CENTRAL KANSAS COLLABORATIVE FAMILY LAW PRACTICE GROUP

HANDBOOK FOR CLIENTS

AN ORIENTATION TO THE DIVORCE PROCESS, THE DISPUTE-RESOLUTION OPTIONS AVAILABLE TO CLIENTS, AND THE NEW DISPUTE-RESOLUTION OPTION, "COLLABORATIVE LAW."

1. What are my choices for professional help in my divorce?

All divorces involve decisions and choices. Which professionals will assist you, and how you will utilize their help, are decisions that can powerfully affect whether your divorce moves forward smoothly or not.

Some couples resolve all their divorce issues without any professional assistance at all, and process their own divorce papers themselves through the courts. On the other end of the spectrum, some couples engage in drawn-out courtroom battles that cost dearly in emotional and financial resources and can take considerable time to complete. Most people find their needs fall between these extremes.

Below are the choices for obtaining professional legal services in divorce that are available in most localities today. The list moves from choices involving the least degree of professional intervention, and the most privacy and client control, to choices involving greater professional intervention and the least privacy and control.

Unbundled Legal Assistance: The client in this model acts as a "general contractor" and takes primary responsibility for the divorce, making use of legal counsel on an "as needed" basis for help in resolving specific issues, drafting papers, and so forth. The lawyer doesn't take over responsibility for managing the case.

Mediation: A single neutral person, who may be a lawyer, a mental health professional, or simply someone with an interest in mediation, acts as the mediator for the couple. The mediator helps the couple reach agreement, but does not give individual legal advice, and may or may not prepare the divorce agreement. Few mediators will process the divorce through the court. Retaining your own lawyer for independent legal advice during mediation is generally wise. In some locales the lawyers sit in on the mediation process, and in other locales they remain outside the mediation process. Mediators do not have to have to be licensed professionals in most jurisdictions.

Collaborative Law: Each person retains his or her own trained collaborative lawyer to advise and assist in negotiating an agreement on all issues. All negotiations take place in "four-way" settlement meetings that both clients and both lawyers attend. The lawyers

cannot go to court or threaten to go to court. Settlement is the only agenda. If either client goes to court, both collaborative lawyers are disqualified from further participation. Each client has built-in legal advice and advocacy during negotiations, and each lawyer's job includes guiding the client toward reasonable resolutions. The legal advice is an integral part of the process, but all the decisions are made by the clients. The lawyers generally prepare and process all papers required for the divorce.

Conventional Representation: Each person hires a lawyer. The lawyers may be good at settling cases, in which case they work toward that goal at the same time that they prepare the case for the possibility of trial. If the lawyers are not particularly good at, or interested in, settling the case all lawyer efforts are aimed solely at preparing for trial, though a settlement may still result at or near the time of trial. Either way, the pacing and objectives of the legal representation tend to be dictated by what happens in court. Cases handled this way generally involve higher legal fees, and take longer to complete, than collaborative law cases or mediated cases. The risk of a high conflict divorce is higher than with mediation or collaborative law.

Arbitration, Private Judging, and Case Management: In some states, it is possible for clients and their lawyers to choose private judges or arbitrators who will be given the power to make certain decisions for the clients as an alternative to taking the case into the public courts. Case management is an option available from private and some public judges, in which the judge is given the power to manage the procedural stages of pretrial preparation, as well as settlement conferences, by agreement of the clients and their lawyers. These options can reduce somewhat the financial cost and delays associated with litigation in the public courts. The financial and emotional costs may still remain high, however, because positions are polarized and the lawyers have no particular commitment to settlement as the preferred goal, and continue to represent the client whether the case settles or goes to trial.

"War": One or both parties are motivated primarily by strong emotion (fear, anger, guilt, etc.) and as a consequence the parties take extreme, black and white positions and look to the courts for revenge or validation. Reasonable accommodations are not made. The attorneys often function as "alter egos" for their clients instead of counseling the clients toward sensible solutions. This is the costliest form of dispute resolution, emotionally and financially. It is always destructive for the children involved. Such cases can drag on for many years. Few clients report satisfaction with the outcome of cases handled this way, regardless of who won.

