

Article

FAMILY LAW



Collaborative Law

The Win-Win Process to Settle Disputes Between Warring Couples

By Joanne Cliff

Collaborative law is a new option for out of court family law alternative dispute resolution. It was developed in the USA by a Minnesota lawyer in the late 1980's who believed that there had to be a better way to resolve family law disputes than the adversarial process with its accompanying aggression and win at all costs approach adopted by the parties and lawyers.

Collaborative Law has now become popular in not only the USA but also in Canada, the UK, Europe and Australia.

What is Collaborative Law?

Put simply, Collaborative Law involves the parties and their lawyers meeting to negotiate a settlement of property and/or children's issues without the necessity of going to court, preparing court documents and complying with court rules and procedures. Importantly with collaborative law, the parties and their lawyers:

- have a shared commitment to proceed honestly, respectfully and in good faith for the parties and the process;
- agree to negotiate a mutually beneficial settlement;

- create shared solutions taking into consideration the interests and priorities of both parties; and
- engage in an honest and complete exchange of information and documents.

Unlike mediation there is no mediator to guide the process - it's done by the parties and their lawyers face to face.

Throughout the process the separating couple will be:

- present for all negotiations and for all legal advice that is given;
- given the option of having a financial planner present who can assist with gathering information, preparing a list of assets and reality testing financial options. The financial planner will remain neutral and does not give advice; and
- given the option to have a relationship counsellor attend to assist in dealing with children's issues and the emotional atmosphere. The counsellor will also remain neutral.

If a resolution is reached, which may take a number of meetings, orders can be drawn and sealed by the Family Court so they become enforceable.

At the commencement of the process the lawyers for each party provide a retainer agreement to their client which sets out the scope and duties of the lawyer. If settlement cannot be reached or if one party decides to terminate the process and head to court then the lawyer's retainer is terminated and they are disqualified from representing the party in court. This is necessary because of the frank and open nature of the process but it will lead to more costs being incurred.

What are the Advantages?

- There is no litigation so no court timetable to follow.
- The issues and solutions are not limited by the Family Law Act 1975.
- The lawyers do not communicate with each other outside of the meetings.
- The parties communicate directly with each other.

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- The parties, not a judge, control the process including the timetable and make the final decisions while having the support and guidance of their own lawyers and financial and relationship specialists.
- The parties can create shared solutions acknowledging the highest priorities of all parties.
- The lawyers work towards a mutually created resolution of all issues.
- The process is private so it can be attractive to high profile people.
- It can lead to ongoing constructive communication between the parties into the future, which is vital when children are involved.
- It minimises hostility and conflict.
- The overall cost should be less than the court process, but it may depend on how many meetings are held to reach resolution.
- It is flexible and allows for creative solutions.

What are the Disadvantages?

- If settlement cannot be reached for whatever reason and court proceedings are issued then the lawyers are not able to represent the parties - this adds to the costs.
- Each party gives up their right to unilateral advocacy, access to the court system and to object to producing

documents and/or providing information that is relevant and appropriate to divulge.

- If a lawyer believes that the other party is not acting in good faith, perpetuating dishonesty etc. or is using the process to delay litigation then the lawyer can withdraw or terminate the process.
- The lawyers cannot guarantee that the parties will adhere to the Collaborative Law principles or that a resolution will be reached.

Is it for Everyone?

Collaborative Law is not without its issues. It takes trust between both parties to undertake the process, which is often the most lacking ingredient in family law cases.

Lawyers have to undertake training to be able to participate in the process. Much of the success of the collaborative process depends on the lawyer initially undertaking an assessment as to whether the case and the client are suitable and then being able to put to use their skills

Abuse, Mental Health and Drug Dependency

If there is a history of domestic violence/controlling and dominating behaviour, mental health issues and/or addictions by one party then this process is unlikely to be suitable. The parties need to feel comfortable being in the same room and talking face to face to the former partner while they address difficult personal and emotional issues. They have to be able to consider the needs and interests of the other party and anything that clouds this ability will make the process futile.

Finance

If the financial resources of one or both parties is modest then consideration has to be given to whether this process is suitable and in particular if it would be better to proceed to court to guarantee a result.

In Australia, with court resources decreasing and with a lack of political will to address it Collaborative Law offers an alternative to court proceedings and mediation for clients and lawyers to consider.

If you need a lawyer to assist with your separation or divorce and would like to investigate this process further please call our Family Law team.



MORE INFO

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