

COLLABORATIVE LAW

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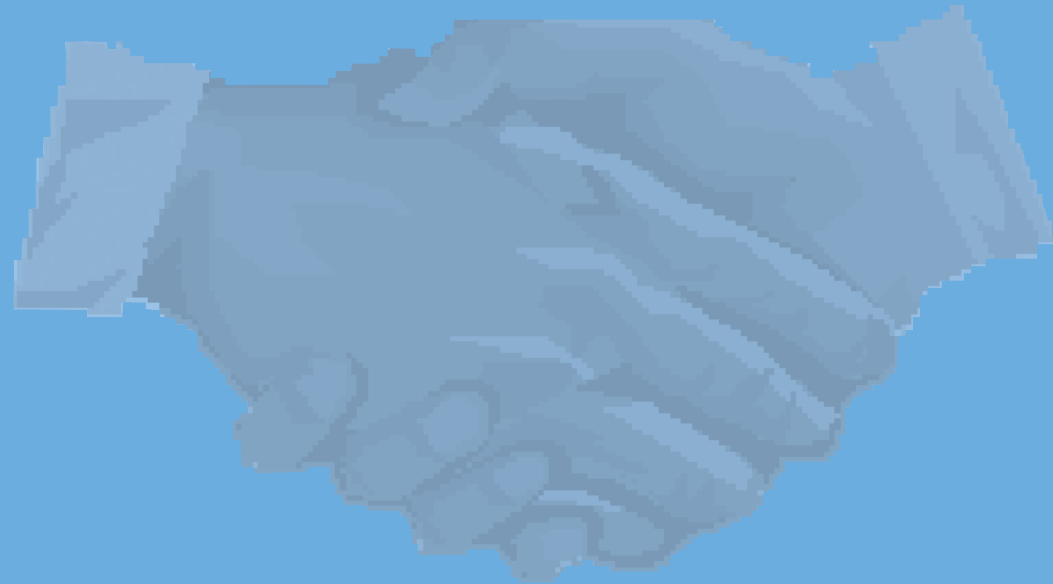
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Collaborative Law

The law regulates many aspects of our lives. One of the purposes of law is to provide guidelines for resolving certain issues. Within these guidelines there are choices about how to resolve a conflict.

People (or organizations and businesses) may be able to reach an agreement on their own. They can then get legal advice about the agreement they have reached. However, it is sometimes difficult for people in conflict to come to an agreement. This may be because it is difficult to talk about the conflict with each other. It could also be because the parties involved are confused or concerned about their legal rights and responsibilities.

Sometimes an independent third party, like a mediator, is used to help parties in conflict reach an agreement. The parties can then take this agreement to their lawyers to have the agreement formalized. Another option, which is often the most familiar, is for parties in conflict to hire lawyers to resolve the dispute in the court process, which is called litigation. In the court process the issues are resolved either when the lawyers negotiate a settlement for the parties or when a judge decides how the issues will be resolved.

Collaborative law offers people another option.

What is Collaborative Law?

Collaborative law is a process for resolving issues with the advice and assistance of lawyers without going to court. The founder of the collaborative law process is a lawyer from Minneapolis, Minnesota, Stu Webb. After practising law for over twenty years, mostly in the area of family law, he became very dissatisfied with the results of settling disputes through litigation. He believed that most people really don't want to go to court to solve their problems but don't know any other

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way to deal with their conflict. He developed a system for resolving conflict which is now called the collaborative process.

In the collaborative process the lawyers and the parties sign a contract agreeing not to go to court. The parties and the lawyers also agree to follow principles of honesty, compromise, cooperation, moderation, integrity and professionalism. Throughout the process the parties and the lawyers work together in meetings to reach an agreement that best meets the needs of the parties.

How is Collaborative Law different from other means of resolving legal disputes?

In a collaborative process, everyone works together as a team seeking solutions that meet the needs of all of the parties and that can be agreed to by all of the parties. In a collaborative process, the parties and the lawyers agree to be respectful, open and honest with each other.

In a collaborative process the parties manage the process. This is unlike the court process, where many rules and procedures determine when, how and which decisions are made. The parties decide together such things as what is to be discussed, when it is to be discussed and how information is to be gathered and exchanged. It is the parties that decide when and how decisions are made.

Collaborative solutions can be more flexible to fit the unique needs of the parties in conflict. The parties know better than anyone what will work for them. The flexibility of collaborative solutions may also better meet the needs of others that are affected by the conflict between the parties.

The collaborative process can be less expensive than litigation and may produce results more quickly than litigation. In the collaborative process some costs, such as the production of paperwork and the cost of obtaining expert advice or reports, can be reduced. By managing the

process, the parties can also manage the cost and the time it takes to reach a conclusion.

