

## The Collaborative Process and the New Divorce

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by **Robert J. Merlin**

COVID-19 has put pressure on everyone, especially couples who have problems in their relationship. The stresses of being forced to live in a limited space and losing a job, income and possibly a home has people wondering about surviving, and possibly doing so without their spouse. It is more difficult for some to see a bright future with a spouse in these times. Many family attorneys worldwide expect that there will be an increase in divorces in the near future. Most divorcing couples only know about fighting each other in court, but there are alternatives to litigation.

Attorneys have an ethical duty to ensure that their client makes an informed decision about their matter. This includes explaining options for handling their divorce and the advantages and disadvantages of each option. Most family

attorneys only talk about litigating and possibly mediation. Very few discuss the collaborative process, which is ideal for most families.

In litigation, the judge decides the future of the couple and their children. Virtually everything that is filed in court is open to public scrutiny, so the media, friends, competitors and children can see what was filed. Judges must make decisions based upon statutes, rules and appellate decisions. A decision contrary to the statutes, rules and appellate decisions can be reversed on appeal.

The collaborative process is a private way for couples to dissolve their marriage. Everything done in the collaborative process is private, confidential and privileged, so no outsiders should know what is happening until simple papers are filed in court for approval. Instead of the nightmares of family attorneys fighting each



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other as is common in litigation, collaborative professionals work together to help the couple determine their own future. After all, who is in a better position to determine the best interest of the couple and their children than the parents themselves?

The distinguishing characteristics of the collaborative process are:

- The couple has the freedom to create a settlement that meets their family's needs, rather than being limited by

the law, as judges are. There is a constant focus on the best interest of the children throughout the collaborative process.

- Each party has their own attorney, who is specially trained in the collaborative process. A neutral mental health professional acts as a facilitator and child specialist to help the parents decide how to raise their children. The facilitator also helps the couple focus on resolving their differences, rather than battling each other. When appropriate, a neutral financial professional is hired as well.

- The collaborative process is confidential and privileged, so no one should discuss what happens during the process with anyone else, and no one can be compelled to testify about the process except in very limited circumstances. Information and documents are voluntarily exchanged, and the couple commits to transparency. There is no need to go to court to ask a judge to order someone to produce a document or to provide information.

- The couple and professionals meet together. It is easier to schedule a private meeting than to schedule a hearing

before a judge. The professionals demonstrate to the clients how to communicate properly and to resolve differences. Very few couples who have used the Collaborative Process ever return to court after obtaining their final judgment. The Collaborative Process is voluntary, so either party can terminate it at any time, but if they do, the attorneys cannot represent them in contested litigation against each other. The termination of a Collaborative matter is rare, with approximately 90% of Collaborative matters in Florida resulting in a full settlement agreement.

The international media recently covered the *Greene v. Greene* case in Miami where a child was taken away from her mother, an emergency room doctor. Had the couple used the collaborative process, the child's private life would not be known by everyone.

Florida Statutes Section 61.55 states the following as the public policy in Florida:

“It is the policy of this state to encourage the peaceful resolution of disputes and the early resolution of pending litigation through a voluntary settlement process. The collaborative law process is a unique nonadversarial process that preserves a

working relationship between the parties and reduces the emotional and financial toll of litigation.”

The collaborative process may not be for everyone. A person who has unreasonable expectations of a divorce, someone who wants to control his or her spouse, or someone who has significant mental health issues may not be able to use the collaborative process successfully, but that type of person likely will be dissatisfied with any divorce process that is used.

Anyone considering a divorce should consider retaining a collaborative attorney. Doing so will set the tone for your settlement negotiations and it will most likely result in a settlement that is private, fits the needs of the family and is enduring.

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