The Collaborative Law (R)evolution

An Idea Whose Time Has Come In Nevada

By: The Hon. Robert W. Lueck, Family Court Division

The epiphany for Stuart Webb came in 1990 after practicing family law in the same way for many years. The adversary legal system for divorces was stressful for lawyers and litigants alike, and he was convinced this system wasn't working. He thought there had to be a better way to do divorces.[1]

He was far from alone in his thinking. There is a growing body of opinion evolving in the legal and mental health professions that agrees.[2] In many cases, it may be the worst way to get divorced. The traditional adversary system entails a lawsuit whereby one party sues the other. It is "me" versus "you." The adversary system intuitively encourages conflict and often inflames the feelings of anger, hostility, emotional pain, and emotional trauma that normally accompany the divorce process. Litigation forces the parties to take "positions" and dig in their heels. This becomes exacerbated by attorneys who zealously advocate for their respective clients adding more fuel to the litigation fires and prolonging the conflict.

Those of us who have spent much time in domestic relations cases readily recognize the behavior patterns; one spouse makes allegations and attacks against the other spouse; the other spouse denies the allegations and makes similar allegations and attacks in response. It is the legal equivalent of fencing with rapier swords.

A divorce is not a legal problem. It is a relationship problem with collateral legal consequences. There are three main components in a divorce case: financial, legal and emotional. These components are thoroughly intertwined and must be addressed in every case. Lawyers who understand these dynamics and how they interact are better equipped to understand their clients and facilitate settlements. It is still very much a personal art and not a science. Some lawyers settle almost every domestic case while others settle cases only after much difficulty, expense and rancor.

By nature, domestic relations cases are among the most difficult, because they involve considerable emotional stress and uncertainty for litigants and the attorneys.

These couples had, once upon a time, fallen in love; shared their deepest intimacies; and often brought children into the world from their union. The breakup of a marriage or a long-term personal relationship may be one of the most traumatic experiences of a person's life.

Domestic relations may negatively impact lawyers, even though the lawyers themselves can sometimes be difficult and eager to litigate. There are times the client disregards the advice of counsel and seeks to advance weak or meritless contentions that the lawyer knows won't fly in court.

Lawyers often receive phone calls from irate clients and have to endure the venom or frustration if the case doesn't go so well in court. Also, disgruntled clients may be less likely to pay outstanding fees to their lawyers. Now the attorney/client relationship becomes even more strained. The lawyer may be forced to withdraw and litigate a lien on the case to protect the fees earned in the case. The cost to the lawyer includes the lost time and the lost money commonly known in the legal profession as involuntary pro bono work.

The Courts Have Rules of Evidence

The goal of a trial lawyer is not necessarily to seek the truth but to prevail in the case. To this end, lawyers attempt to limit the evidence that hurts their case and try to admit evidence that enhances their case. The real goal is to spin and twist the evidence as far as the rules of evidence will permit in order to gain the winning edge. Forceful advocacy is equated with zealous advocacy. The parties may share a portion of the blame. Unfortunately in today's litigation environment, some parties have little or no hesitation in perjuring themselves in court in their efforts to "win" the battle.