2. Can you say more about Collaborative Law?

Collaborative law is the newest divorce dispute-resolution model. In collaborative law, both parties to the divorce retain separate, specially trained lawyers whose only job is to help them settle the case. If the lawyers do not succeed in helping the clients resolve the issues, the lawyers are out of a job and can never represent either client against the other again. All participants agree to work together respectfully, honestly, and in good faith to try to find win-win solutions to the legitimate needs of both parties. Four creative minds work together to devise individualized settlement scenarios. No one may go to court, or even threaten to do so, and if that should occur, the collaborative law process terminates and both lawyers are disqualified from any further involvement in the case. Lawyers hired for a collaborative law representation can never under any circumstances go to court for the clients who retained them.

3. Is Collaborative Law only for divorces?

Collaborative lawyers can do everything that a conventional family lawyer does except go to court. They can negotiate non-marital custody agreements, premarital and postnuptial agreements, and agreements terminating gay and lesbian relationships. Collaborative Law can also be used in probate disputes, business partnership dissolutions, employment and commercial disputes—wherever disputing parties want a contained, creative, civilized process that builds in legal counsel and distributes the risk of failure to the lawyers as well as the clients.

4. What is the difference between Collaborative Law and mediation?

In mediation, there is one neutral professional who helps the disputing parties try to settle their case. Mediation can be challenging where the parties are not on a level playing field with one another, because the mediator cannot give either party legal advice, and cannot help either side advocate its position. If one side or the other becomes unreasonable or stubborn, or lacks negotiating skill, or is emotionally distraught, the mediation can become unbalanced, and if the mediator tries to deal with the problem, the mediator may be seen by one side or the other as biased, whether or not that is so. If the mediator does not find a way to deal with the problem, the mediation can break down, or the agreement that results can be unfair. If there are lawyers for the parties at all, they may not be present at the negotiation and their advice may come too late to be helpful. Collaborative Law was designed to deal with these problems, while maintaining the same absolute commitment to settlement as the sole agenda. Each side has legal advice and advocacy built in at all times during the process. Even if one side or the other lacks negotiating skill or financial understanding, or is emotionally upset or angry, the playing field is leveled by the direct participation of the skilled advocates. It is the job of the lawyers to work with their own clients if the clients are being unreasonable, to make sure that the process stays positive and productive.

5. How is Collaborative Law different from the traditional adversarial divorce process?

- In Collaborative law, all participate in an open, honest exchange of information. Neither party takes advantage of the miscalculations or mistakes of the others, but instead identifies and corrects them.
- In Collaborative law, both parties insulate their children from their disputes and, should custody be an issue, they avoid the professional custody evaluation process.
- Both parties in collaborative law use joint accountants, mental health consultants, appraisers, and other consultants, instead of adversarial experts.
- In collaborative law, a respectful, creative effort to meet the legitimate needs of both spouses replaces tactical bargaining backed by threats of litigation.
- In collaborative law, the lawyers must guide the process to settlement or withdraw from further participation, unlike adversarial lawyers, who remain involved whether the case settles or is tried.
- In collaborative law, there is parity of payment to each lawyer so that neither party's representation is disadvantaged vis-á-vis the other by lack of funds, a frequent problem in adversarial litigation.

6. What kind of information and documents are available in the collaborative law negotiations?

Both sides sign a binding agreement to disclose all documents and information that relate to the issues, early and fully and voluntarily. "Hide the ball" and stonewalling are not permitted. Both lawyers stake their professional integrity on ensuring full, early, voluntary disclosure of necessary information.

7. What happens if one side or the other does play "hide the ball," or is dishonest in some way, or misuses the Collaborative Law process to take advantage of the other party?

That can happen. There are no guarantees that one's rights will be protected if a participant in the collaborative law process acts in bad faith. There also are no guarantees in conventional legal representation. What is different about collaborative law is that the collaborative agreement requires a lawyer to withdraw upon becoming aware his/her client is being less than fully honest, or participating in the process in bad faith.

