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COLLABORATIVE FAMILY LAW: An Overview

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Collaborative law is the newest method of family law dispute resolution, which uses lawyers but avoids court. It is mediation with a twist. Like mediation, spouses are directly involved in the negotiations, but unlike mediation, each has a lawyer at his or her side, acting as legal advisor, problem solver and advocate. Their goal is to achieve a settlement in a non-adversarial, amicable and principled way. The four-way settlement meeting is the structural focus, with both spouses and their lawyers present at all meetings. Letters back and forth are minimized.

Both lawyers must be trained collaborative lawyers, willing and able to work within its rules and principles. The parties sign an agreement at the outset that includes a commitment that they will not start or pursue litigation during the collaborative law process. To make this agreement effective, the lawyers who represent the parties in the collaborative process cannot be the ones who litigate for them if the negotiations break down. Each spouse must hire a new lawyer if he or she has to start court proceedings to resolve the case. As a result of this approach, everyone has a vested interest and a greater commitment to settling the case outside the adversarial rancour of the courts.

The participation agreement, which the parties and their lawyers are required to sign, includes rules of conduct *everyone* must follow– honesty, respectful communications, a commitment to act in good faith, and full financial disclosure. Parties are encouraged to set their own agendas and discuss issues with each other and both lawyers. Neutral professional experts (for example, mental health professionals for cases involving children, or accountants and valuators for financial issues) can also be added as consultants by mutual agreement. These experts then become part of the team. This inter-disciplinary approach is fast evolving as the standard when the case calls for it.

Collaborative law is *interest-based,* which means that the focus is on finding common ground to achieve a fair settlement. Before undertaking collaborative law, lawyers take specialized training in interest-based non-adversarial negotiation skills to add to their legal training.

Since 1999, seven local collaborative family law associations have been established in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec and Nova Scotia, all of which have specific training qualifications for members.

Traditional mediation is usually interest-based, and has the partners negotiating directly with each other, normally with one mediator present who does not take sides and tries to facilitate a resolution. This means the parties do their own negotiating, and after achieving a tentative settlement, the parties each go to their own lawyer to get the agreement drafted and signed. If that is the first time they secured legal advice, one or both parties may get information and legal advice, which may change their mind. There are risks in mediation: Without lawyers present, the more dominant spouse may benefit. Both collaborative law and mediation differ from traditional lawyer-based negotiations, in which the lawyers conduct the negotiations for the parties, who may or may not be in the room while the negotiations take place and may or may not have participated in the discussions.

If as the result of any of these processes, a settlement is reached, it can be incorporated into an agreement drafted by the lawyers and thereafter into a court order.

Collaborative lawyers consider the focus on the family's underlying and complicated interests to be a benefit of the collaborative process, and view traditional lawyers as often taking extreme positions which reflect a party's very "best day" at a trial. They suggest that traditional lawyers' methods rely on the threat of court and often lawyers are not able to settle until the parties are at the courthouse door after an expensive process that entrenches animosity.

The process to select is the one that suits the personalities of the parties. Some couples need the court process and a court-imposed decision, particularly if one of the parties is uncompromising or abusive or unwilling or unable to see that there is more than one side to the issues. However, even within the court structure in many jurisdictions, there is a built-in settlement-minded focus. For example, many Ontario courts require at least one preliminary "case conference" with a judge to try to settle as much of the case as possible before proceeding with any litigation.

If mediation and arbitration will not work, then litigation may be the only way to resolve the impasse. Sometimes, initiating litigation will encourage settlement; other times, it will not. Much depends on the personalities of the parties involved and the reputation and style of the lawyers. Litigation can be expensive, and the outcome is not guaranteed

to satisfy the litigants. The adversarial process can be traumatic because ordinary people are not used to summarizing and justifying their lives and their expenditures from a witness box. In the end, however, the courts are a safety valve, imposing a resolution on disputes that are otherwise deadlocked.