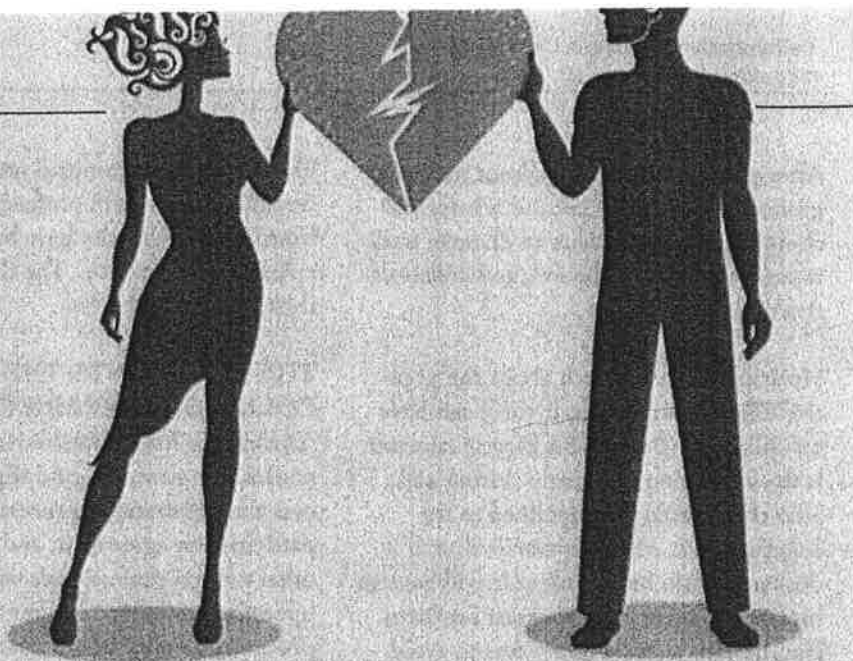


## Collaborative Divorce: A Case Study

by Marlene Eskind Moses and Irwin J. Kuhn



The two of us wrote separate articles for the bar in 2010<sup>1</sup> and 2011,<sup>2</sup> presenting overviews of collaborative family law. After a general review of the elements of the collaborative process, we share a more detailed view of how the process works in practice. The situation we describe below is hypothetical but drawn from our experiences and those of our collaborative colleagues.

Although this hypothetical involves a divorce, the collaborative process is well suited to help fashion prenuptial agreements to resolve family law disputes arising after divorce, and to unwind relationships between unmarried couples.

Collaborative practices are also used to resolve non-family civil matters, but our focus here is collaborative family law.

### REVIEW: WHAT IS COLLABORATIVE PRACTICE

Collaborative practice is a voluntary process in which the parties and counsel contract to follow certain protocols when negotiating settlement of a dispute. At the heart of the process is the agreement that collaborative attorneys will be hired pursuant to a limited scope representation agreement. Attorneys will work with clients to help them reach settlement. If settlement cannot be reached, and the clients pursue more traditional litigation in court to resolve their differences, the collaborative attorneys will withdraw from representation.

In addition to putting a premium on settlement for clients, there is no financial incentive for attorneys to resort to litigation. For attorneys, success is achieved when clients reach a durable, win-win settlement agreement. Because of the withdrawal provision of the collaborative agreement and its confidentiality provisions, parties are free to have the type of candid discussions that would not take place when opposing counsel might later be cross-examining them in court.

### WHAT A COLLABORATIVE CASE LOOKS LIKE

Pauline Tessler and Peggy Thompson write in their seminal book, *Collaborative Divorce*.

*One way to understand the sequence of events in a collaborative divorce is to compare it to building a house. There are all kinds of houses - big and small, simple and complex - but no matter what kind of house you require, the sequence you'll need to take to get it built is the same, involving many choices at every juncture. Whatever kind of house you build, it starts with a foundation, moves through framing to roofing, and leaves the finish work to last. If you do your research ... and make good decisions relying on a well-chosen team of experienced building professionals, your new house can provide shelter and comfort for a lifetime.<sup>3</sup>*

### THE ARCHITECTS:

#### INITIAL CLIENT CONSULTATION

Husband makes an appointment for an initial consultation about divorce. During the consultation, the attorney learns that Husband and Wife have been married for 15 years. They have two boys in a prestigious private middle school. Husband is a successful music producer. Wife is a pediatrician. Despite long periods of counseling, the parties have never been able to reconcile conflicts caused by his demanding travel schedule and her busy medical practice. Their marriage counselor referred husband.

