**Collaborative Divorce as a Path to Containing Rather Than Exacerbating Conflict**

**BY ROY MARTIN**

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Representing clients in divorce is fundamen­tally different than other areas of practice. Most cases are not legally complex. One tends to see the same basic issues again and again. While some cases can present com­plex financial issues, that’s not what makes divorce fundamentally difficult. After all, even complex numbers can be analyzed and quantified with the help of tax profession­als, forensic accountants, financial advisers, etc. What makes divorce uniquely challeng­ing is that almost every case is emotionally fraught. For the divorcing parties, the pro­cess itself, and the underlying reality, is pain­ful and scary.

**FEAR, LOATHING, AND LITIGATION**

Fear is most often what causes divorce to become contentious. In my opinion, the vast majority of those who take the first tentative steps toward dissolving their marriage wish, in their heart of hearts, to keep things ami­cable. Few want a pound of flesh. And even for those who do, something is beneath that desire—typically fear.

Fear most often falls into one of a few cat­egories. There’s fear around the well-being of the children. Fear around losing connec­tion with one’s children. Fear around finan­cial insecurity. Since divorce has impact be­yond the immediate family, there can be fear around losing connection to in-laws, friends, and members of one’s community. Fear of what are called “intra-psychic losses,” one’s hopes and dreams for the future, which of­ten seem to be shattered as a marriage comes apart. And then of course people are often afraid of being alone or lonely, sometimes with a sense that they might never find an­other profound, loving partnership.

What’s challenging about fear is that, un­less contained, it tends to feed on itself. Let’s use a rather mundane example to illustrate: Spouse A fears that there won’t be money to pay the bills. If communication hasn’t bro­ken down, perhaps Spouse A calls Spouse B and expresses this fear. Spouse B may pro­vide what psychologists call “containment.” Spouse B might say, “Don’t worry; I’ll keep paying the mortgage and other bills until we figure this out.” That assertion alone might assuage the fear. Or maybe the spouses agree that the financially vulnerable partner will pull money from an account and set it aside. Or they come up with something else. There are innumerable ways to create containment.

The challenge comes when communi­cation breaks down. Then spouses typically turn to friends and family members who, out of a desire to protect their loved one, tend to fan the flames of fear. Maybe Spouse A, af­ter receiving “legal advice” from a friend or relative, pulls money from the bank account without talking to Spouse B first. In that sce­nario, Spouse A does not typically intend to scare Spouse B but, rather, simply seeks to be protected from running out of funds. But then Spouse B finds out when an automatic payment overdraws the account or he/she notices the transaction when making a de­posit or checking a statement. If there’s been no communication, this recognition that funds are missing is likely to trigger fear.

The same can happen in the context of children and parenting time. A parent may be afraid of losing contact with a child. If the spouses discuss it and the other spouse says something along the lines of, “Don’t worry; you’re the only father/mother our children will ever have,” that alone is likely to go a long way toward containing fear. But if com­munication has broken down, people can get into destructive battles that, ironically and tragically, typically harm the children most of all.

Divorce is an area of law that requires an attorney to be part counselor, part sage, part philosopher, and, ideally, a consistent, wise, and steadying voice. The vast majority of my colleagues who litigate divorce cases gener­ally do their best to be all those things and to encourage clients to make smart choices. It’s the context of litigation itself that tends to drive people into their fear. It’s the nature of turning over one’s fate to a process with an uncertain outcome. Fear just goes with the territory.

Because litigation is so poorly suited to divorce, an attorney in Minnesota named Stu Webb decided many years ago that there had to be a better way. A respected litigator, he reached out to some colleagues and pro­posed another way of approaching cases— and the collaborative movement was born.**1**

**COLLABORATIVE DIVORCE AND THE PARTICIPATION AGREEMENT**

The heart of collaborative divorce is what’s called the Participation Agreement (PA). The PA governs how the case unfolds. It contains many important provisions but most central is a clause that requires both attorneys (and all allied professionals—more on that in a moment) to withdraw if the parties do not reach settlement.

At first glance, this may seem puzzling. Why does it create containment if parties fear losing their attorneys? It works, and in fact is essential, because it prevents the par­ties from behaving in an adversarial manner. Put another way, it’s now impossible for one party to “win” at the other’s expense. Noth­ing can happen (short of the collaborative case terminating) unless both parties agree. From this point forward, the only “win” is a “win-win.”

The exclusion clause also has the effect of forcing attorneys to behave well. If I don’t like something your client is doing, rath­er than jumping to conclusions (as I often did as a litigator) and writing a letter that is likely to place the other attorney or party (or both) on the defensive, as a collabora­tive attorney I’ve learned to deal with this challenge very differently. The first thing I’m going to do is reach out by phone to my colleague, who I no longer think of as “op­posing counsel” but rather as my partner in helping to contain our clients’ fears and con­cerns. But even before contacting the other attorney, I’m going to cultivate curiosity. Rather than believing my initial assumption of bad faith, I’m going to do my best to ask what’s up in a non-threatening way. So, if my client tells me he was denied time with the children this past weekend, I’m going to ask my colleague to find out what happened. If we’ve resolved cases together before, we’ve likely established a pool of trust. The more we trust each other, the easier it is to assume the other attorney will assist in resolving the issue.

