

'WHAT SHOULD WE DO?'THE CHOICES FOR DIVORCING FAMILIES

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How about giving divorcing families (in crisis, as, of course, most of them are) some choices, some ways to reach settlement with dignity and respect? We can, you know.....and we should.

Life is full of choices, and an important and even vital one is the avenue by which the family reaches the Separation Agreement. In my family law practice, I consider myself morally and ethically and legally obligated to the divorcing person(s) in front of me to let him or her or them (I am merely dispensing information at this point and am not representing either party and am painfully clear about this if the couple wants to come together to see me and get educated) learn about their options at this critical moment in their lives. This is, after all, their lifetime (and not mine) ahead of them, and they should each know what lies ahead (as best we can predict anything) so that he or she makes a decision after, and only after, full disclosure and with informed consent.

Thus, I make it a regular practice to meet with each potential client for at least an hour before we make a joint decision to work together (or not – I am also aware that my practice doesn't always fit with some potential clients). I make sure the person in crisis understands the choices :

1. The litigation model in which the attorney and the party work together to request that the court make the vital decisions

(usually because the parties just can't do it together, for one or many reasons). This time-tested model is completely appropriate for some parties and for some attorneys. No one model fits all, after all.

2. The mediation model in which the neutral mediator guides the parties toward settlement, usually with the attorneys for the parties on the fringe of the process. We are so fortunate to have so many skilled mediators in our geographical area who can ably and successfully facilitate an Agreement between the parties. I refer clients to the Massachusetts Council on Family Mediation for more information (www.mcfm.org), and sincerely believe that educating the client is one of my primary obligations.

3. The collaborative law (also known as collaborative practice) model whereby each client hires a collaboratively-trained attorney (go to www.massclc.org or www.collaborativepractice.com for more info). Then, in a series of 4 way meetings structured around an agenda and fair dealings and transparent negotiations, the parties and their attorneys articulate the goals of the divorcing parties and strive to reach the goals in order to create a Separation Agreement. There are several keys, in my view, to a successful collaborative law situation –

a. The most vital ingredient is for the process to be guided by two collaboratively-trained attorneys. Although many experienced divorce (and business, too – this works in the civil arena also) attorneys can articulate, “I have been negotiating collaboratively forever and already know how to do it.”, my experience is that without the training and belief in ‘paradigm shift’ taught only at a Collaborative Practice training (offered in MA by the Massachusetts Collaborative Law Council several times a year – www.massclc.org), the real collaborative process just doesn't happen, and the clients do not receive the benefits that are possible.

b. At the very first 4 way meeting, the parties and their attorneys voluntarily review and then sign a Collaborative

Process Agreement whereby everyone agrees that if either party involves the court in the process (in other than the final divorce hearing or some other agreed-to situation), then both attorneys will withdraw from the process. Thus, the parties would have to hire new attorneys in order to proceed with litigation. This 'collaborative commitment', this binding agreement to negotiate a resolution with these 4 parties without court intervention, is the cornerstone of the collaborative process and the brilliant idea of Stu Webb, the Minnesota attorney and architect of the collaborative model. The pragmatic 'collaborative commitment', while still offering the parties another choice, further requires their individual and collective 'informed consent' to the process, and serves as a deterrent to one or the other of the parties bolting from the process when the going gets tough, as it can do.

My personal experience with the collaborative model is very good; I have had some incredibly rewarding and challenging cases whereby the other attorney and I were required to communicate openly and often, to talk to each other and to our clients constantly, to draft agendas, to model good behavior for our clients in the midst of tough negotiations, to keep the goals of the clients in the center, where they belong. The goals are an interesting and, I believe, necessary exercise, and I find it very helpful to work with my client before the 1st four way meeting so we can develop, at least partly, the beginnings of the list of goals; every client has them, but some have to be coaxed to share them – one of the most often shared is something like, 'to reach a fair and equitable resolution in a cost-effective and dignified and respectful manner'. Needless to say, I haven't yet found anyone who disagrees with that one! And I find that when the negotiations get really tough (and, believe me, they certainly do! We are, after all, still dealing with divorcing families in crisis!) my 'collaborative colleague' (the other collaborative attorney) and I can often invoke one or another of the previously- set goals in order to (try to) move the discussion along in an appropriate manner.

More possibilities abound in the collaborative protocol. Although each case is individual in its needs and expectations and resources

and personalities and such, the collaborative model can be molded to fit. I have had great fortune with our 'allied professionals', a collaboratively-trained group of financial and mental-health professionals who are often called in to work with one or the other or both of the clients. I have even begun to require that my collaborative clients each spend at least one session with a divorce coach (I usually give the client about 3 names of coaches who have been collaboratively-trained and let the client and the coach work out the relationship) so that he or she begins to establish a professional connection and can, hopefully, turn to that divorce coach during the process for assistance and support. Each client needs a team during the divorce, I have found, and some people use their family and accountant and brother-in-law's cousin and distant friends who have miserable divorce stories to get their information and advice; needless to say, this approach doesn't often advance the best interest of the client. So, by providing access to a team of collaborative professionals during the collaborative divorce, the divorce attorney can guide the client to educate him or herself about the reality and the possibilities. The financial professionals can be used in the traditional ways of appraising or guiding or warning or projecting, but often the financial professional is hired "by the process", by both collaborative clients; also, the financial information is freely shared and explained during 4 way meetings so that everyone receives the exact same information.

All in all, I opt for choices. Collaborative law is my favorite one, and I let my potential clients know that. In addition, I encourage each of you readers (if you go this far in the article, you must be interested.....) to participate in the collaborative movement – educate yourself, your clients, your world. Join us in expanding our options. The possibilities abound.....