

COLLABORATIVE FAMILY LAW PRIMER

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What is collaborative family law?

Collaborative law is a revolutionary new way to practice family law that is spreading like wildfire across North America and into Europe and Australia. It is reframing the experience of separation and divorce for a growing number of families and transforming their lawyers as well.

The traditional process offered to divorcing couples has been the adversarial legal system. Whether or not they eventually wind up in court, negotiations conducted under the implied or overt threat of litigation often inflict personal and financial devastation on families. Despite sincere efforts by lawyers to help, resolution usually comes too late, costs too much, and falls below expectations. The intangible interests of the parties - to preserve relationships with extended family and mutual friends, to co-parent amicably after divorce, to be treated with respect, and to control the process and the outcome - are ignored altogether.

Three decades ago, interest-based mediation was heralded as the answer to the litigation process for families. Indeed, mediation was the first dispute resolution model to recognize the capacity and authority of the parties to determine their own settlements and it continues to be a powerful process option. However, in mediation, the parties work with one neutral facilitator and that approach is not appropriate for everyone. Furthermore, mediated agreements sometimes breakdown in the hands of lawyers operating in the adversarial paradigm.

In 1990, Stu Webb, a lawyer in Minnesota, spoke out on behalf of divorcing spouses and disillusioned family lawyers. He created an enlightened alternative to the adversarial process that he called Collaborative Law. The concept is simple and profound: tailor the process to the parties, not the other way around, and give lawyers a joint mandate to empower the parties to create their best possible agreement, as they define it.

In the collaborative law process, trained collaborative lawyers represent and support the parties throughout each stage of the process. The parties agree to act in good faith, make full disclosure, put their children first, and consider each other's perspective and interests. Lawyers act as negotiation coaches, information resources, and advocates for the interests of their clients and the integrity of the process. The

underpinning of collaborative law is the written agreement between all participants that the collaborative lawyers are retained solely to facilitate the negotiation of a mutually acceptable agreement. If either party decides to go to court, both lawyers are disqualified from further representation.

With the option of drifting to court waived, the creativity and problem-solving skills of all participants are unleashed. Over and over again, collaborative clients confirm the wisdom of Stu Webb's concept by creating customized, outside-the-box agreements. Clients take away an improved ability to communicate and co-parent and a process for resolving future issues. They achieve closure of their relationship with dignity, at reasonable cost.

Principles of CFL

The principles of the CFL process are as follows:

- **Team approach** – The lawyers and the clients work together as a team of equals, all pulling together on the same side of the problem. The team may include neutral experts when needed.
- **Court is not an option** – Neither lawyer can commence a legal proceeding or threaten to do so during the CFL process. This provides an incentive for the lawyers and their clients to keep working together to find acceptable solutions and unleashes creative, out of the box problem solving.
- **Recognition of the interdependence of the parties** – There is a shared belief that the best possible outcome can only be achieved if the needs and interests of both parties are met. Clients are not expected to agree with each other, but to accept that the other, along with his or her perspective and belief system, is a necessary partner in creating a solution.
- **Focus on interests** – Collaborative negotiations are interest-based, rather than adversarial. The parties exchange information and consider all available options before choosing the best solution to meet their identified interests.
- **Law is not the only standard** – Although CFL lawyers inform their clients about their legal rights and obligations, they encourage the parties not to limit themselves to outcomes dictated by the law.

- ***Process and outcome are of equal importance*** – In collaborative negotiation, the parties seek to understand and to be understood. The lawyers, in consultation with the parties, bear responsibility for creating a respectful, effective negotiation process. The parties own the outcome.

Assumptions of CFL

While the adversarial approach assumes that people in conflict do not have the capacity to make their own decisions, CFL assumes that most people in conflict can, with proper support, make decisions for themselves. They do not need either their lawyers or a judge to decide matters of importance for them. It is recognized that conflict, particularly about important personal issues, usually causes people to feel weak and self-focused and diminishes their capacity to make good decisions. However, CFL lawyers provide the parties with support and guidance to enable them to regain the capacity to think for and beyond themselves.

The nature and degree of support provided by a CFL lawyer to her client will depend upon a variety of factors, including the client's personality type, emotional state, cognitive abilities, education, and expertise, as well as the nature and complexity of the issues and the level of conflict between the parties. Clients may need help to voice opinions and concerns, to understand complex information, to deal with feelings of guilt, hurt or anger, and to appreciate the legal landscape.

Individual meetings may be necessary to allow the clients to vent strong emotions and to allow lawyers to reality check the clients' stated objectives when they diverge widely from accepted legal options and the objectives of the other spouse. For example, a client who appears angry about the obligation to pay spousal support in a long-term relationship needs to clearly understand that indefinite support is customary after lengthy, traditional marriages, where there is a need by the other spouse. In this situation, the dependant spouse's interest in her future financial well-being and clear legal entitlement to ongoing appropriate support are congruent. A CFL lawyer may convene an individual meeting with her client or take a break from the settlement meeting to have a brief discussion of this kind of issue. It provides the client with an opportunity to express strong feelings without harming the working relationship between the parties, and to negotiate realistically around the issue in question.