The collaborative process promotes better communication between people and works to provide the parties with skills not only to resolve the current conflict but also to be able to better resolve conflict in the future.

Throughout the collaborative process each party is represented by their own legal counsel. This is one of the ways that the collaborative process is different from mediation.



Why use Collaborative Law?

Collaborative law may be particularly useful for resolving disputes where the parties will have ongoing contact in the future. When parties settle matters through litigation they typically communicate through their lawyers and do not have control over the litigation process. This can create greater conflict between the parties. The collaborative process can prevent increased conflict between the parties and can help to meaningfully resolve conflicts that already exist. It emphasizes the importance of how we communicate with others, particularly those we are in conflict with. As well, through the collaborative process, parties can develop skills to deal with future conflict.

There are times when parties in dispute will never have to deal with each other again. In those cases, when the court decides who “wins” and who “loses”, the fact that the parties may not like the solution or may feel angry or resentful toward the other party is not relevant.

However, there are many times when parties in dispute continue to have contact with each other. This is certainly the case in family law disputes when the parties have children. It may be the case in estate disputes, where family gatherings are part of the future or in business communities when attendance at common associations or functions is anticipated.

Because the collaborative approach is based on co-operation between the parties and an agreement not to go to court, it can be less time-consuming and less costly than other methods of resolving legal disputes. Collaborative law may also be less stressful because it is based on respectful communication and the parties and the lawyers working together, not against each other.

A collaborative law approach may result in a better long-term resolution. Collaborative law can provide a greater sense of satisfaction because it deals with issues that the parties themselves identify as important. It can deal with issues in a way that courts, which are bound by legislation and case law, cannot. The end results of a collaborative process may better meet the unique needs of each of the parties.

Strong dissatisfaction with the outcome of a dispute can lead to more disputes in the future or to one or all of the parties not complying with a prior agreement or court order. A party that has actively participated in the decision-making process is more likely to abide by the decision that is made. A decision that has been tailor-made to meet the unique

needs of the parties is also likely to work better, longer.



A collaborative approach provides each party with a skilled legal advisor at every stage. All lawyers who practice collaborative law in Saskatchewan must have

received special training that has been approved by the Law Society of Saskatchewan. Collaborative lawyers are trained in methods to achieve settlement and they can assist parties to reach tailor-made agreements.

Beginning the Collaborative Law Process

If a person is interested in using collaborative law to resolve their situation they can meet with a lawyer who practices collaborative law. The lawyer will provide information about the different options that are available for resolving the dispute including mediation, the collaborative process, negotiation through lawyers and the court process.

To begin the collaborative process, a letter of introduction will generally be sent by the collaborative lawyer to the other party. The letter explains that the lawyer has been contacted about resolving the conflict in question through the collaborative process. In this letter the lawyer will explain the options for resolving the dispute and provide a list of collaboratively trained lawyers in that area should the other party be interested in using the collaborative process. Collaborative law is a voluntary process that can only be used if all parties agree and each retains a lawyer trained in the collaborative process.

Once the parties have agreed to use collaborative law, each party will meet with their own lawyer to prepare for the first collaborative meeting. At this lawyer/client meeting the lawyer will review the collaborative process with the client and identify “pressing” issues that need to be discussed at the first collaborative meeting. The lawyer and client will discuss expectations of lawyers and clients in the collaborative process and the lawyer will coach the client on interest-based communications. The lawyers will talk with each other to set up the first collaborative meeting and they will discuss some of the problems that have been identified by the parties in the lawyer/client meetings.

The Collaborative Law Contract

In the first collaborative meeting the parties and their lawyers will review and sign the collaborative contract. Through this contract the parties and the lawyers agree to use the collaborative law process to resolve the dispute and to abide by the principles of the collaborative process.

goals

The contract outlines the goals of the collaborative process including...

- ✦ focusing on the future needs and interests of all parties (in family law matters where children are involved, the focus will also be on the wellbeing of the children)
- ✦ finding solutions that work for all parties
- ✦ avoiding the negative economic, social and emotional costs of going to court
- ✦ providing a relaxed atmosphere and giving all parties time to think about any settlement reached
- ✦ putting agreements that have been reached into a written contract

not going to court

In the contract the parties commit to settling the matter without going to court. The parties agree that if the matter does go to court neither lawyer can represent their client in proceedings against the party. The parties have to hire new lawyers from different law firms. The lawyers who were involved in the collaborative process cannot give any information from the collaborative process to the new lawyers.

information

The parties agree in the contract to give complete, honest and open disclosure of any information whether requested or not. The parties also agree to provide any information requested whether they think it is relevant or not.

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communication

The contract contains guidelines about how the parties will interact with each other during the process. All parties agree to communicate in a respectful, constructive manner, to effectively listen, to focus on the future and to not make accusations or claims that are not based on fact.