For instance, if documents are altered or withheld, or if a client is deliberately delaying matters for economic or other gain, the lawyers have promised in advance that they will withdraw and will not continue to represent the client. The same is true if the client fails to keep agreements made during the course of negotiations, for instance an agreement to consult a vocational counselor, or an agreement to engage in joint parenting counseling.

8. How do I know whether it is safe for me to work in the Collaborative Law process?

The collaborative law process does not guarantee you that every asset or every dollar of income will be disclosed, any more than the conventional litigation process can guarantee you that. In the end, a dishonest person who works very hard to conceal money can sometimes succeed, because the time and expense involved in investigating concealed assets can be high, and the results uncertain. However, far greater efforts to track down concealed assets and income can be expected in conventional litigation than in collaborative law, which relies upon voluntary disclosure.

You are generally the best judge of your spouse or partner's basic honesty. If s/he would lie on an income tax return, he or she is probably not a good candidate for a Collaborative Law divorce, because the necessary honesty would be lacking. But if you have confidence in his or her basic honesty, then the process may be a good choice for you. The choice ultimately is yours.

9. Is Collaborative Law the best choice for me?

It isn't for every client (or every lawyer), but it is worth considering if some or all of these are true for you:

a) You want a civilized, respectful resolution of the issues.
b) You would like to keep open the possibility of friendship with your partner down the road.
c) You and your partner will be co-parenting children together and you want the best co-parenting relationship possible.
d) You want to protect your children from the harm associated with litigated dispute resolution between parents.
e) You and your partner have a circle of friends or extended family in common that you both want to remain connected to.
f) You have ethical or spiritual beliefs that place high value on taking personal responsibility for handling conflicts with integrity.
g) You value privacy in your personal affairs and do not want details of your problems to be available in the public court record.
h) You value control and autonomous decision making and do not want to hand over decisions about restructuring your financial and/or child-rearing arrangements to a stranger (i.e., a judge).
i) You recognize the restricted range of outcomes and "rough justice" generally available in the public court system, and want a more creative and individualized range of choices available to you and your spouse or partner for resolving your issues.
j) You place as much or more value on the relationships that will exist in your restructured family situation as you place on obtaining the maximum possible amount of money for yourself.
k) You understand that conflict resolution with integrity involves not only achieving your own goals but finding a way to achieve the reasonable goals of the other person.
l) You and your spouse will commit your intelligence and energy toward creative problem solving rather than toward recriminations or revenge—fixing the problem rather than fixing blame.

10. My lawyer says she settles most of her cases. How is collaborative law different from what she does when she settles cases in a conventional law practice?

Any experienced collaborative lawyer will tell you that there is a big difference between a settlement that is negotiated during the conventional litigation process, and a settlement that takes place in the context of an agreement that there will be no court proceedings or even the threat of court. Most conventional family law cases settle figuratively, if not literally, "on the courthouse steps." By that time, a great deal of money has been spent, and a great deal of emotional damage can have been caused. The settlements are reached under conditions of considerable tension and anxiety, and both "buyer's remorse" and "seller's remorse" are common. Moreover, the settlements are reached in the shadow of trial, and are generally shaped largely by what the lawyers believe the judge in the case is likely to do.

Nothing could be more different from what happens in a typical collaborative law settlement. The process is geared from day one to make it possible for creative, respectful collective problem solving to happen. It is quicker, less costly, more creative, more individualized, less stressful, and overall more satisfying in its results than what occurs in most conventional settlement negotiations.

11. Why is collaborative law such an effective settlement process?

Because the collaborative lawyers have a completely different state of mind about what their job is than traditional lawyers generally bring to their work. We call it a "paradigm shift." Instead of being dedicated to getting the largest possible piece of the pie for their own client, no matter the human or financial cost, collaborative lawyers are dedicated to helping their clients achieve their highest intentions for themselves in their post-divorce restructured families.

