



## COLLABORATIVE FAMILY LAW: POSSIBLE PERILS

By Ken Nathens\*

As a family law practitioner with 15 years experience I know the possible financial and emotional turmoil lengthy family court proceedings can bring to a family. Many family law clients are searching for alternatives to the Family Court system to resolve disputes. In recent years, Collaborative Family Law has become one such alternative method of dispute resolution.

Collaborative Family Law provides the opportunity for spouses and their lawyers to meet and resolve disputes in an interest based, non adversarial manner usually through a series of meetings held in the boardrooms of the lawyers. Participants on a collaborative law file, including the separated spouses and their lawyers, are required to sign a contract that stipulates that if the matter cannot be resolved through the collaborative process and the matter must proceed to court, the spouses cannot use their collaborative lawyers to represent them in court and must obtain separate litigation counsel. The evidence and documents generated in the collaborative law file also cannot be used in court without the consent of the spouses. The restrictions on the use of the collaborative lawyers and documents generated in the collaborative process are meant to dissuade participant from contemplating court proceedings and leaving the confines of the collaborative negotiation.

While Collaborative Family Law works well for many participants, and I have had a number of successful collaborative files that have been completed to the satisfaction of the spouses, I list the following 5 possible pitfalls of Collaborative Family Law that the consumer of Family Law services should be aware of in making his or her decision as to how to proceed. These are:

1. Decision Making: Collaborative Family Law encourages spouses to make his or her own interest based decisions regarding their financial future and children's future, with reference, although not necessary strict adherence, to the legal principles of Family Law. In my experience, not all spouses are able to make rational decisions resulting either from lack of knowledge or often from emotional reasons that may result from the separation itself. Sometimes, judicial input or management is required to move a file along. If a spouse is not able to make decisions in the collaborative process the file may not be able to be resolved with financial and emotional repercussions to both spouses.
2. Nature of Spouses and Separation: Not all family law files are ideal for Collaborative Family Law. If a separation is particular bitter, results from an adulterous affair, or if the spouses have been abusive or violent to one another, the prospect of settlement of all issues with the Collaborative approach is not likely to occur. In such a situation, the Collaborative Family Law process may make matters worse as it provides a forum for the airing of grievances of the spouses which the collaborative lawyers are likely not trained to handle.
3. Children: Collaborative Family Law encourages the search for the "middle ground" and interest based negotiation. The "middle ground" may not be ideal for children and parental interests are not always the same as a child's interests. For example, a three year old child should not be required to spend 50% of the time with the mother and 50% of the time with the father that results from a compromise position between the spouses if this means that the young child has no sense of having his or her "home base" or is exposed to extensive

travel time back and forth between parents. Judicial input may be required to determine the “best interests” of the children, if the spouses are not able to do so for themselves.

4. Lawyers: Experienced family law lawyers are not cheap. Typical legal fees may run between \$300-\$500.00 per hour. If a Collaborative Family Law file breaks down, spouses are required to terminate the services of his or her collaborative lawyer and start all over with a new lawyer for litigation purposes. This is an expensive duplication of resources. Further, a lawyer in the Collaborative Family Law process cannot threaten court proceedings to move matters along if collaborative negotiations stall nor commence court proceedings to promote and protect his or her client’s interests. The Collaborative Family Law client is therefore paying hard earned money to a lawyer who cannot use all of the tools of the trade to move the file along in accordance with the client’s interests or needs.
5. Cost: Collaborative family law is often but not always less expensive than the alternative. The cost of proceeding to court for family law resolution is expensive, however, the cost of failed Collaborative Law negotiation followed by extensive court proceedings with a new lawyer is even more expensive. The spouse who is considering the Collaborative Family Law method must be aware of the potential cost of not reaching a resolution in the collaborative process. In my experience, approximately 30% of Collaborative Family Law files will not result in resolution.

Collaborative Family Law is often an effective and amicable way to resolve family law disputes. However, the informed family law client must take into account the five perils listed above when considering the Collaborative Family Law option.

As an alternative to Collaborative Family Law, spouses should consider the possibility of informal negotiation and settlement discussions between spouses and lawyers outside of Court without the requirement of a collaborative contract and its potential perils.

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