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Collaborative divorce gains momentum in state



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gone in the other direction, gaining tremendous momentum: collaborative family law.

Way back when, at my invitation, a group of family law attorneys met in 1999 on a Saturday morning to discuss the idea of forming a collaborative divorce group in Wisconsin. At the time, collaborative divorce was a foreign term in the state, as in most of the country. Today while it might not be a household name yet, collaborative divorce has become a widely accepted area of legal practice.

That 1999 Milwaukee Saturday morning meeting resulted in the Collaborative Family Law Council of Wisconsin Inc. (www.collabdivorce.com), which today

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The year was 1999. We were all worrying about Y2K, eating low-carbohydrate diets and asking, "Is that your final answer?"

Those are all distant memories now. But one event dating back to the end of the 20th century has

has 118 lawyers, 27 financial experts and 58 mental health experts as members throughout the state.

To test the success of this process, informally and at the local level, my office studied three years of collaborative divorce cases filed in Waukesha County. In this article and next week's, we'll look at the results of this study, and discuss the impact of collaborative divorce and its role as a method of an alternate dispute resolution process on divorce, now and in the future.

A Speedy Review

Prior to 2000, the only ADR available to divorce lawyers in Wisconsin was mediation.

In 1990, Minnesota lawyer Stuart Webb began experimenting with an alternative to traditional divorce negotiations, designed to eliminate even the threat of trial from the legal process.

The first collaborative divorce group was founded in California in 1993, when attorney Pauline Tesler developed the process into a multi-disciplinary one, including mental health and financial professionals.

For any readers of this column who have been in a coma during the last five years, in a collaborative divorce, the parties and attorneys sign an agreement not to litigate. There are mutual promises of full and voluntary disclosure, joint appraisals and good-faith negotiating. The "teeth" in the agreement is that if litigation is needed, both attorneys will withdraw and turn the case over to new lawyers, at considerable cost to both parties.

When we began exploring the process

in Wisconsin in 1999, beside California and Minnesota, the only states with collaborative divorce groups were Ohio and Connecticut. We invited these lawyers to meet with us, and were delighted that 40 lawyers throughout the country came to Chicago at their own expense. That meeting developed into an annual meeting under the auspices of what is now known as the International Academy of Collaborative Professionals (IACP; see www.collaborativepractice.com).

Today, the IACP has more than 3,000 members from 194 different collaborative law groups in 38 states, plus Washington D.C. There are also collaborative groups in 11 foreign countries. The annual meeting is now a major event, drawing hundreds of attendees.

Parenthetically, we are proud that Milwaukee attorney Susan Hansen was president of IACP last year — a sign of the vitality and importance of the Wisconsin group.

The Study

On the theory that close to a decade is sufficient time to yield reliable statistics, my office studied three years of collaborative cases in Waukesha County. We chose Waukesha because it has a sizable number of attorneys who are members of the collaborative group, without an unwieldy number of divorce filings.

We looked at all divorces filed in 2005, 2006 and 2007 and identified those in which collaborative agreements were filed. We then looked at each of these cases and examined whether it appeared that the collaborative agreement was successful. (The raw data is posted on our

office Web site at www.loebherman.com/collaborativestudy. Thanks to Che' Shane Francis for collecting it).

We counted a three-year total of 3,927 divorces filed, and of them, there was a three-year total of 75 collaborative divorce cases. Of those 75 cases:

- Sixty settled within the context of the collaborative process;
- Six were dismissed, all apparently due to reconciliation;
- One case is still open, but appears to be moving toward settlement within the collaborative process; and,
- Eight cases, or 11 percent of the total collaborative cases filed, resulted in a breakdown of the process where new lawyers had to be retained.

The greatest fear of collaborative divorce in 1999 was the risk of failure. Due to the costs of changing lawyers, not only financially, but in the lost time while the new lawyers get up to speed, it was felt that a high failure rate would doom the process. Given the prevalence of using the threat of litigation in settlement negotiations, many felt that a process that promises not to use litigation would have a substantial failure rate.

Clearly, at least in Waukesha, those fears were unfounded.

In addition, although arguably not enough time has elapsed to make this statistic meaningful, of the 60 cases that settled within the collaborative process, only one case had a postjudgment action brought outside of the collaborative process.

Next week, I'll discuss what these and other results from the study might mean about the future of the collaborative process.

12/1/08

Collaborative divorce sees success, not wide use



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Council of Wisconsin Inc.'s Web site at www.collabdivorce.com. In this column last week, I looked at the phenomenal development of that group.

To test the success of this process, my office informally studied three years of collaborative divorce cases filed in Waukesha County from 2005 through 2007. This week, I'll discuss more find-

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It has now been close to 10 years since the first steps were taken to bring collaborative divorce to Wisconsin. In that time, collaborative divorce went from an unknown to a vibrant organization; see the Collaborative Family Law

ings from the study and the impact of collaborative divorce on divorce cases.

To recap, one of the most important findings was that, of the collaborative cases filed in Waukesha County in a three year period, only 11 percent resulted in a breakdown of the process where new lawyers needed to be retained.

We additionally discovered that the number of collaborative cases is quite small compared to the total number of cases filed. During this three-year period, there were 3,927 divorces filed. Only 75 cases, or less than 2 percent, had collaborative agreements filed. While many of the 98 percent of non-collaborative cases were pro se on one or both sides, the number of collaborative cases is still quite small.

Finally, the number of collaborative cases remained fairly stable during this three-year period, at 25, 22 and 28 respectively.

The Central Question

If the process is so successful, why is it not used more widely? Several answers are possible.

Perhaps the reason failure rates are so low is that the only cases that lawyers choose for collaborative agreements are those where settlement is highly likely — akin to picking only the low-hanging fruit.

Among the unanswered questions about collaborative divorce is its applicability to cases involving alcoholism, drug abuse or domestic violence. A number of years ago when I was speaking to a bar association about collaborative divorce and raised the question about these type of cases, a judge in the audience yelled out: "You just described every case in my courtroom!"

If the reason for its limited use is that only certain cases qualify, the process is still valuable for those cases. Several years ago, I helped start another group devoted to a settlement process, the Cooperative Divorce Institute of Wisconsin (www.cooperativedivorce.org).

A cooperative divorce incorporates many of the features of a collaborative divorce, such as full, voluntary disclosure, informal discovery and joint appraisals. But, a cooperative divorce agreement is only a good-faith agreement, as it does not require mutual, mandatory withdrawal of both lawyers if the case goes to litigation. This process, while not revolutionary like collaborative divorce, has no downside, so it should be available even in the most difficult cases.

Another possible reason for the lack of more collaborative cases is the failure of

the process to achieve substantial public awareness. When it first started, it was (somewhat of) a media darling. But, as is often the case with the popular media, publicity is short-lived.

Most likely, the reason is that the process is still fairly new. Like most things, it takes time to gain traction and 10 years is not a long period of time.

Looking Ahead

Whatever the reason, as any lawyer who has handled a number of collaborative cases can attest, under the right circumstances, the process can benefit parties enormously. Perhaps by assuring potential collaborative parties of the high historical rate of success, the process can expand in the future.

In the meantime, all lawyers should offer clients the options of collaborative and cooperative divorces in the appropriate cases. Divorce cases are not uniform, so representation should not be "one size fits all."

As demonstrated by our study, for the vast majority of cases, collaborative divorce works. As mentioned earlier, there is no downside to a cooperative divorce. Failing to have these options available for the appropriate case means a lawyer is not equipped to offer the best representation to all clients.