Whether client support is provided in the settlement meetings in the presence of all participants or by way of an individual meeting with the client is a question of judgment. While lawyers work together as a team in an atmosphere of transparency, it is also critically important that the lawyer maintains the client's dignity, allows her to save face, and maintains her trust and confidence. Such is the art and balance of collaborative negotiation.

Traditional negotiations conducted in the adversarial arena, cooperative as they may be, assume that the law dictates the outcomes available to the parties. Lawyers and clients may have tremendous difficulty letting go of the notion that results must comply with a statute and legal custom. The CFL process gives the parties, not their lawyers or the law, the right and responsibility to create their own outcomes. CFL lawyers encourage their clients to treat an outcome based solely upon statutory or case law as one option among many, to be assessed in terms of its ability to meet the interests of the parties in the best way possible.

CFL Process Overview

In general terms, the CFL process involves a progression through a series of stages. While they are sequential, there is nothing to prevent the participants from looping back to an earlier phase if they reach an impasse. However, it is extremely important that all stages take place and that none are skipped or glossed over. For example, for the CFL process to work well, it is essential that the client be properly prepared prior to participating in the first settlement meeting. Similarly, one cannot omit a discussion of the parties' individual and common interests before looking at settlement options.

Stage One: The First Client Meeting

The process begins with an initial meeting between the client and her lawyer. The lawyer listens to the client's concerns and reviews process options. If the client has not yet made any decisions as to process, CFL is presented as one option for the client to consider, along with mediation and the traditional legal approach including litigation. The purpose of this discussion is to screen for appropriateness for CFL, and to help the client make an informed choice as to the most appropriate dispute resolution process for her.

If the client has already chosen CFL, the process may be discussed, questions answered and the Retainer Agreement signed. Afterwards, the lawyer may inquire of the client's interests and objectives and provide an

overview of her legal position. The scope and duration of this discussion is subject to time considerations as well as avoidance of information overload. A comprehensive review of process may be all that a client can absorb during this first meeting.

Stage Two: First Contact with the Other Side

Once both parties commit to the CFL process, one of the lawyers initiates contact with the other, preferably by telephone or a meeting as opposed to the traditional exchange of letters. At this early stage, the lawyers begin the team approach. They identify any urgent concerns for both parties and agree to exchange whatever preliminary disclosure is necessary to deal with those issues. The lawyers then arrange the first settlement meeting. They might conduct a run-through of that meeting to ensure that it will proceed smoothly.

Stage Three: Client Preparation

Before the first meeting, each lawyer has an in-depth, client-centred discussion with her client, to understand not only the facts of the case but also to learn what the client really wants. The lawyer explains the client's legal rights and obligations as one of many settlement options.

The lawyer prepares her client to participate effectively in the CFL process. They review the principles and assumptions of CFL. They discuss the respective roles of the lawyers and the clients and how they contrast with a more traditional, lawyer-dominated approach. They consider the protocol for effective participation and communication in the settlement meetings. Finally, the lawyer explains the various stages of the CFL process and, in particular, the settlement meetings at which they rely upon interest-based negotiation to resolve the issues.

Stage Four: The First Settlement Meeting

The lawyers welcome and introduce the participants. The lawyers review the Participation Agreement and all of the participants commit to the CFL process orally and in writing. With the lawyers facilitating their discussion, the clients agree to the behavioural guidelines that will govern them in the process. The participants then turn their attention to any immediate concerns. An agreement on urgent matters at this stage contributes to the momentum of their problem-solving efforts.

An important task at the first settlement meeting is the identification and prioritization of the issues that each

party would like to resolve. The lawyers begin to elicit the interests, concerns, and objectives of each party. The participants determine the information and documents that they require. They agree upon the time frames for the exchange of this information, assign homework tasks, and schedule dates for the next settlement meeting and those that are to follow.

Following the first settlement meeting, the lawyers debrief with their respective clients and with each other. They should do this before and after each subsequent settlement meeting to flag and resolve problems and keep the process moving smoothly.

Stage Five: Subsequent Settlement Meetings

During the meetings that follow, the parties work together to resolve each of the issues. They identify their interests and objectives; analyze the information; develop as wide a range of possible options for settlement as possible; and move incrementally toward a comprehensive settlement. An outcome that maximizes the satisfaction of the parties' common and individual interests is their goal. Toward that end, the participants may choose to involve third party experts or a neutral mediator to help them overcome impasses.

