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SPECIAL REPORT: ARBITRATION

An alternative to having a divorce become all-out war

by **Robert J. Merlin**

For many of us, the images of the Michael Douglas movie “War of the Roses” and the character Arnie Becker from the TV show “L.A. Law” are indelibly marked in our minds. They are the stereotypical models of horrific divorces and of ruthless divorce attorneys.

Historically, the only divorce model we had was the litigation model, where the parties were adversaries and were frequently not concerned with how much damage they did to each other — or their children — as long as they got what they wanted at the end of the process.

Times have changed, and there now is a recognition that divorces do not have to be all-out wars. It is possible to amicably resolve a divorce without the parties destroying each other. The newest and most promising method to settle a divorce is through collaborative family law.

Collaborative family law is an alternative dispute

resolution tool, just as arbitration and mediation. Unlike arbitration, however, a third party does not make a decision for the parties in a collaborative family law matter. The parties in a collaborative case resolve all of the issues themselves.

While a collaborative family law matter can include mediation, it frequently will not because the parties usually resolve all of the issues without having to pay for and utilize the services of a mediator.

Through collaborative law, the parties and their attorneys make a commitment to resolve all issues through respectful face-to-face negotiations. In fact, the parties and attorneys sign a formal agreement providing that if one of the parties chooses to leave the collaborative process to litigate, neither attorney will represent the parties. This requires that the parties and the attorneys make a true commitment to resolving all of the issues rather than litigating them.

In theory, the collaborative family law process should be faster and less



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expensive than traditional litigation. For instance, there are no hearings, depositions or formal discovery requests in the collaborative process. If one side wants a particular document or information that the other side has, it just requests the document or information from the other party. Consequently, each side can save thousands of dollars in fees compared to traditional litigation.

There necessarily is a large element of trust in the collaborative process. Not only does each party make

a commitment to provide full disclosure to the other party, each party must trust the other party to be truthful and open with their disclosure. This is where the trained collaborative attorney comes in — to convince the client that agreeing to the collaborative process includes a commitment to being fair and open with the other side.

For those of us who practice collaborative law, we know that we can rely upon the representations of the other attorney, and know that the other attorney will convince his or her client of the necessity of complete honesty in the process.

If the parties need to retain the services of an expert, such as a forensic accountant, financial planner or psychologist, usually only one expert in a particular field is hired. The expert would not represent one of the parties but would act in a neutral capacity to render an unbiased opinion. No longer will parties have to hire dueling experts and hope that a judge can understand the

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experts or the issues in dispute. This also results in a significant savings to the parties.

Too many parents involved in divorces are unable to perceive the effect of their conduct on the children. They say they would never do anything to harm their children. But the parties' attitude toward each other, especially the way they speak to each other in the presence of their children, can have a devastating effect on the children without the parents being aware of it.

Through the collaborative family law process, the parents can learn to treat each other with respect and to preserve an appropriate relationship with each other, for the sake of their children. Thus, the conflict between the parties is minimized.

Minimal public record

A collaborative family law matter begins with both parties deciding to hire attorneys who are specially trained in the collaborative process.

The attorneys go through many days of training to learn how to think in a different way. A trained collaborative family lawyer will know how to help steer his or her client toward an amicable resolution.

Most of the trainings in South Florida have been presented by the local groups of collaborative professionals — the Collaborative Family Law Institute in Miami-Dade

County and the Collaborative Family Lawyers of South Florida Inc. in Broward County. There are approximately 100 attorneys and other professionals in South Florida who have been trained in the collaborative process.

If one party starts exhibiting behavior that indicates the party is more concerned with lashing out at the other spouse, the attorney can restrain the client by reminding him or her of the benefits of and commitment to the collaborative process. The trained collaborative family law attorney also learns how to avoid causing problems, which sometimes occurs in traditional litigation.

The reality is that some attorneys simply add fuel to the fire instead of trying to keep fires to a minimum. In the collaborative family law process, the attorneys cooperate with each other to avoid fires flaring up. When such conflict occurs, the attorneys work with the clients to resolve the dispute rather than letting it get out of hand.

Another attractive aspect of handling a divorce collaboratively is that nothing is filed in the public record until the parties fully settle their case. The actual papers filed in court can be kept to a minimum, and the family can avoid airing their dirty personal laundry in public. This process should be especially appealing to clients who are in the public eye or who have significant wealth.

Just because the attitude

of the attorneys and parties is one of cooperation does not mean that either party in a collaborative divorce will be shortchanged. The results should be basically the same as they would have been through litigation. But there should be much less spent on the process getting there, both emotionally and financially.

Each party should spend much less time on the collaborative matter than he or she would if it was litigated because there will be no hearings or depositions to attend. A collaborative case should also result in much less time lost from work, a benefit to the parties and their employers and co-workers.

With the collaborative attitude of the parties and the attorneys and both sides having reasonable expectations of the ultimate outcome, the parties learn to trust each other and the other attorney. Both parties find that the process is much less threatening and frightening.

Less acrimony

Most importantly, the parties have complete control of their case. Neither attorney will push the client into a settlement. The attorneys are there to facilitate a resolution and to help guide the clients through the process.

A trained collaborative family lawyer becomes part of a respected and trusted team working with the family to dissolve a marriage and resolve all of the relat-

ed issues that affect the family.

This is healthier for the family and society as a whole. Marriages will dissolve with less acrimony, court dockets will be less crowded and the chances of the family resorting to the judicial system in the future will be dramatically reduced.

A very significant portion of the family law cases handled in South Florida and throughout the country involve post-final judgment litigation. Once the parties participate in the collaborative family law process, they learn to trust each other and to resolve any future disputes between themselves without having to resort to the courts for intervention.

Very few people are aware of the availability of collaborative law to resolve a divorce. This is due to the fact that the process is relatively new and not too many people have experienced it yet.

Once more people start to handle their divorces on a collaborative basis, it will become popular. Collaborative family law makes sense — financially and emotionally. I am confident that it is the wave of the future. ■

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