORATIVE PROCESS

If you would like to know more about the collaborative process, a good starting place is the Collaborative Law Institute of Texas. The web site for the Collaborative Law Institute of Texas is [www.collablawtexas.org](http://www.collablawtexas.org). The Collaborative Law Institute of Texas is a statewide organization attempting to inform the public, attorneys, mental health professionals and financial professionals about the collaborative law process and to identify collaborative law attorneys and other professionals to the public. The Collaborative Law Institute’s web site contains contact and background information for collaborative lawyers, mental health professionals and financial professionals. The web site also includes numerous articles and links to other collaborative law web sites.

#### I. CONCLUSION

The collaborative law process is not appropriate for all cases and certainly is not a perfect or foolproof process. However, for families having legal disputes who have both real conflict and a desire to settle their differences without going to court, the collaborative process will offer hope for many. In many cases, the collaborative process will be better able than the litigation process to increase the chances that the dispute will be resolved in an acceptable way without the family having to endure the difficulties