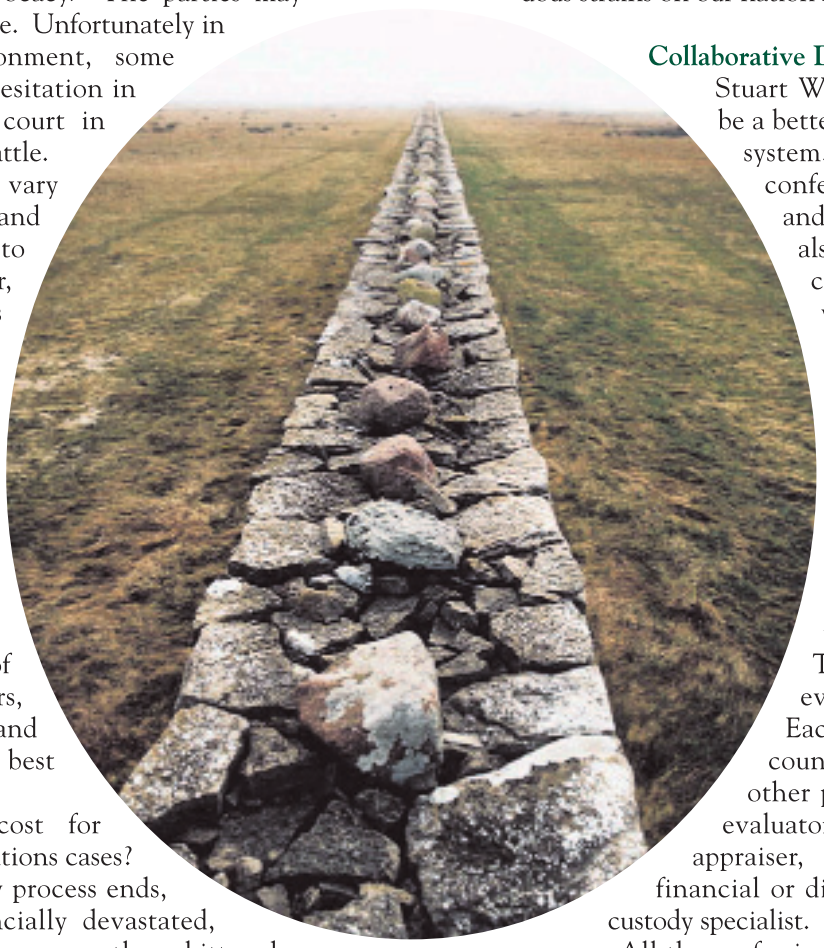
These attacks, which vary in degrees of intensity and character, are presented to an authoritative stranger, the trial judge, who is supposed to sort through it all and somehow divine who is telling the truth about anything. Judges are human and are not blessed with extra-sensory perception or divine wisdom even with many years of experience and education. Judges get to hear a few hours of testimony from strangers, determine the truth, and hopefully reach the best decision possible.

But what is the cost for "winning" in domestic relations cases? By the time the adversary process ends, the parties can be financially devastated, emotionally drained, and permanently embittered. The scars on the litigants may heal, but they still show years later just like scars from a past car accident.

Suffer the Children

The real damage may be to the children. A substantial body of research conducted over the past three decades indicates that divorces, particularly high conflict divorces, have significant consequences on the children.[3] These children tend to need counseling more than children of intact nuclear families; they are more likely to use drugs and alcohol; they have delinquency problems; they become adult criminals; they adjust poorly to school and have difficulties in their personal relationships as adults. This development of sociological evidence has led some to argue that divorce is a public health problem.

It is generally accepted as true today that one half of all marriages end in divorce. A study of data from the 2000 census indicates that the traditional nuclear family constitutes only 24 percent of the family units in the United States.[4] This data suggests that there is a large number of unmarried couples with children, single parent family units, and other non-traditional family structures. Grandparents are raising their grandchildren in record numbers, because the natural parents have faltered due to drug abuse, criminal problems, alcoholism, etc. These trends have put tremendous strains on our nation's domestic courts.



Collaborative Divorce Is Born

Stuart Webb decided there had to be a better way than the adversarial system. He thought about it, conferred with other lawyers and mental health professionals and developed the idea of collaborative divorce. It was the product of his burning desire to find a better way for people to be divorced.

The concept of collaborative divorce is remarkably simple. The parties and their counsel formally agree in writing not to go to court or even threaten to go to court. They agree to negotiate everything in their divorce. Each party is represented by counsel and can involve any other professional counselors or evaluators such as a divorce coach, appraiser, accountant, certified financial or divorce planner, or a child custody specialist.

All the professionals and the parties would "collaborate," i.e., work together in a negotiation model to resolve the disputes and submit the case for an uncontested divorce. The negotiations take place in group meetings, and the parties could call the other party's attorneys or call any of the other members of their collaborative team during this process. The proceedings are private and the litigants make all of the final decisions. This process encourages full and

