

Collaborative Divorce: The Time is Now

August 14, 2023

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Originally posted on 04/28/2020, content updated on 08/14/2023

“Divorce: a resumption of diplomatic relations and rectification of boundaries.” [i]

We were in uncharted waters — living life in lockdown — many, for the very first time, spent prolonged periods together with spouses and children. The stress of extended family confinement and forced comradery has taken its toll on many marriages. Some marriages were already in the midst of breaking apart and others became ripe for divorce. Initially, Courts were closed for all but emergency matters; divorce not being one of them. Recently, the Courts began to expand their repertoire of cases[ii], but the existing ban on the filing of, or hearings on, new “non-essential” matters, translation – contested divorces — remained in effect. So, what can be done now to move forward with a divorce?

Since many Courts are refusing to permit the filing of new contested divorce cases, and are courteously abstaining[iii] from moving divorce matters along, the choice of either commencing a divorce in a Collaborative setting or moving an active case from litigation to Collaboration makes eminent sense. Moreover, it all can be undertaken in “cyber-space.” Consultations, negotiations, and group meetings — all aspects of the Collaborative process in divorce can be done from the safety of your home via Skype, Microsoft Teams, Zoom[iv] or any other online meeting platform.

What is Collaborative Divorce?

Why collaborate? The answer is simple: control, cost, and speed.

If you and your spouse: (i) do not want to wait for the Courts to re-open to start or continue a divorce, and are seeking a somewhat kinder/gentler resolution of your marital issues; (ii) wish to keep costs down; and (iii) desire a speedier conclusion to marital problems than traditional divorce litigation, then Collaborative divorce should be of considerable interest to you.

A Collaborative divorce most closely resembles mediation; but it is not mediation (as will be discussed below). It is a divorce where the parties side-step combative litigation and instead commit to resolve their issues in a manner that is mutually beneficial. The Collaborative process proceeds in much the same manner as a traditional litigated divorce. The issues are the same: from custody and visitation of the parties’ children, to asset division and support.[v] The parties and their attorneys learn about the issues before proceeding with resolution. Where it differs from litigation is that the parties and their attorneys work

together to resolve the case.[vi] The attorneys then prepare a proposed settlement agreement and the parties sign. The divorce is essentially all done on paper. Rarely will a Court appearance (other than an uncontested divorce hearing) be necessary.[vii]

Unlike mediation, Collaborative lawyers work both on behalf of their clients and together, as they negotiate and enable resolution. In mediation a mediator facilitates negotiation but is neutral. In Collaborative practice the parties agree to cooperate and actively accomplish a settlement. In mediation, the parties need not retain counsel and do not commit to achieve anything. Thus, absent counsel and a commitment to a non-litigated conclusion, there is a latent risk to a party in mediation, in terms of duress, over-reaching, and lack of informed consent.

Proceeding with a Collaborative divorce requires that each party hire a lawyer who engages in Collaborative practice. [viii] Once selected, the parties and their respective counsel will sign an agreement by which both parties commit to the Collaborative process, i.e., transparency of relevant information, mutual problem solving and a mutually beneficial resolution; a win-win if you will. The attorneys and their clients will meet separately, and speak together on as many occasions as is necessary, and then meet jointly (both attorneys, both clients) as often as needed to resolve the divorce. Rather than engage in costly legal battles, attorneys in the Collaborative process guide their clients through dispute resolution, working together with the parties to gather information and generate options for settlement. The attorneys enable and promote problem solving; they can neither promote nor threaten adversarial engagement. A crucial element of a Collaborative agreement is that the parties agree that they will not seek Court intervention for a dispute. If either does, the attorneys must withdraw. Collaborative counsel cannot represent their respective clients in contested hearings in Court.

Another essential element of the Collaborative process is transparency, that each party agrees to disclose voluntarily all relevant information. One of the biggest drivers of legal fees in a litigated case is discovery disputes: the effort of one spouse to obtain information that is not forthcoming from the other spouse. In the Collaborative process, both spouses make a commitment to turning over all relevant information; each spouse pledges that he or she will not take advantage of a misunderstanding of the other party, but instead will seek affirmatively to correct any misunderstanding by the other spouse.

Collaborative divorce being more transparent, straightforward, and effectual, is usually more cost-efficient. By working together to generate, prioritize and implement alternatives for a solution—instead of provoking anger, enabling blame, and airing long held grievances—there is ample opportunity to strive for quicker results that can satisfy more of both parties' respective goals. Complete disclosure and facilitated communications with all eyes focused on problem-solving, enable the parties to address and deal with all issues without wasting time on destructive battles. Since the matter is settled out of Court, there is no need for the numerous Court appearances and scheduling dates necessary with litigation. Experience shows that Collaborative divorce cases generally take less time than litigated ones.

Finally, last, but not least, Collaborative divorce need not originate as a Collaborative matter. These writers have personally represented individuals in the Collaborative process who chose to leave their litigated divorce actions behind, and decided to reach agreement with their spouse in a much faster manner and with less sturm and drang.

Conclusion

Particularly in our then-current climate, spouses needed to consider alternatives to the Courts to resolve their differences. Parties wishing to divorce or proceed with their divorce actions were locked out of our adversarial judicial system, and no one knew how long it would take until the Courts returned to normal operations (or a new normal). Some may have wished to wait and prepare for a divorce while in captivity.[ix] But for others the time is now to take their first steps toward resolving their marital problems or, at least, take a turn onto a better route. Times being what they were, the Collaborative divorce process

was more appealing than ever before and should have been a strong consideration for many as they maneuvered through the treacherous waters of a post-COVID world.

[i] The Unabridged Devil's Dictionary, Ambrose Bierce[ii] During the past week, judges have been reviewing their non-essential case inventories, looking for ways to move these pending matters forward. These "pending matters" can, in a Judge's discretion, include some matrimonial cases.[iii]From 1776 , the musical with music and lyrics by Sherman Edwards and a book by Peter Stone.

[iv] Be advised that Zoom has been having problems with security; and is not a recommended format.

[v]There is full disclosure of all assets, debts, and income without formal proceedings.

[vi]The parties can and do often jointly retain other professionals to aid in the process, such as property appraisers or financial consultants.

[vii] Some states may require a Court appearance to finalize the divorce.

[viii]An attorney specially trained in collaborative practice.

[ix] But that is a discussion for another day.