The parties agree not to discuss what happens during meetings with people outside the process unless all parties and their lawyers have agreed to it. They also agree not to use the information in any court process. The parties agree to communicate with each other about the dispute only during the meetings. The parties also agree that a matter of concern raised by one of them with their lawyer, outside of a meeting, will be discussed between the lawyers and brought back to a meeting.

confidentiality of the process

The parties agree that everything that is discussed or disclosed during the collaborative process is confidential and cannot be used in any other situation. The commitment by the lawyers to withdraw in the event that the matter does go to court is important to preserve the confidentiality and integrity of the collaborative process.

It is agreed that information obtained during the collaborative process is not to be referred to or relied upon outside of the collaborative meetings. It is agreed that if the collaborative process is not successful, neither party may, in the court process or otherwise, refer to any statement, comment or disclosure made by the other party or any of the experts or consultants in the collaborative process.



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The contract states that unless the parties agree otherwise in writing, the lawyers and any experts used cannot be witnesses and expert reports and opinions cannot be admitted in court. This preserves the confidentiality of the collaborative process and ensures that all parties have ownership of all work created during the collaborative process.

participation with integrity

The parties agree in the contract not to act on their own and to respect the dignity and privacy of each other. For example, family law clients agree to not dispose of family property, incur debts that they expect the other party to share responsibility for or change any aspect of the children's lives without the consent of the other party, during the collaborative process.

good faith

The parties acknowledge that their respective lawyers represent only them. They agree to try to create proposals all parties can accept, to compromise if necessary and to not use the threat of going to court to force a settlement.

costs

The parties either agree to each pay their own lawyer or to each pay half the costs of all lawyers. The parties also agree to hire experts jointly if they are needed.

abuse of the process

The contract outlines actions that are considered an abuse of the process and what will happen if either party abuses the process. Actions that are considered an abuse of the process include withholding or misrepresenting information, failing to participate in the spirit of the process and acting unilaterally by doing things like disposing of family property without the other party's knowledge or consent. If any of the lawyers learns that one of the parties has taken unfair advantage of the process, all lawyers must withdraw from the case.

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effect of agreements

The contract also provides that agreements made during the process are not binding unless they have been put in writing and signed by all parties and their lawyers.

The Collaborative Meetings

Once a contract agreeing to the collaborative process is signed, the parties and their lawyers have a series of four-way meetings. Where and when to meet is decided by the clients and the lawyers. The number of meetings required will depend on the complexity of problems that need to be resolved. Six to eight meetings would not be uncommon and more complex matters may take longer. The meetings vary in length but are generally 2 1/2 - 3 hours long. At these meetings the parties have control over making any decisions and each party has their own lawyer working with them to discuss issues and help identify fair solutions.

How the meetings will proceed and the number of meetings required will depend on each individual case. Generally, the first meetings are to determine what issues need to be resolved, to identify information that each party may need and to disclose that information to each other. Once the parties know what has to be decided and have the information they need, the meetings focus on generating options and finding solutions that work for all parties. When a collaborative approach is used the parties do not negotiate "the terms" of an agreement until everyone has all the information they need and all possible choices have been explored.

The collaborative meetings are the place where all communication between the parties concerning the issues takes place, unless all parties agree otherwise. If parties bring an issue to their lawyer, their lawyer will pass the concerns on to the other lawyer who will then pass the concerns on to the other party so that the matter can be put on the agenda for the next four-way meeting.

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Although parties do not communicate with each other between meetings the lawyers generally meet with each other before and after each four-way meeting. This allows the lawyers to evaluate the meeting, discuss ways to improve the next meeting and deal with their clients' concerns.

Between meetings the lawyers will talk with their own clients to discuss how the collaborative process is working and to discuss any concerns their client may have. During these discussions with their clients the lawyers will not talk about how to resolve the issues nor will they discuss the law. Those discussions must occur in the collaborative meetings.

interest-based negotiation

Throughout the process the parties and their lawyers use what is often called "interest-based" negotiation. This type of negotiation involves each party identifying what is important to them, what may concern them and what they need and why. Options are then developed that might satisfy those interests and options are selected that best satisfy all parties' most important interests. At this stage creativity can be used to develop unique options tailored to meet the needs of all parties.

Interest-based negotiation is different from other types of negotiation because parties disclose their real interests, such as their current needs, future needs, concerns or fears. In other types of negotiations, commonly called "positional bargaining", the parties may actively hide their real

interests from the other side and ask for things that are not necessarily crucial to settling the issues. This is done so that the party can then "give" something away and still get what is really important to them. With positional bargaining the real needs of the parties can get lost and never be met.



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When all parties agree to the collaborative process, all parties are committed to interest-based negotiation and parties' real interests are out in the open. This allows options to be evaluated based on whether they meet all parties' needs and can lead to more satisfying results than had the parties gone to court.

