

Split Decisions

COLLABORATIVE LAW CAN MAKE BREAKING UP LESS HARD TO DO

by Roger S. Peterson

Everyone has a divorce horror story, especially business owners in community-property states such as California. But one passionate group of Sacramento professionals, including attorneys, is challenging the nasty culture of divorce with collaborative law, a concept they believe can apply to probate, employment law and business partnerships.

How might collaborative law work for a business tangled in a divorce? Richard J. Cohen, a McGeorge School of Law instructor and collaborative divorce attorney, uses this illustration: Let's say a father provided a secure economic base for his son by giving him the 1,000-acre family farm. The son married, and he and his wife worked the farm together. The wife was in charge of sales and purchasing. The husband managed farm operations. The wife also started and operated a successful organic egg business.

After 12 years, they decide to divorce. The land has increased in value since acquisition by \$2 million. A neutral financial specialist suggests transferring the farm into a trust for the couple's children, subdividing 10 acres for the wife's housing and egg business and paying the husband a generous salary to continue managing operations.

Because both husband and wife want to retain the family farm for future generations, they adopt the analyst's plan. Cohen claims litigation would not produce such an even-handed dissolution.

"Everything is negotiable," says a medical professional we'll call John, who went through a collaborative divorce. "Let's say someone acquired a business before marriage," he says. "It is not community property, although the income is. The business can remain intact in exchange for something else. A judge could make a weird decision, but with collaboration it's more predictable."

"Collaborative law is all about interest-based bargaining rather than positional or adversarial fighting," says Hal D. Bartholomew, a leading Sacramento collaborative divorce attorney with Bartholomew & Wasznicky LLP.

The collaborative paradigm differs from litigation in other ways too. Each spouse has an attorney, but all four meet together to develop a mutually satisfactory agreement. They also agree not to litigate in court. If collaborative law

fails, both attorneys must leave the case. Thus it is in the attorneys' interest to make collaboration work.

Both parties agree to full disclosure of financial and other information. "Sound and complete information leads to logic, which leads to an agreement," Bartholomew asserts, adding that secrets can destroy collaboration and negate the final accord. "In this model, spouses hire attorneys to help them and advise them, not to tell them what to do to each other."

Cohen says any collaborative agreement can be revisited if the parties agree to it. "But most post-settlement issues arise because trust was not established beforehand," he says.

An extended team comprised of divorce coaches and an independent financial analyst assists the primary team of spouses and their attorneys. If children are involved, a child

advocate is added to the team. The spouses must meet with separate divorce coaches at least once. These communications specialists assess the parties' abilities to adapt to collaboration. The coaches' goal is to eliminate negative emotions so each spouse can negotiate fairly and logically.

"We do not do therapy," says divorce coach Linda Tell, who says

her role is to help couples plan ahead. Because a business can be lost in divorce court, Tell helps parties negotiate a mutually satisfactory plan without breaking up the business. "In collaborative law you are in charge, not a judge," she asserts, adding that cooperation is far less expensive and helps maintain each spouse's dignity.

"You watch the hurt and the tension diminish as these coaches work their magic," says collaborative attorney Helen Stockdale. "I once observed this with the most conflicted couple I ever saw; meeting with them exhausted me. But the coach got them talking." Stockdale adds that collaborative law appealed to both spouses because each faced risks if the divorce went to court.

"After 30 years of litigation, I do only mediation and collaborative law," Stockdale is relieved to say.

The second member of the extended team is the financial specialist mutually retained to assess all the numbers. "I function as the neutral analyst who gets his arms around

"You watch the hurt diminish as divorce coaches work their magic."

*—Helen Stockdale,
collaborative attorney*

Collaborative divorce attorney Hal D. Bartholomew says "Collaborative law is all about interest-based bargaining rather than positional or adversarial fighting."



the entire financial picture," says Steven J. Rutlen. "No posturing or adversarial role. All 52 cards are shown to both parties." Rutlen's goal is to help couples leave divorce in good positions without spending money on years' worth of attorney fees or relinquishing control to a judge.

In divorce, time is truly money. Collaborative divorce, even if a business is involved, can be resolved in a year, compared to four to seven years in litigation.

Quick resolution was the case with Wally, who inherited a manufacturing business prior to his marriage. After 30 years, his wife, who was not involved in the business, wanted a divorce. The cou-

ple used collaborative law to assure the wife would be adequately represented. The collaborative lawyers hired a collaborative accountant who concluded the business was not community property. The case ended in nine months. Wally kept the business; his wife receives spousal support.

"It's easy to identify the value of a house, but it is more difficult to set the value of the business. The spouse outside the business might claim it is worth more," says Stephen, a retailer who went through a collaborative divorce. "But in collaborative law, both parties agree on one person to evaluate the business's value."

The third team member is the child

specialist, who becomes the voice of the children involved. Marriage and family therapist Elly Fossum meets once or twice with children and informs them that she will share what they say with the team. "In collaborative my role is assessment only; I do no therapy with the children," says Fossum, adding that she sometimes recommends therapy by someone outside the team.

Rutlen asserts that divorce litigation has generated lots of attorney and CPA fees, but it has also generated considerable burnout among attorneys. Consequently, the typical collaborative attorney is an older professional.