The PA requires full disclosure of all rel­evant information. That of course includes financial information. It also includes any­thing pertinent to the children’s well-being. If there’s a question as to whether something is relevant, I’ve learned that best practice is to assume it is. If my client fails to disclose something relevant, I must withdraw. Very much as when an attorney announces in court that they can no longer represent a client, my withdrawal will make clear to the other attorney that something’s amiss and, most likely, my client has behaved in a way inconsistent with the collaborative process. In Whatcom County, where I practice, if the misbehavior is egregious, each attorney has the option of terminating the collaborative process entirely without explanation. This is to prevent either party from misusing the collaborative process to financially or emo­tionally exhaust the other or to insist on or avoid a particular outcome.

**THE INTERDISCIPLINARY MODEL: ALLIED PROFESSIONALS**

Soon after collaborative law came into being, a group of professionals in California began to innovate.**2** They developed an interdis­ciplinary model that includes allied profes­sionals. This was an enormous advance in our standard of practice. These days, I won’t take a collaborative case without a divorce coach. A divorce coach is a mental health professional who takes on a role very differ­ent from that of a therapist. The coach isn’t there to help the parties reconcile or resolve their internal conflicts, but rather to help them communicate effectively. As the case unfolds, the coach gets a strong sense of the communication dynamic between the cou­ple and reports back to the rest of the profes­sional team. This helps all of us choreograph our actions in a way that provides contain­ment rather than exacerbating conflict. The coach also helps each party address their fears and look at long-term goals. This helps the spouses to step back from what might seem important in the moment and realize that they have more important priorities— like the well-being of their children—than acting on whatever pain, frustration, or an­ger they’re feeling in the moment.

A collaborative case can have a single neutral divorce coach who works with both parties or two allied coaches who each work with one spouse, and then together with each other to bring about mutual under­standing and emotional containment.

A child specialist is important any time there are children involved. This team member is a mental health professional well trained in working with children. Once again, the child specialist is not there to do therapy. In fact, the child specialist will be clear with the children that confidences will not be kept. Rather, each child will have an opportunity, through words and behavior, to reveal what they’re feeling and needing in a way that the parents will be guided to see and address. A child specialist can help parents understand their children’s normal developmental needs as well as each child’s unique idiosyncratic needs. Child specialists give the children an opportunity to express their needs in a way that feels emotional­ly safe, knowing that the information will be presented in a manner that calms rather than stirs conflict. As an example, if a child is uncomfortable spending time in a parent’s home, the child specialist will know that it’s important to help the parents understand why and provide avenues through which the issue can be resolved in a healthy way that opens the door to reconnection.

Cases that have complex financial issues or in which one or both parties aren’t finan­cially savvy may benefit from the inclusion of a financial specialist. This professional will gather financial information, which significantly reduces the time, expense, and potential duplication of effort if attor­neys perform this task. Once that’s done, the attorneys will receive a financial report with supporting references and documents. If the attorneys have questions, they pose them to the financial specialist, who can in­vestigate further and explain discrepancies or modify the report. The financial special­ist will also work with the parties to help them understand their financial challeng­es. A financial specialist can play a key role in helping spouses resolve issues around property division, child support, and spou­sal maintenance.

**VALUING THE INTANGIBLES**

Collaborative divorce offers something else that can get lost in conventional litigation. It recognizes and focuses on the value of intangibles, such as the ability to parent co­operatively. In conventional divorce, the focus tends to be on those things that can be weighed and measured. So when talking about the children, there’s a tendency to quantify whatever can be quantified—e.g., the parenting time share (the number of days with each parent), child support, etc. Obviously, those are important and need to be addressed, but the collaborative approach comes at them by first focusing (and helping clients to focus) on shared values, a desire for cooperative parenting, and the needs of the children.

In the very first joint meeting with our clients, we’ll ask each of them why they’ve chosen the collaborative process rather than engaging in a more conventional approach. Their answers are important and we’ll refer back to them throughout the case. Partic­ularly as we get into the weeds of property division or a parenting plan, it becomes im­portant to remind people of what brought them to this process in the first place. Doing so helps them to keep their core values front and center.

In talking about why they’ve chosen col­laborative divorce, clients will often say they want to ensure that the children’s needs come first, particularly if one or both par­ents is a child of divorce and remembers the fear and pain they experienced. People often speak of wanting to be friends when the di­vorce is over, wanting to maintain connec­tions with the spouse’s family and friends, wanting to end their marriage in a way that’s consistent with their values and the way they’ve cared for each other, and the like.

A recent case in which I was represent­ing the husband provided a poignant exam­ple of why the collaborative approach was chosen. The wife spoke of how one day their daughter would be pregnant with a child of her own and how, when it came time for her to deliver, she wanted the two of them to be standing next to each other in the maternity ward, waiting to greet their first grandchild together. We all had tears in our eyes. It was one of those moments when one feels hon­ored to be a part of a family’s journey.

I’ve been doing collaborative divorce since 2001 and this work never becomes rou­tine or fails to surprise and inspire. For most people, divorce represents a sort of failure. But when people can do it well, that sense of failure can be offset by a whole host of silver linings.

**About the Author:**

**Roy Martin** is a graduate of Johns Hopkins University (bachelor’s degree, natural sciences), and the University of Arizona, (J.D., magna cum laude). As an attorney, he has sought to practice in ways that felt meaningful and important. In law school, he went through an extremely challenging litigated divorce and ultimately wound up with custody of his children. Through this experience, he learned much about the divorce process, its challenges and limitations, and about how an attorney can impact people’s lives in profound ways, for better or worse.

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**NOTES**

**1.** https://familydiplomacy.com/the-origins-of-collaborative-divorce-stu-webbs-letter/.

**2.** www.academia.edu/36260539/Collaborative\_ Family\_Law.