Role of the Collaborative Lawyers

In the collaborative process each party has their own lawyer. The lawyers guide their clients through the collaborative process. While each lawyer is there to coach and advise their own client, the lawyers will work together to make the process work for all parties.

The lawyers will coach the parties in communicating in a way that is respectful and that reflects the principles of the collaborative process. The lawyers will assist the parties in identifying and speaking about the things that are important to each of them. They will coach them through the creation of options that may lead to an agreement and they will help them assess the options. They may identify other professionals that have skills or information that may help the parties resolve the conflict. In the four-way meetings the lawyers will discuss the law and what a judge might do, as requested by their clients.

The lawyers will talk to each other to evaluate meetings, to suggest ways to improve future meetings and to discuss any concerns of their clients. Between meetings the lawyers will talk privately with their own clients to discuss how the collaborative process is working and to discuss any concerns their client may have.

If an agreement is reached the lawyers will prepare the documents to make the agreement a legally binding contract. The lawyers will help the parties to obtain any necessary court approval or implement the agreement. If the process is ended without reaching an agreement, the lawyers cannot represent their clients in any court proceeding concerning the matter.

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Role of the Collaborative Clients

When parties agree to the collaborative process they also agree to use the collaborative approach to resolve the issues. Parties agree to attack the problem, not each other.

Parties agree to listen to each other without interruption and to commit the time required to meet regularly.

Parties also agree not to use language that blames or finds fault with the other party, to focus on the future, not the past, and explore all possible choices.

Parties agree to share information and documents as requested.

Parties agree that no action will be taken by either of them that may affect the other unless it is agreed to in the collaborative process.

Consultants

When a collaborative law process is used, the parties can choose to receive additional information or guidance from other professionals such as accountants, psychologists, business valuers, social workers, appraisers, family counsellors, and financial planners. A consultant will become involved only if all parties agree. The parties must agree on how the consultant will be paid.

If the collaborative process breaks down, the consultant cannot give evidence for one party over the other. Any work of the consultant or reports of the consultant are owned by all parties and remain confidential. If the collaborative process breaks down, neither party can use a collaborative consultant's work or report in a court proceeding unless each party agrees to its use.

If the Collaborative Process Ends

A collaborative process could come to an end without any settlement being reached for a number of reasons. If either party is abusing the process the lawyers are required to end the process. Either party may also choose to end the process.

The parties agree that if either one decides to withdraw from the process they will give prompt notice to the other party through their lawyer. The parties also agree to wait at least 30 days before any court hearing to give the parties time to get new lawyers.

An action can be taken earlier if a party satisfies the court that it is an emergency that cannot wait 30 days.

The collaborative process depends on the parties being willing to freely disclose information and share options. The rules concerning confidentiality and the collaborative lawyers not representing the parties if the process ends are in place to ensure that someone who participates in a collaborative process is not at a disadvantage if the process is ended and the matter goes to court.

Even when a collaborative process ends, the parties may still agree to follow some of the agreements reached in the collaborative process.

Agreements

The purpose of the collaborative process is to try to reach settlement of all things in dispute between the parties. However, there can often



be a number of different issues that have to be resolved. During the collaborative process the parties may agree on how to settle some things but may require more time to reach agreement on other things. Agreements on a temporary basis, while a complete settlement is still being worked on, are sometimes called interim agreements or arrangements. Once an agreement is reached on all issues, these interim agreements may be included in the final settlement agreement if the parties agree that the solutions reached in the interim agreements are working well for them.

The collaborative process is designed to allow the parties to agree on some things but not be bound by those agreements if ultimately all matters are not settled through the collaborative process. Where a collaborative process is ended in favour of the court process, parties may still agree to follow some of the interim agreements reached.

One of the goals of the collaborative process is that all parties are satisfied with the settlement reached and have time to consider the different aspects of the settlement. If either party has any concerns about the settlement there will be another four-way meeting to discuss the concerns.

Agreements reached in the collaborative process can be final agreements or may be agreements that the parties agree to review in the future. The parties may decide that they do not have enough information about the future to make decisions that will bind them forever. Sometimes the parties may agree that all or some of the agreement should be changed if certain events occur in the future. It is often difficult to predict the future and provisions of this kind allow for that uncertainty to be dealt with in the future.

When agreement is reached on all issues, that agreement will be put into a written document and it will be signed by all parties and their lawyers. The lawyers will work together to legally formalize the collaborative agreement. The lawyers will work together to obtain any court approval that may be necessary and will advise or assist the parties

in carrying out the terms of the agreement that has been reached. If disputes arise after the agreement about the agreement itself or how to implement the agreement, the parties are required to again meet in the collaborative process to discuss the problem.

If you are interested in learning more about the collaborative law process or in using it to resolve a dispute, contact...

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