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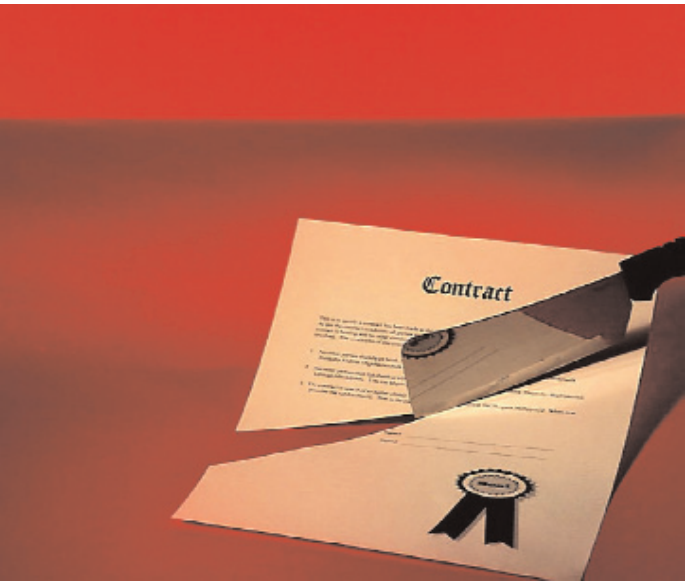
frank discussions, since there is no fear that anything said can be used later in court if the collaborative process fails.



The one distinguishing factor that proponents contend makes this process work is that if the parties are unable to agree, they must hire new lawyers. They cannot use the same lawyers, the same experts, or other professional counselors involved with their collaborative team. This voluntary, contractual inability to use the same lawyers in a court case is perhaps the most controversial element of the collaborative divorce model.[5] Those professionals who have enthusiastically embraced the collaborative model argue that this restriction is critical, because it precludes the parties from using the threat of court action as a form of coercive leverage in the negotiation phase. Proponents contend that this threat element is harmful to the goal of truly encouraging parties to fully and freely participate in the collaborative model and forces the parties and their lawyers to be more creative in crafting settlements.[6]

There is an intermediary model best described as the cooperative model. In this model, the parties start out in the collaborative model, but the parties and the lawyers retain the right to go to court in the event that a settlement is not reached. Several family law attorneys in the Tampa, Florida area extensively use this model.

The core philosophy of the collaborative model is that divorces are problems to be solved rather than battles to be fought. A divorce is viewed as one of life's passages through adulthood. In the adversary model, the parties fight over the past and, despite the advent of no-fault divorce, the goal is to blame the other party for what has happened.

The collaborative model tends to focus on the parties' present circumstances and tries to plan their future. They recognize that the marriage has failed and try to create a successful divorce. The collaborative model recognizes and addresses the emotional content of the divorce process far more than does the adversary model.

The collaborative model takes many of the normal adversarial attitudes and behaviors out of the process and replaces them with approaches that encourage open communication, cooperation and creative problem solving. This process is less stressful and far more productive. The parties end the process with less rancor and bitterness, and with lower attorneys fees and costs.

In the collaborative model, the time spent is in direct consultation with clients, reviewing financial records, preparing for and participating in meetings, and arranging for the work of the other experts in the collaborative group. The parties and their collaborative professionals can set their own schedules and can meet whenever and wherever they want. They are not tied to court schedules and crowded dockets. The only court action is the filing of the final paperwork to obtain the formal uncontested divorce.

Collaborative Divorce Gains Momentum

Attorneys interviewed for the *Lawyers Weekly* article indicated fees were as low as one-tenth to one-third the cost of a traditional divorce. A Georgia attorney advised me recently that her uncollectible fees were much lower due principally to higher client satisfaction rate with the collaborative model. The anecdotal evidence also indicates that far fewer bar complaints are filed against collaborative lawyers.

The collaborative model is catching on rapidly across the United States and Canada. There are collaborative law institutes in some larger cities including Cincinnati, Ohio; Atlanta, Georgia; Minneapolis, Minnesota; the San Francisco Bay area, Los Angeles, and others. One presenter at a recent seminar listed at least 68 web sites promoting collaborative divorce either for geographic areas or for individual practitioners.

In one mid-sized Canadian city, Medicine Hat, Alberta, Canada, almost all lawyers doing domestic work now practice in the collaborative model.[7] The result has been an 85 percent reduction in the caseload in their local family court. Judge W. Ross Foote of the Ninth Judicial District Court in the Rapides Parish, Alexandria, Louisiana, was so enthusiastic about the collaborative divorce model that he arranged for a $200,000 grant from a local foundation to help create a local collaborative professionals group and to offer collaborative training for lawyers and counselors for a nominal fee. Several divorce professionals have been trained and are now using this method. Judge Foote promotes collaborative divorce by posting articles on the court's official web site.[8]

Collaborative specialists indicate that their settlement rates are well above 90 percent. Few cases fail in the collaborative model and need to go the traditional route for the final divorce. The collaborative divorce model is not intended for use in truly high conflict cases or where one or both parties have

significant mental illnesses, personality disorders, domestic violence, or drug or alcohol abuse problems. The coercive power of the court is needed in those cases to manage the conflict and the litigants. These cases may need specialized professional evaluations and court mandated participation in rehabilitative programs or mental health counseling or treatment.