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After a lengthy discussion about the background of the case, Husband is informed about various approaches to divorce, traditional litigation, mediation, and collaborative divorce.

Husband has read much about the negative effect a contentious divorce can have on children.<sup>4</sup> Because his biggest concern is the well-being of his sons during and after the divorce, he is inclined to try collaboration. He understands that, if it does not work, he and his wife will have to hire new lawyers to go to court for them. But, he feels that she too wants to avoid a divorce process that creates unnecessary conflict. Still, they have never talked about collaborative divorce and he is not sure she even knows what it is.

Husband is encouraged to have Wife get more information about collaborative divorce from the websites of the International Academy of Collaborative Professionals (IACP), [www.collaborativepractice.com](http://www.collaborativepractice.com), and the Middle Tennessee Collaborative Alliance (MTCA), [www.mtcollab.com](http://www.mtcollab.com), a local practice group of collaboratively trained professionals.

Wife is very interested in the collaborative process. From her pediatric practice, she also is aware of how divorce can get out of hand and badly impact children. She interviews and hires one of the local collaborative attorneys listed on the MTCA website.

Both sign their own retainer agreements with their collaborative attorneys. Both attorneys have provisions in their respective retainers that they have been retained for a limited purpose, which does not include litigation.

The collaborative attorneys contact each other and discuss what they initially perceive to be the important issues. They also discuss what, if any, other professionals may be helpful members of this collaborative team. They agree that it will be important to have a neutral divorce coach assisting the team from the beginning.

They agree to recommend one of the several mental health professionals (MHP) from the MTCA who have been trained in collaborative practice. The clients accept their recommendation.

### **THE BLUE PRINTS: THE FIRST COLLABORATIVE MEETING**

During the first collaborative meeting, the parties, the attorneys, and the MHP discuss the collaborative process, review the participation agreement, and determine if other neutral professionals will be called upon for assistance. Among the other professionals may be a financial neutral that assists in analyzing assets, liabilities and post-divorce financial planning. The financial neutral agrees that he or she will not work for either party after the divorce to avoid any question of neutrality. Some cases require a neutral business evaluator and others a child specialist or both.

The participation agreement is the contractual foundation of the collaborative case. MTCA has adopted a standard agreement, which can be tailored to individual cases.

All collaborative agreements must have the attorney limited engagement provision. As well, all contain an agreement to fully disclose all relevant information. The rule of thumb is that if one party would want to know information if they were on the other side, they provide it. For comfort, parties may rely not only on good faith but also sworn statements.

The participation agreement prevents parties from taking any action to disrupt the status quo that would be prohibited by statute<sup>5</sup> if a case were filed, whether or not one has yet been.

The participation agreement also makes clear that all discussions in the collaborative process are confidential and will be treated in the same fashion as any settlement discussions. The parties waive the right to call the attorneys or any of the professionals engaged in the process to be witnesses in the event of litigation.

After having the opportunity to ask questions about the agreement, the parties and attorneys sign counterparts in the presence of each other.

At the first meeting, the ground rules for the collaborative process are also reviewed. These are rules established to allow people to have difficult conversations while avoiding destructive interactions. For example, parties are encouraged to look forward to solving problems rather than recreating history and attributing blame for the past. Husband and Wife are asked to refer to the other by their name rather than "he" or "she."

### **THE FOUNDATION: INFORMATION GATHERING**

Next, the parties spend time gathering and sharing information. The lawyers are experienced and have a good sense of what full disclosure requires. They do not exchange formal interrogatories, request for production of documents, or requests for admission. Nonetheless, the lawyers do ask both to sign sworn asset and liability statements, as well as income and expense statements. Here, Husband's attorney wants more information about the details about Wife's medical group's pension plan. Wife's lawyer asks about Husband's interest in intellectual property. It is provided. In this case, the parties will engage a financial neutral to help them sort through their complex finances and to plan for the future.

### **FRAMING: GOAL SETTING**

In the next phase, Husband and Wife enter into the critically important phase of goal setting, or finding out what is most important to each going forward. Identifying what is most important to each is an essential part of finding lasting solutions.

Husband tells the group that his goal is for both parents to have a good relationship with the boys after the divorce. Wife says stability for the boys is most important for her. The coach asks them to be more specific without being tied down to a single solution.