Stage Six: Settlement and Closure

The CFL lawyers prepare a written settlement document collaboratively, using language chosen by the clients wherever possible, and reciting the principles, assumptions, and rationale upon which their agreement is based. Ideally, all of the participants convene at a final meeting to review and sign the Separation Agreement and bring closure to the CFL process.

Screening

Obviously, it takes two to collaborate. If one party is not willing to participate in a cooperative, problem-solving way, then the other must either capitulate to his demands, adopt a similar competitive, win-lose approach, or abandon the process. A collaborative client who discloses sensitive information may be prejudiced if the other side does not make reciprocal disclosure. A collaborative client may experience a profound sense of failure if the CFL process does not result in an agreement. He is then put to the delay and additional cost of retaining another lawyer to act in the adversarial arena.

To protect against these risks, it is essential to screen clients to assess whether they are suitable for the CFL

process. Lawyers must determine whether the prospective client has, or can develop, the capacity to participate effectively in the CFL process. Clients must share a similar commitment to work with rather than against the other for mutually acceptable results. They must demonstrate an acceptance of the fact of their separation, the willingness to manage or learn to manage their emotions, an interest in the well-being of the other side and a commitment to an honourable divorce process. They must value the benefits of maintaining their relationship, of taking a long-term view of the issues, and of retaining control over their own solutions.

Clients who wish to prove a point, punish or control the other spouse, enforce legal rights or establish legal precedent are not suitable for this process. A client who refuses to make temporary arrangements to support a dependant spouse pending negotiations, equivocates on providing full disclosure, or unreasonably delays in starting the process is likewise not appropriate. A client who does not believe that the other spouse will ever provide honest disclosure or negotiate in good faith is not suitable for the process.

Individuals who suffer from serious drug or alcohol abuse, who have clinical issues, who are unwilling to take responsibility for their own choices, or who have difficulty following through with commitments made must be scrutinized carefully at the outset to determine whether sufficient support can be put in place to allow effective participation. If a lawyer is in doubt about any of these matters, he may wish to enlist the services of a therapist or experienced CFL lawyer to help screen for appropriateness or decline to recommend CFL.

Some CFL lawyers have a thorough understanding of the dynamics of domestic abuse and sufficient experience with this issue to enable them to manage the process effectively where spousal abuse has occurred and the abused spouse wishes to pursue CFL. Such a lawyer can ensure that the abused spouse is capable of asserting her needs and that appropriate protocols and ground rules are in place to create a safe environment for negotiation, both at and away from the table. He understands the psycho-dynamics of the abuser and the abused spouse and can ensure balanced negotiations. With a properly skilled lawyer, CFL may provide the best option for resolution for an abused spouse in cases where mediation and adjudication are not appropriate. However, lawyers who do not have sufficient

experience with domestic violence may wish to refer that client to another CFL counsel or recommend traditional lawyer to lawyer negotiation.

There is likely to be a wide divergence of views as to which clients may be appropriate for CFL. Some lawyers believe that any properly informed client has the right to choose the process. Other lawyers assume an obligation for thorough screening and determination of appropriateness for CFL on behalf of the client. We recommend that CFL lawyers only enter into collaborative cases with clients and counsel with whom they feel confident. As the skill level of the lawyer increases, he may take on clients who present greater challenges in terms of their capacity.

CFL lawyers chosen by the parties must also assess whether they have the capacity to collaborate together. They may have a poor track record of working together and there may be a low level of trust between them. If a lawyer believes that he will have difficulty working with the CFL lawyer selected by the other client's spouse or partner, he should address this issue directly with the other lawyer. They should talk about their working relationship. They might consider retaining a mediator or CFL consultant to be paid by them.

Alternatively, a lawyer could refer a client to another CFL lawyer who might feel a greater level of comfort working with the other spouse's lawyer. Also, CFL is not the only process choice available to lawyers who would like to work together and avoid litigation. They could agree to follow the CFL model of collaborative behaviour but decline to enter into a CFL Participation Agreement.

Participation in the CFL process does not preclude the clients from later pursuing arbitration or litigation if negotiations break down. Even if they should so proceed, they may still have derived some benefits from their CFL experience. It may have improved their ability to communicate, streamlined the exchange of documents and information, and achieved a resolution of some of the issues, leaving only unresolved matters for adjudication or arbitration.

What law clerks bring to the collaborative process

Law clerks are an indispensable part of the dispute resolution team. Law clerks form independent and important relationships with the client, support the work that the collaborative lawyer does and contribute in

important ways to creating and maintaining a collaborative environment for negotiations. Law clerks enhance the collaborative process by doing the following:

Learn about collaborative law

It is important for law clerks working with collaborative lawyers to understand how collaborative law works and how it is different from traditional family law. Law clerks interested in learning more about collaborative law may check out the Toronto website at www.collaborativefamilylawassociation.com and the website for the International Academy of Collaborative Professionals, www.collabgroup.com. You may also wish to read the following books:

Shields, R., Ryan J., Smith V. (2003), *Collaborative Family Law: Another Way to Resolve Family Disputes*, Carswell.

