

COLLABORATIVE PRACTICE Toronto

Previously Featured Article

COLLABORATIVE LAW More of the Same or A Quantum Leap?

This article was originally written by Victoria L. Smith, for the March issue of the OBA Family Law Section Newsletter "Matrimonial Affairs"*

Many lawyers who are new to Collaborative Family Law ask the same question - Given that we settle most of our cases anyway, how is collaborative law different from what reasonable lawyers already do? Is CFL just a new label for the same old thing?

Over and over again, some lawyers who come to collaborative law process training workshops begin the first day by wondering what on earth they need to learn about CFL that could possibly take two full days, let alone the three days devoted to skills training! About mid-afternoon, well into the role play section of the course, the lights begin to turn on. One by one, these experienced, well-regarded lawyers have their "Aha" moment. *Wow, this is really different.... I think I'm beginning to get it.... I have no idea how to handle this...Help!!!*

In his January *Matrimonial Affairs* article on Collaborative Family Law, Drew Gunsolus expressed the view that Collaborative Family Law isn't necessary or special because good lawyers should conduct themselves collaboratively anyhow. True, but Mr. Gunsolus, like our fledgling collaborative lawyers, does not yet appreciate the essence or magnitude of collaborative law.

Collaborative Family Law isn't just a trendy buzzword and definitely is not what most of us do already. It is nothing short of a revolution in the way that we approach the practice of family law - including how we define our roles and our relationship with our clients and each other; what we believe about conflict; and how we measure our professional worth. Heady stuff.

Collaborative Family Law is about combining our old skills as advocates with new skills as facilitators and coaches to help *both* clients create their own best outcomes. The premise of CFL is not simply that most litigation cases eventually settle. (Leaving aside that settlement after traditional negotiation is usually achieved by splitting the difference between legal positions after the parties are exhausted and out of money.) The

underpinning of Collaborative Family Law is the assumption that most clients are capable, with support, of making their own best decisions - they don't need lawyers or judges to decide for them - and that interest-based negotiation, rather than adversarial negotiation, produces the best outcomes.

We all agree with Mr. Gunsolus that most people do well to avoid overly combative lawyers who lead their client into court to fill their own pockets. Everyone knows that parenting (and most other) issues are better resolved out of court, given that litigation increases animosity between the parties and extracts crippling legal fees. Does this nearly universal awareness mean we have no need of collaborative family law?

Mr. Gunsolus argues that "The best family law lawyers know when to negotiate and when to litigate. They can assess their client's legal position and save their clients much agony and much in the way of unnecessary costs". While this statement may very well describe an excellent lawyer operating within the adversarial system, it most definitely does not describe a good *collaborative* lawyer.

Collaborative lawyers do not tell their clients when or what to negotiate or when to go to court. Rather, collaborative lawyers believe that the client shares control of the process and owns the outcome. Collaborative lawyers do not limit the solutions available to the client to those dictated by law. Collaborative lawyers view each client as a whole person, with emotional, psychological, relational, financial and legal interests. Collaborative lawyers advise their clients about their legal entitlements and obligations but encourage their clients to look for solutions that go beyond the law and address their real interests.

Collaborative lawyers recognize that the impediments to effective negotiation for divorcing clients are psychological as well as practical. We know that individuals experiencing separation and divorce often feel hurt, angry and out of control. Collaborative lawyers help clients learn to manage strong emotions, communicate effectively, express their views and objectives, listen to and appreciate the perspective of the other spouse, and take a long-term view of the issues. At the same time, we ensure that temporary financial and parenting arrangements are in place, that agreements are kept and that clients are protected while they negotiate.

The Participation Agreement which prevents both lawyers from litigating on behalf of these particular clients is a hallmark of collaborative law. That Agreement provides an incentive for the parties and their lawyers to stay at the table when negotiating gets tough and to seek creative ways around impasses. But the essence of Collaborative Law is the mental shift that lawyers who embrace the process must make.

Collaborative lawyers make a radical, ground-up change in our assumptions about the nature of conflict, the capacity of individuals to resolve their differences, how we define ourselves and deliver our services. We let go of many conscious and subconscious behaviours and attitudes and adopt an entirely new skill set and mindset. Collaborative lawyers listen more than talk, work respectfully with each other and both clients as a team, acknowledge the interdependence of the parties, and focus on process as much as results. Effective collaborative lawyers measure success not in terms of winning cases, or even settling cases, but in terms of how well we support our clients to make their own best decisions. For many lawyers, the transformation to collaborative law involves a quantum leap in attitude and approach.

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