

Collaborative Settlement



Resolving Disputes After Separation or Divorce

JOHN-PAUL BOYD, MA, LLB

Everyone has experienced the end of a serious relationship, whether as a teen or an adult. A traumatic event that many psychologists compare to the loss of a loved one, it usually involves the same feelings of anger, hurt and grief. When a couple has children, is married or has lived together for a long time, separation often has legal consequences that must be managed alongside these intense emotions. As a family lawyer, my job was to help people resolve their legal issues as fairly and as quickly as possible, with as little conflict and cost as can be managed. Family law is the area of law that deals with the division of property, the payment of support and the care of children after the separation of their parents.

Family law is a challenging area of law to practise. Good family law lawyers need to be sensitive to their clients' emotional state and to the needs and circumstances of the children, and they must also understand related areas of law, such as wills and estates, tax law, criminal law, corporate law and child protection, that might also be involved in a case. Family law is also very different

than other areas of law because it looks toward the future and generally is not concerned with wrongs that happened in the past, such as a car accident or being unfairly fired from a job. The job of the family law lawyer is not to fix the past but to help create parenting and financial arrangements that are reasonable and fair, and that will work for the family into the future.



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The practice of family law has changed enormously in the past 25 years. Although lawyers once assumed that most, if not all, family law disputes would be resolved through the courts and a trial before a judge, there is now a wide variety of tools to resolve disputes, most of which are not antagonistic in nature. In fact, according to recent data from the Canadian Research Institute for Law and the Family, lawyers today take only a very small proportion, less than 8%, of their files to trial; the lion's share is resolved through some form or combination of negotiation, mediation and arbitration.

Many people, however – especially those who have not received advice from a lawyer – assume that family law problems should or must be resolved in court. Court, after all, is how disputes are resolved on television; court is how everyone's parents handled their separations; and court is where you must go if you want to get divorced.

Court is not always the ideal way of resolving legal disputes, especially between separated couples. The common law court system Canada inherited from England is based on the idea that litigants have opposing goals and conflicting recollections of the past. It pits spouses and parents against each other in a battle to achieve the best outcome, and it encourages

conflict and vindictive behaviour and feelings of bitterness, resentment and outrage as a result. This toxic stew of actions and emotions has many negative consequences for the adults involved in litigation, yet it can have even more serious consequences for their children.

Children experience the separation of their parents in different ways depending on their age, their maturity and what is going on at home. Many children will start acting out at school when their parents' relationship comes to an end; some will experience psychological disorders, such as depression and anxiety, or go through phases of extraordinary sadness and anger. Younger children often experience delays or regression with regard to developmental milestones, such as toilet training.

Older children may start skipping school and, in some circumstances, may turn to drugs or alcohol. All of these reactions are fairly normal, but the likelihood that a child will go through some or all of them increases when they are exposed to conflict between their parents. If this conflict is particularly severe, children also risk losing their relationship with a parent and developing poor anger management habits, and may have problems maintaining trusting, loving relationships as adults.

These are all very good reasons for parents to avoid going to court to resolve their differences if at all possible. However, if the effects of conflict on children are not enough to discourage litigation, court also happens to be a very expensive way to deal with family law problems. It commonly takes more than two years to bring a family law case to a close, even when the issues are relatively straightforward and the people involved are relatively reasonable. In general, cases considered highly conflicted – the number of which is usually estimated to be around 5% to 20% of families engaged in litigation – cost considerably more to resolve, take substantially longer to resolve, involve significantly more applications prior to and after trial, and are much more likely to require expensive reports from parenting and financial experts.

Given the destructive effects of litigation on families and children, family law lawyers across Canada have increasingly turned to cooperative processes to resolve family law disputes out of court. In my experience, litigation is now generally reserved for situations where people or property must be protected, a child has been abducted, a parent wishes to move away with the children or all reasonable efforts to reach settlement have failed.

Alternatives to litigation

The three primary alternatives to litigation, as a means of resolving family law disputes, are negotiation, mediation and arbitration.

Negotiation at its most basic is a dialogue between spouses or parents intended to result in settlement of the legal issues arising from their separation. Negotiation usually involves some degree of compromise by each party and, as a result, people wishing to negotiate a resolution to their dispute must be flexible and accept the fact that the dispute will not go away unless they are prepared to accept an outcome that is something less than their ideal result.

Some people are able to negotiate directly with each other, while others require the use of lawyers or other people such as counsellors, elders or community leaders. It is often easiest to use lawyers because they will be familiar with the range of outcomes that would likely be realized if the dispute went to trial. They are also able to talk to each other about the issues without the emotional baggage from the relationship cluttering the discussion.

Mediation is a kind of assisted negotiation. In mediation, spouses or parents use a neutral third party, someone who has no personal interest in the dispute and is not a supporter of either side, to help them talk about their situation and legal dispute. Although a great deal of skill is involved, mediators really only help people talk to each other and find their own settlement. Mediators do not have the power to decide what a fair result is and cannot make the parties accept a particular arrangement; if the parties are able to reach a deal, it is *their* deal.