The collaborative model is not without its critics. Some question the process because of possible power imbalances in the negotiating process; others question the ethics of precluding a lawyer from representing the client in court if the collaborative model fails to achieve a settlement.[9] The academic debates have appeared principally in the form of law review articles. Some are pro, some are con, and others provide thoughtful analysis and commentary. Other articles suggest that the code of professional ethics for lawyers needs revising to better guide lawyers working in different alternative dispute resolution models.[10]

The first empirical research study of the collaborative model was funded by the Social Science and Humanities Research Council of Canada in 2001. The principal researcher is Dr. Julie Macfarlane of the University of Windsor Law School faculty. The study is being done over three years, and the results will not be available for several months. Professor Macfarlane described her ongoing study at a workshop meeting on dispute resolution on January 3, 2003 at the Association of American Law Schools annual meeting in Washington, D.C. She seems intrigued by the collaborative lawyering movement and is especially fascinated by the formation of collaborative lawyering groups or networks springing up to promote collaborative divorce and create a larger pool of collaborative practicing professionals.

The only authoritative book to date is *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation* by Pauline Tesler and published by the ABA Family Law Section in 2001. Ms. Tesler practices collaborative law full time in San Francisco and is one of the premier trainers in the United States. Her book includes a compact computer disk with various forms for use by a lawyer using the collaborative process.

A collaborative divorce group is now forming in Las Vegas with several lawyers, mental health and financial professionals. Some have already received the basic training and more are attending training sessions this year. This group may attempt to arrange training in Las Vegas in order to promote the concept and get a larger number of people aboard the collaborative train.

The Family Court judges have formally voted to encourage this development, since we can use any new process that helps address our increasing case loads. There are hundreds of potential clients who need to go through the divorce process but are apprehensive about the expense and stress of the traditional adversary system.

What many lawyers have lost in their training and experience is the art of being counselors who help their clients heal the wounds of divorce and move on with their lives. The idea that lawyers should also seek to be healers is slowly coming back into the legal culture. And nowhere is it more needed than in the domestic relations field. Family law lawyers should embrace this new mode for the sake of their clients and themselves. Those who don't may well miss an opportunity to expand their professional skills and marketing ability for new clients. Welcome to the world of collaborative law. NL

Hon. Robert W. Lueck

Endnotes

1. "Divorce Without Bloodshed," Lawyers Weekly USA, April 3, 2000, p. B10, 2000 LWUSA 314

2. Elrod, *A Minnesota Comparative Family Law Symposium: Reforming the System to Protect Children in High Conflict Custody Cases*, 28 Wm. Mitchell L. Rev. 495 (2001), footnotes 3-6; Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. Cal. L. Rev. 469 (March, 1998).

3. *The Scientific Basis of Child Custody Decisions*, pp. 73-75 (Robert M. Galatzer-Levy and Louis Kraus, eds., John Wiley and Sons 1999); Elrod, supra at note 3.

4. 2000 Census Report, America's Families and Living Arrangements, U.S. Census Bureau.

5. Lande, *Possibilities for Collaborative Law: Ethics and the Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 Ohio St. L. J. 1315 (2003). Professor Lande's article is the most thorough summary of the developments of the collaborative law movement including courts and law schools.

6. An excellent article that lucidly explains the collaborative process is Lawrence, *Practitioner's Corner: Collaborative Lawyering: A New Development in Conflict Resolution, 17* Ohio St. J. on Disp. Resol. 431 (2002).

7. Rebecca Glass, *Tipping Toward Civility: Developing Collaborative Law in the U.S. and Canada*, available on the internet at www.collabgroup.com/article/ tipping__toward__civility.htm

8. Judge Foote has four short articles about divorce and the collaborative process on the court's official website located at www.family courts.org and he is an avid proponent of the collaborative process.

9. Lande, supra at footnote 6; Lawrence, supra at footnote 7; Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads*, 18 Ohio St. J. on Disp. Resol. 505 (2003); and Goren and Beckwith, *The Collaborative Lawyer as Advocate: A Response*, 18 Ohio St. J. on Disp. Resol. 497 (2003).

10. Supra at footnote 12.