Husband says that he wants to be with the boys as much as possible, if not 50% of the time.<sup>6</sup> Wife says that stability means staying in the same schools, if possible staying in the same house, and most of all coming home to a parent.

Wife is concerned about the amount of time Husband spends on business travel. Last year he was out of town over 100 nights. Husband acknowledges he travels a great deal but, at the same time, Wife frequently works late and the boys come home to caregivers.

Husband and Wife also discuss a number of different financial goals. It is clear though that the boys are the biggest concern, and challenge.

#### **MORE FRAMING: OPTION GENERATING**

The next collaborative session is for option generating. Before that meeting, the professionals help frame the discussion for the meeting. They conclude parties must answer the question: *How do we develop a parenting plan that allows for strong, active relationships with both parents while providing stability and minimizing the amount of time with caregivers other than parents?*

The attorneys meet individually with their clients to help them generate ideas to present in a full team meeting and to suggest ways to present those ideas at the meeting.

At the collaborative session, the coach encourages brainstorming. The coach states that neither party is tied to an idea because she or he presents it. Proposing an option is not an offer. The coach also suggests that the parties not evaluate the options that day but wait until the next session. The parties agree. The lawyers, the financial professional, and the MHP may make suggestions, but the focus is on party generated options. A similar process takes place in respect to the financial goals and brainstorming opportunities.

#### **PUTTING ON THE ROOF: EVALUATION OF OPTIONS**

At the next session, the team begins to evaluate the many options generated during brainstorming. The coach asks them to give each option an A, a B, or a C. If either party gives an option a C, it is out.<sup>7</sup>

One of the proposals is for the boys to be with Husband on the nights he is in town, up to 15 nights a month. Wife gives this idea a B. Husband thinks it is an A. The lawyers explain that this plan might be difficult to implement and hard to enforce.

The parties proceed to list the pros and cons of each remaining option.

Eventually the parties agree they will have legal responsibility for the boys on a week-to-week basis. If Husband would be out of town overnight, Wife would have the right to have the children with her. Likewise, if Wife knows she will work past 5 p.m. during her parenting time, Husband will pick the boys up from school and have them with him until Wife picks them up. Both agree it is important for them to live close enough to each other to allow for the most flexibility with the least disruption for the children.

#### **THE FINISH WORK: FORMALIZING THE AGREEMENT**

After Husband and Wife reach an agreement about the boys as well as financial issues, the lawyers draft a parenting plan and a marital dissolution agreement. The parties sign both documents and other formalities are addressed. Because the court may have some questions about the parenting plan, both go to court for a hearing on the final decree and are available to answer the judge's questions. Satisfied that the agreement is in the best interest of the children and the property division is equitable, the court enters the final decree incorporating the parenting plan and the marital dissolution agreement and wishes the parties the best for the future. ■



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#### **(Endnotes)**

<sup>1</sup> Marlene Eskind Moses & Jessica J. Uitto, *An Overview of Tennessee's Burgeoning Alternative Dispute Resolution Process: Collaborative Law*, 46 TENN. B.J. (Sept. 2010).

<sup>2</sup> Irwin J. Kuhn, *Collaborative Family Law Comes to Nashville*, 11 NASH. B.J. (Dec. 2011/Jan.2012).

<sup>3</sup> PAULINE H. TESSLER, M.A., J.D., & PEGGY THOMPSON, PH.D., *COLLABORATIVE DIVORCE, THE REVOLUTIONARY NEW WAY TO RESTRUCTURE YOUR FAMILY, RESOLVE LEGAL ISSUES, AND MOVE ON WITH YOUR LIFE*, ch.2, ¶11 (Harper Collins e-books, EPub Ed.)(May 2006).

<sup>4</sup> See e.g., Joseph Nowinski, *The New Grief: Helping Children Survive Divorce: Three Critical Factors*, PSYCH. TODAY (Oct. 9, 2011), <http://www.psychologytoday.com/blog/the-new-grief/201110/helping-children-survive-divorce-three-critical-factors>.

<sup>5</sup> TENN. CODE ANN. § 36-4-106(d).

<sup>6</sup> The collaborative process does not presume that parenting time will be equal.

<sup>7</sup> There are many different ways to evaluate options. This one was recommended by Zena Zummata, J.D. and Tom Denton, J.D. in a workshop, *Negotiation Skills for Collaborative Professionals*, held on October 27, 2011.

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