The art of mediation has become highly developed over the past several decades, and mediation training for lawyers often requires an entire week of instruction, sometimes two. Different mediators have different practices and techniques. Some are evaluative and very frank in their views about the likely success of one position or another; some have extensive pre-mediation processes in which they screen for family violence and spend a lot of time with each party separately; some resolve disputes in a single marathon mediation session, while others prefer a series of shorter half-day sessions. Lawyer mediators tend to be more direct in their approach and less willing to overlook unreasonable positions.

As with negotiation, some people are able to attend mediation sessions on their own, while others are better off having their lawyer with them. Lawyers usually assist the process by explaining their clients' legal position, particularly when the law on an issue is complex, as is the case when one parent wants to take the child and move away from the other or when the division of property involves important tax consequences, and by helping their clients assess proposals in light of what would probably happen if the dispute went to trial.



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Both negotiation and mediation are non-adversarial, meaning that the spouses or parents involved are not combatants fighting against each other in a battle to achieve victory. In these processes, the parties work together to find a mutually acceptable solution that is as good for both as possible. Arbitration, on the other hand, is an adversarial process, like court, in which a neutral third party, usually a lawyer, hears the parties' evidence and arguments and makes a binding decision resolving their dispute.

Arbitration has several advantages over court, however. Arbitration is held in private, out of public view, with all documents remaining confidential and no decision ever being published. The parties and their lawyers can pick the arbitrator whose skills best suit the dispute. The parties can also pick the rules that the arbitrator will use to decide their case, including the rules about evidence. An arbitration session can be held as soon as everyone is available, which is often much quicker than trial dates can be found in court, and it is usually less costly to resolve a case through arbitration than through litigation.



Collaborative processes aim to find a settlement with minimal emotional and psychological impact, to help parting couples go forward as a separated family and cooperatively raise their children.

Collaborative settlement processes

Collaborative settlement processes – which are sometimes called collaborative law, even though they are not an area of law – are the newest alternative to litigation, and were developed by Stu Webb, a Minneapolis lawyer, in the early 1990s. Webb had become fed up with litigating family law disputes and was thinking of leaving law altogether when he realized he could maintain a practice pursuing settlements for his clients out of court. He found himself taking on many files with a colleague similarly dedicated to resolving family law problems without litigation, and the collaborative approach was born. When word spread about Webb’s approach, other lawyers began to try it for themselves, and the concept has since been adopted throughout most of North America. According to the Canadian Research Institute for Law and the Family, collaborative

processes are presently used to resolve about 18% of Alberta family law lawyers’ files; in Ontario, they are used to resolve about 8% of lawyers’ cases.

Collaborative processes are forms of intense, assisted negotiation. The process starts when each spouse or parent hires a collaboratively trained lawyer. The parties and their lawyers all sign an agreement in which they promise to be open and honest with each other, to exchange all relevant documents, to keep settlement discussions and documents confidential, and to never go to court about the dispute. This last term is particularly important. The parties must commit to resolving their dispute without a lawsuit, and most agreements require that a lawyer who discovers that his or her client is planning on starting a lawsuit, or has hidden or provided misleading information, must stop acting for the client. This can be a powerful incentive to stick with the process, even when emotions are running high and it looks like discussions have stalled.

Once the lawyers are retained and the agreement is signed, the lawyers will begin a direct discussion with each other about the case and the issues, and set up a series of joint meetings between the parties and themselves aimed at exploring and resolving the dispute. These meetings are rarely longer than a half-day and take place in a comfortable room in one of the lawyers’ offices that is well stocked with coffee and snacks.

Collaborative processes are aimed at finding settlement while leaving the couple as emotionally and psychologically intact as possible, to give them the best chance to go forward as a separated family and cooperatively raise their children. For this reason, mental health professionals with special training in collaborative processes, sometimes called divorce coaches, are often hired to help. The spouses or parents will have their own counsellors to help them deal with the emotional consequences of their separation, roadblocks to settlement and parenting issues as they arise. When negotiations get bogged down or the parties’ emotions threaten to become a barrier to progress, the lawyers will talk directly to the parties’ counsellors to try to find solutions. Otherwise, everyone – the parties, the lawyers and the counsellors – will meet together to discuss the case.

Collaborative processes can involve professionals other than counsellors. When a dispute concerns parenting arrangements, the children have special needs or the children are having difficulty coping with their parents’ separation, a third mental health professional may be brought on board to represent the interests of the children, to provide an opinion about the parenting arrangements that are best for them or to present their views and wishes. A financial specialist, such as a pension expert or financial planner, may also be recruited to help the parties

figure out how to live on reduced incomes, plan investments for their futures or find tax-effective ways of dividing property. Child and financial specialists are neutral in the collaborative process and are not aligned with either party.

Collaborative processes always take more than one meeting between the parties and their lawyers to resolve a case. If parties' disputes were simple enough to resolve in a single session, lawyers would be more likely to work out a settlement over the telephone, making the collaborative process unnecessary. When settlement is reached, one of the lawyers prepares a legally enforceable separation agreement that the parties and their lawyers will sign, putting an end to their dispute. For married couples, all that may be left is starting the court process necessary to get a divorce.