Collaborative lawyers do not act as a hired guns, nor do they take advantage of mistakes inadvertently made by the other side, nor do they threaten, or insult, or focus on the negative either in their own clients or on the other side. They expect and encourage the highest good-faith problem-solving behavior from their own clients and themselves, and they stake their own professional integrity on delivering that, in any collaborative representation they participate in.
Collaborative lawyers trust one another. They still owe a primary allegiance and duty to their own clients, within all mandates of professional responsibility, but they know that the only way they can serve the true best interests of their clients is to behave with, and demand, the highest integrity from themselves, their clients, and the other participants in the collaborative process.

Collaborative Law offers a greater potential for creative problem solving than does either mediation or litigation, in that only collaborative law puts two lawyers in the same room pulling in the same direction with both clients to solve the same list of problems. Lawyers excel at solving problems, but in conventional litigation they generally pull in opposite directions. No matter how good the lawyers may be for their own clients, they cannot succeed as Collaborative Lawyers unless they also can find solutions to the other party's problems that both clients find satisfactory. This is the special characteristic of collaborative law that is found in no other dispute resolution process.

12. What if my spouse and I can reach agreement on almost everything, but there is one point on which we are stuck. Would we have to lose our Collaborative Lawyers and go to court?

In that situation it is possible, if everyone agrees (both lawyers and both clients), to submit just that one issue for decision by an arbitrator or private judge. We do this with important limitations and safeguards built in, so that the integrity of the collaborative law process is not undermined. Everyone must agree that the good faith atmosphere of the collaborative law process would not be damaged by submitting the issue for third party decision, and everyone must agree on the issue and on who will be the decision maker.

13. What if my spouse or partner chooses a lawyer who doesn't know about Collaborative Law?

Collaborative lawyers have different views about this. Some will "sign on" to a collaborative representation with any lawyer who is willing to give it a try. Others believe that is unwise and will not do that.

Trust between the lawyers is essential for the collaborative law process to work at its best. Unless the lawyers can rely on one another's representations about full disclosure, for example, there can be insufficient protection against dishonesty by a party. If your lawyer lacks confidence that the other lawyer will withdraw from representing a dishonest client, it might be unwise to sign on to a formal collaborative law process (involving disqualification of both lawyers from representation in court if the collaborative law process fails).

Similarly, collaborative law demands special skills from the lawyers—skills in guiding negotiations, and in managing conflict. Lawyers need to study and practice to learn these new skills, which are quite different from the skills offered by conventional adversarial lawyers. Without them, a lawyer would have a hard time working effectively in a collaborative law negotiation.

And some lawyers might even collude with their clients to misuse the collaborative law process, for delay, or to get an unfair edge in negotiations. For these reasons, some lawyers hesitate to sign on to a formal collaborative law representation with a lawyer inexperienced in this model. That doesn't mean your lawyer could not work cordially or cooperatively with that lawyer, but caution is advised in signing the formal agreements that are the heart of collaborative law where there is no track record of mutual trust between the lawyers. You and your spouse will get the best results by retaining two lawyers who both can show that they have committed to learning how to practice collaborative law by obtaining training as well as experience in this new way of helping clients through divorce.

14. Why is it so important to sign on formally to the official Collaborative Law Agreement? Why can't you work collaboratively with the other lawyer but still go to court if the process doesn't work?

The special power that Collaborative Law has to spark creative conflict resolution seems to happen only when the lawyers and the clients are all pulling together in the same direction, to solve the same problems in the same way. If the lawyers can still consider unilateral resort to the courts as a fallback option, their thought processes do not become transformed; their creativity is actually crippled by the availability of court and conventional trials. Only when everyone knows that it is up to the four of them and only the four of them to think their way to a solution, or else the process fails and the lawyers are out of the picture, does the special "hypercreativity" of collaborative law get triggered. The moment when each person realizes that solving both clients' problems is the responsibility of all four participants is the moment when the magic can happen.

Collaborative law is not just two lawyers who like each other, or who agree to "behave nicely." It is a special technique that demands special talents and procedures in order to work as promised.

Any effort by parties and their lawyers to resolve disputes cooperatively and outside court is to be encouraged, but only collaborative law is collaborative law.