It was burnout that prompted Minneapolis attorney Stu Webb, the founder of collaborative divorce, to find another method. By 1991 he was tired of seeing clients leave courtrooms unhappy. In his first 98 collaborative cases, all but two were resolved using collaborative law.

Lawyers, child therapists, divorce coaches and accountants have taken Cohen's four-day narrative mediation seminar to gain mediation certification as part of the collaborative law training requirements. All collaborative team members also spend two to three days training in collaboration.

The Sacramento Collaborative Practice Group has 34 attorneys, 18 financial specialists, 18 divorce coaches, six child specialists and a certified insurance underwriter. California has 26 collaborative practice groups, operating primarily in Los Angeles, Sonoma, San Francisco, Marin, Contra Costa, San Diego, Sacramento and Santa Clara counties.

But collaborative divorce does not always work. Divorce coach Linda Tell recalls a case involving a husband's

Mediated Divorce v. Collaborative Divorce

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|--------------------------------------|----------------------------------|
| Legal representation not required | Legal representation required |
| Adversarial positioning may exist | Cooperative agreement is the aim |
| No formal support team | Full formal support team |
| Mediator explains but doesn't advise | Team advises and explains law |

professional-service business and an unemployed wife. The wife expected an income; the coaches advised her that she had to develop a new life plan, but she resisted unreasonably. The attorneys and coaches concluded collaborative divorce could not prevail.

In another case, the financial specialist outlined three possible plans for a couple, both employed. Tells says the plans were all mutually beneficial, but one spouse was uncooperative and dropped out, allowing emotions to override logic.

Jack Cornelius, a collaboratively trained CPA, believes collaborative divorce is good for business owners. “But I am not convinced it works all the time. If the parties hate each other, for whatever reason, it can work in spite of the emotional issues, but it’s much tougher.”

According to Cohen, collaborative divorce will not work if substance abuse or mental health issues are involved. “Such conditions impede reasoning and make negotiating difficult,” he says. The divorce coach’s job is to identify such conditions and inform the collaborative team that treatment outside the team must precede collaboration.

“People who play hide-the-ball are not appropriate for collaborative law,” Helen Stockdale asserts. Steven Rutlen adds that if one spouse is bent on suing, no matter what, collaborative law obviously won’t work.

Despite collaboration’s advocates, Wally says collaborative law is merely the lesser of two evils. “It’s not all sweetness and kumbaya; it’s still painful and emotional.” Bartholomew agrees, but says collaboration isn’t as emotionally draining and distracting because adversarial positioning is taken out of the equation.

Bartholomew believes collaboration can also work in other civil disputes, such as probate, employment disputes and disputes between businesses and suppliers.

Cohen wishes some of the partnership disputes he mediated had used collaborative law instead. He recalls one long-term partnership riddled with

The recipe for collaborative divorce

- 2 spouses
- 2 attorneys
- 1 divorce coach
- 1 financial specialist
- 1 child advocate

high emotions. “I was a lawyer and their mediator — but not their lawyer. The team could have used an impartial financial analyst to assess the partnership’s business value,” he says.

Another case Cohen recalls involved a contested will between children and their stepmother. “Dad told the boys that they were getting all the stuff. The judge sent it to me for mediation, but I wished they had opted for collaborative law.” Cohen says he worked hard to reduce the mutual rancor, but it prevailed nonetheless. “In collaborative law they could have used the coaches to handle the emotions and a financial person to outline some creative options on the value of the house and other stuff, much of which was sentimental property.

“Collaboration is the best thing the legal profession has to offer,” Cohen continues. “It’s better than mediation because the parties receive more support, especially if one party is on unequal footing in their knowledge, their emotions, their education or their communication skills,” he adds.

A mediated divorce differs from a collaborative divorce in several ways. In mediation, attorneys do not represent the spouses. Although attorneys are welcome, their presence in mediation leads to legal positioning as it does in litigation. Cohen also says a

mediator doesn’t necessarily know if both spouses are being honest.

Cohen adds that a mediator does not make decisions for the couple, nor can the mediator render legal advice. Instead, he or she helps couples understand such issues as retirement benefits and IRAs. Likewise, couples make all decisions in collaboration, but with the support of their attorneys and team advisers. “Mediation doesn’t offer the couple a supportive, neutral team,” he adds.

“This is the future, especially for business people with lots of assets,” retailer Stephen claims. He started his business before marriage. After marriage, he and his wife formed a corporation in which she became an officer. “Attorneys predicted divorce litigation could cost us \$90,000, but collaboration cost us only \$10,000. We both agreed it was a fair and wise thing to do. She got the house; I got the business. In litigation, attorneys are the only winners,” Stephen adds.

Rutlen is convinced collaborative law keeps people in the relatively calmer eye of what he calls Hurricane Divorce. “Outside the eye of the storm lies total devastation,” he claims, stating that the role of the collaborative team is to keep both spouses inside the calm eye where they can negotiate effectively. “But if you go through litigation, the healing process may never start.”

“Most lawyers I have talked to think collaborative law is a good direction, especially older attorneys,” says Cohen. “They know the downside of litigation because they are so tired of what they’ve gone through.”

Nonetheless, the mumbles of detractors can be heard. “There is a constant Greek chorus among the public resisting collaborative divorce,” Bartholomew jokes. “What’s more, many lawyers are so used to the court route that they just don’t get it.” ©

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