Children and collaborative processes

According to psychologists such as Robert Emery and Joan Kelly, parental separation can significantly increase the risk of adverse outcomes for children, who are infrequently prepared for, or informed about, their parents' separation.¹ Moreover, Kelly has found that children are rarely consulted as to their wishes or preferences, which can lead to feelings of isolation, loneliness, confusion and anger, and also increases the likelihood of adverse outcomes. Janet Johnston and Joan Kelly have found that conflict between parents increases the risk of adverse outcomes and can have long-lasting effects on children's behaviour, such as higher levels of aggression, acting out and other behavioural problems, low self-esteem and truancy.² Conflict can even affect the quality of parents' parenting or, worse, encourage parents to inappropriately involve the children in their dispute.

Collaborative processes are intended to preserve parents' relationship with each other after separation by reducing conflict, encouraging mutual understanding and involving counsellors to help them address the consequences of their relationship coming to an end. Ultimately, this benefits not just the parents, but also their children by minimizing the magnitude of parental conflict and managing their exposure to and understanding of their parents' dispute.

The collaborative approach is extraordinarily flexible. It is not guided by rigid, detailed rules like those that govern the conduct of a lawsuit, but merely by the overarching framework of the collaborative process agreement and the goodwill and good faith of the parties and their lawyers. As a result, collaborative processes can be adapted as necessary to suit the needs of a particular case and accommodate a wide variety of situations that would be challenging to address in court, such as



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parties with brain injuries or mental illness, parties with addiction issues, or the involvement of influential relatives or new partners. Some collaborative practitioners have even begun to engage children in their collaborative process.

Children can be involved in collaborative processes in a number of ways. For most families, children's primary contact with the process will be through the child specialist, who will assess their experience of their parents' separation, their adaptation to new living arrangements and their overall well-being. Although the decision to involve children any further in the process should not be made lightly, it can be important for older children to express their wishes and feelings directly to their parents in the supportive context of one or two collaborative meetings. Teenagers finishing high school and adult children pursuing post-secondary



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education can also be usefully involved to help parents address parenting schedules, extracurricular events and payment of costs related to education. Many parents also find it helpful to have their children attend a collaborative meeting to tell them, together, about important changes to their home, school, activities and time with family.

Drawbacks to the collaborative approach

There are, however, some notable disadvantages to the collaborative approach. First, it can be prohibitively expensive to pay for the cost of the professionals involved when more people are involved than just the parties and their lawyers. Compared to the potential cost of litigation, the total expense may be negligible, but it can still be very difficult to write monthly cheques to pay for a lawyer, a counsellor, a child specialist and a financial expert.

Second, although the process can adapt to address power imbalances between spouses and parents, it is not likely to be suitable when family violence is involved. Collaborative processes simply require too much face-to-face contact.

Finally, the process, like negotiation and mediation, depends on the willingness of the parties to compromise their positions and accept a settlement that is less than their ideal. The process cannot succeed if one or both parties cannot bring themselves to accept some give and take.

Collaborative processes in Canada

Collaborative processes are growing in popularity across Canada as a practical, child-focused way of resolving family law disputes without the cost, conflict and rancour of litigation. Even in British Columbia, where only 4% of lawyers' family law files are resolved collaboratively, 470 lawyers and mental health professionals took locally available collaborative training between 2001 and 2013; even if only half of the participants were lawyers, that would still be a significant proportion of the 1,100 lawyers who practise family law, according to the Law Society of British Columbia.

There will always be a role for court in the resolution of family law disputes. The highly emotional circumstances of separation too often create urgent problems where the safety and security of people and property must be protected, and there will always be people and disputes that simply cannot be reconciled. However, collaborative settlement processes are, in my view as a lawyer who has dealt with countless family law disputes both in and out of court, by far the most sensible and rational way of resolving the legal issues arising from separation.

Lawyers' approach to the resolution of family law disputes in Canada will continue to evolve as more professionals involved in the separation of parents are trained in collaborative methods of dispute resolution and as more families in increasingly diverse circumstances adopt a collaborative approach to the legal issues arising from their separation. I expect that collaborative practice will continue to develop in depth and sophistication, and will become the customary means of resolving family law disputes rather than the courts.▼

John-Paul Boyd, MA, LLB, is the Executive Director of the Canadian Research Institute for Law and the Family, a multidisciplinary non-profit organization associated with the University of Calgary.

¹ Robert E. Emery and Joan B. Kelly, "Children's Adjustment Following Divorce: Risk and Resilience Perspectives," *Family Relations*, 52:4 (October 2003), accessed March 17, 2014, <http://bit.ly/1AAEXUn>.

² Janet R. Johnston and Joan B. Kelly, "The Alienated Child: A Reformulation of Parental Alienation Syndrome," *Family Court Review*, 39:3 (July 2001), accessed March 17, 2014, <http://bit.ly/1GYfGLI>.