15. How do I find a collaborative lawyer?

You can check the yellow pages and contact your local bar association to see if there are listings of collaborative lawyers in your area. You can contact the International Academy of Collaborative Professionals (web site: http://www.collabgroup.com) to inquire about collaborative lawyers near you. Find the best collaborative practitioner that you can; interview several, and ask for resumes. Ask how many collaborative cases the lawyer has handled and how many of them terminated without agreements. Ask what training the lawyer has in Collaborative Law, alternate dispute resolution, and conflict management.

16. How do I enlist my spouse in the process?

Talk with your spouse, and see whether there is a shared commitment to collaborative, win-win conflict resolution. Share materials with your spouse such as this handbook and articles that discuss collaborative law. Encourage your spouse to select counsel who has experience and training in collaborative law and who works effectively with your own lawyer: lawyers who trust one another are an excellent predictor of success in dispute resolution.

17. How long will my divorce take if I use collaborative law?

The collaborative law process is flexible and can expand or contract to meet your specific needs. Most people require from three to seven of the four-way negotiating meetings to resolve all issues, though some divorces take less and some take more. These meetings

can be spaced with long intervals between, or close together, depending on the particular needs of the clients. Once the issues are resolved, the lawyers will complete the paperwork for the divorce. Time limits and requirements for divorce vary from state to state; ask your lawyer.

18. How expensive is collaborative law?

Collaborative lawyers generally charge by the hour as do conventional family lawyers. Rates vary from locale to locale and according to the experience of the lawyer.

No one can predict exactly what you will pay for this kind of representation because every case is different. Your issues may be simple or complex; you and your partner may have already reached agreement on most, or none, of your issues. You may be very precise or very casual in your approach to problems. You and your partner may be at very different emotional stages in coming to terms with separating from one another. What can be said with confidence is that no other kind of professional conflict resolution assistance is consistently as efficient or economical as collaborative law for as broad a range of clients. While the cost of your own fees cannot be predicted accurately, a rule of thumb is that collaborative law representation will cost from one tenth to one twentieth as much as being represented conventionally by a lawyer who takes issues in your case to court.

19. Isn't mediation cheaper because only one neutral, instead of two lawyers, has to be paid?

No, mediation is not usually cheaper. Because there is nobody in a mediation negotiation whose job it is to help the client refine issues and participate with maximum effectiveness in the process, mediation can become stalled more easily than collaborative law does. Mediations can take longer, and can involve more wheel-spinning, than collaborative law negotiations. They also can be at greater risk for falling apart entirely, since the mediator must remain neutral and cannot work privately with the more disturbed client to get past impasses. In either event, the resulting inefficiencies can be costly.

Also, most mediators strongly urge that independent lawyers for each party review and approve the mediated agreement. If the lawyers have not been a part of the negotiations, the lawyers may be unhappy with the results and a new phase of negotiations or even litigation may result. If the lawyers do participate, then three professionals are being paid in the mediation.

Lawyers who do both mediation and collaborative law typically see collaborative law as the model that offers greatest promise of successful outcome for the broadest range of divorcing couples. Of course, if two calm and reasonable people whose issues are not complex go to a mediator, they can usually achieve agreement efficiently and often at low cost. Generally, it is only after the fact that we know that a couple was well-suited for mediation. Strong feelings arise unexpectedly; issues become more complicated than anyone anticipated. Collaborative law can usually deal with these predictable happenings more readily than can mediation.

Many people genuinely believe that they will have a very quick and simple divorce negotiation, but life can be surprising. Many people prefer to have a process in place from the start that is well-equipped to deal with unexpected problems rather than to have to terminate a mediation and start over with litigation counsel.

20. How does the cost of collaborative law compare with the cost of litigation?

Litigation is, quite simply, the most expensive way of resolving a dispute. By way of illustration, it is common for litigated divorces to begin with a motion for temporary support. The result is exactly that—a temporary order, not any final resolution of any issues. It is not uncommon for a single temporary support motion to cost as much or more in lawyers' fees and costs as it costs for an entire collaborative law representation.