Tesler, Pauline H. (2001), *Collaborative Law: Achieving Effective Resolution in Divorce without Litigation*, Chicago, IL: ABA Publications

Ensure your clients understand their dispute resolution process choices

In some practices, law clerks are responsible for client intake. If so, they will be the first point of contact with new clients. The law clerk can explain to clients faced with separation that they have three dispute resolution process choices:

- a) Traditional negotiation with the possibility of court in the event of impasse.
- b) Mediation with a neutral mediator.
- c) Collaborative family law.

Law clerks can provide clients considering CFL with a package of information, including the Participation Agreement (a sample agreement is attached to this paper) and a local brochure on CFL which will direct clients to the local or Toronto CFL website. Interested clients may wish to research collaborative law before their first meeting with the lawyer, at which time they will discuss their process choices and make a decision about which process they wish to pursue.

Improve your communication skills

Given that the collaborative process requires that the clients work directly with one another, collaborative lawyers are trained not only in the collaborative process but also in effective communication and interest based negotiation skills. Law clerks, as well as lawyers, work

directly with clients who are experiencing the strong feelings that often go with separation and divorce. In fact, the law clerk often hears about the client's frustration and anxiety before the lawyer does. Training in effective communication skills will increase your capacity to work with your clients to help them manage their emotions, feel understood and be open to hearing their spouse's perspective. Training in interest-based negotiation will increase your ability to listen to the real needs and goals that drive what clients ask for and to appreciate principled negotiation in which the clients:

1. Decide what concerns they wish to resolve;
2. Collect all important information relating to those concerns;
3. Articulate and prioritize the interests, goals and objectives they wish to satisfy;
4. Develop as many options as possible for resolution; and
5. Choose the option which meets their needs in the best way possible.

Stay on top of your client's homework and commitments

At the end of each collaborative settlement meeting one of the lawyers will prepare the minutes of the meeting, or progress report, which will include, among other information, the commitments the clients make to each other and the homework that they undertake with respect to the collection of information. Usually settlement meetings are scheduled two or three weeks apart so that homework needs to be completed in a shorter period of time than a traditional file. Since an integral part of the collaborative process is to re-establish and maintain trust between the parties, it is critical that collaborative clients follow through with the promises they make in settlement meetings. You can provide an invaluable service by following up with the client a few days before an upcoming settlement meeting to ensure he or she has completed agreed upon tasks, gathered any required documents and information, made payments, etc. as agreed at the previous meeting.

Be effective time managers

Lawyers who practice collaborative law will handle fewer cases at one time but they will usually be turned around much more quickly than litigation files. The rhythm of collaborative work is very different than

litigation. Collaborative meetings are usually scheduled for two hours, one in the morning and one in the afternoon, with brief meetings before to catch up with the client and other lawyer and after to debrief with the client and the other lawyer. Since the collaborative process promises timely resolution, it is important to help the lawyer with whom you work to leave time to deal with unexpected matters and to be properly prepared to participate effectively in the collaborative meetings. Back to back meetings with no time for debriefing, catch up or action will not serve clients well. A real challenge in collaborative work is to accommodate the schedules of four people (sometimes five, when neutral experts are brought into the process) to arrange settlement meetings. Using technology such as Microsoft Outlook, and booking two or three meetings at once is recommended.

Help in the collection and assembly of financial information

While there are no affidavits or court documents to prepare, and while the paperwork in a collaborative file is substantially less than a traditional one, it is still necessary to collect and present financial information. The collaborative lawyer will work with the client to decide what information is needed, the extent of back up documentation required and how the information will be presented (sworn financial statement, net worth statement, spreadsheets, etc.). Law clerks may assist in the collection and presentation of information, preparation of financial statements, net family property statements, Supportmate calculations, and interim and final separation agreements.

Organizing and growing the collaborative law practice

Collaborative law is built on trusting, effective working relationships between collaborative lawyers and other professionals. You may assist the lawyer with whom you work by maintaining directories of other collaborative professionals, including mental health professionals (parenting coaches, child experts, counselors), mediators, financial specialists, business valuers and pension valuers. An international marketing campaign has produced outstanding marketing materials for Collaborative Practice which are now available in Ontario. You may assist the lawyer with whom you work by keeping track of referral sources to whom these materials have been sent, and the replies and feedback received. When a collaborative file is concluded, you may send out a client questionnaire to determine how the process worked for the client to assist in monitoring and improving the collaborative process.

As collaborative practice continues to grow, so will the need for law clerks who understand and support the collaborative approach.

This paper (except the section on what law clerks bring to the collaborative process) was excerpted from Collaborative Family Law: Another Way to Resolve Family Disputes.