



# Collaborative Law v. Traditional Divorce: Which is Right for Me?

by Steven A. Paquette

Increasingly, individuals faced with the prospect of seeking an orderly and fair dissolution of their marriage are beginning to consider non-traditional methods to resolve disputes and complete the divorce process. It is important for anyone who is forced to venture into the murky waters of terminating a marriage to be aware of collaborative law, what it is and how it works, in order to make a fully informed decision as to what method would be best for them. Collaborative law is a different way of doing business. It assists parties in winding down the marriage relationship in a setting that allows for conversation and compromise and affords clients the opportunity to forge their own understanding.

As in a traditional divorce, issues regarding child custody and visitation, child support, spousal maintenance, and the equitable distribution of marital assets will need to be resolved. The parties seek to prioritize and resolve issues in a way that is consistent with their wishes and needs. They seek to do so collaboratively, and unlike mediation, do so with the assistance of independent counsel and with the use of carefully selected experts to provide advice in complex areas, including the proper distribution of retirement assets, the sophisticated evaluation of closely-held businesses and other assets, and even professional degrees. The process may include the use of financial planners to determine what the parties' financial world will look like post divorce, and, where appropriate, the use of mental health professionals to help ease the transition for both parties and their children.

In a collaborative setting, no legal pleadings are filed. The parties contract with one another to seek exclusively to utilize the collaborative law process. Each promises the other that fresh counsel will be brought in if the collaboration fails so that each party may feel comfortable speaking frankly and openly about their assets, liabilities, and concerns. The parties gather at a series of meetings in "round-table" fashion, sometimes facilitated by third parties, often times assisted by experts in the particular area to be addressed at that session, with the goal of achieving a resolution that will leave the parties as financially secure and emotionally intact as circumstances allow.

Just as each divorce case is different, each collaborative law case "plays out" differently. Some collaborations result in an agreement after only a couple of sessions. Others require multiple meetings with each session ending with a specific set of assignments for the participants and an identified time for the parties to return to the table to address the next issue.

Ultimately, successful collaborations result in an Opting Out Agreement that is enforceable in court just as if it had been worked out by attorneys. The difference is that the parties feel that they have been a part of the process, a part of the solution, and have maintained a modicum of control over this next phase of their lives. Better agreements result in better long-term relationships and less post-divorce litigation and rancor, which is particularly important where children are involved.

There is no one method that works best for every situation. It is for the individual participant to decide which method may better fit into the facts and circumstances of their own marriage. For collaboration to work, parties need not agree, nor even be friendly, although it helps. They must, however, be willing to abide by a certain code of conduct and rules of civility and must be willing to be open and honest with one another. They must either have or, with assistance, be able to achieve parity at the bargaining table. They must be open to resolving the ultimate question, "What will work best for everyone?" rather than simply, "What will work best for me?"

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Traditional divorce methods follow a track similar to all litigation, such that the rules and procedures are much like that for resolving an automobile accident dispute, a contract dispute, or a thorny real estate issue.

With traditional divorce methods, negotiation can and very frequently does go forward throughout the litigated process. But from the moment of the filing of the Summons and Complaint from which a divorce is sought, the parties move inexorably towards a day of judgment, a date after which the failure to resolve the dispute on their own terms will ultimately result in a judge imposing conditions upon them according to that Judge's view of the law and equities pertaining to their particular situation.

In a traditional divorce, the Plaintiff who initiates the lawsuit must be able to prove grounds for divorce. Under New York law, in the absence of a separation agreement, a party must generally prove fault in order to obtain a divorce unless there exists some rather rare exception like long-term incarceration by one of the spouses. The "discovery" process proceeds through a series of legal documents served by one party on the other with deadlines for the responses and the providing of the information set by the court. Conferences are held that involve court referees and sometimes the judge. Depositions are conducted under oath. Subpoenas are sent to gather data, identify witnesses, and prepare for each party to prove its case. And ultimately, in the absence of an eleventh hour compromise, a trial is held before a judge to determine each party's respective rights and obligations.

For some, the prospect of face-to-face meetings with the estranged spouse is too much to bear. Issues of distrust or failures of communication that caused the marriage to fail in the first place provide legitimate worries about whether or not the collaborative process will work. Parties sometimes also feel concern that they will "lose" their original attorney in the event that the collaborative process fails. For others, the prospect of a more civil process draws parties to the bargaining table to seek a more satisfactory resolution to that next phase of their lives - where what is "best" for the parties and, more importantly, what is best for their children arises as the result of hard work, patience and fair dealing.

Those who favor collaborative law refer to it as a method by which divorcing parties seek an amicable solution to their marital difficulties that leaves participants with greater voice in their own destiny, seeks to preserve assets and relationships, and terminates the marriage with dignity. Where that can indeed be achieved, isn't that tempting?



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