

Chapter 1

What Is Collaborative Law?

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Imagine a divorce process where the lawyers work together outside the courtroom, conduct agreed joint discovery, and must withdraw if a settlement agreement isn't reached. Sounds unlikely, doesn't it? Yet, more and more of these cooperative divorces are done every day in Texas and around the world. They're part of a growing movement called "collaborative law" that's changing the way family lawyers practice. Collaborative law's primary purpose is to meet a couple's shared and individual goals while minimizing financial and emotional damage. The focus is entirely on settlement.

This revolutionary process requires new procedures. At the beginning of a collaborative case, the parties agree in writing not to take any issue to court and to negotiate in good faith. This written collaborative law agreement also covers discovery and disclosures. (See forms 12 and 13 in this book.) If a collaborative settlement isn't reached and the case proceeds to litigation, the collaborative lawyers must withdraw. This makes tactical threats of "See you in court!" by the collaborative lawyers pointless. If the collaborative process fails, the parties must hire litigation counsel to continue the case. Under Texas law, the collaborative process is more than divorces and can be used in all title 1 and 5 disputes (marriage and parent-child matters). See *Tex. Fam. Code § 15.052(3)*.

Another innovation in collaborative law is its team approach to resolving divorces and other family disputes. In Texas, the collaborative team typically consists of the two lawyers, a neutral mental health professional, and a neutral financial professional who work with the couple to develop a customized settlement for their divorce. A case can be collaborative with only the two lawyers, but using a full team brings benefits. You can't have a collaborative case with one lawyer. The reason this process is called collaborative is that the parties, the neutral experts, and the lawyers all work together—"co-labor." Compare this with litigation, which is adversarial by definition.

Collaborative law allows the couple and their team great flexibility to craft custom solutions within a well-defined process with clear ground rules. The couple and their team meet in one or more collaborative sessions every few weeks. These collaborative sessions aren't free-floating conversations; each session has an agenda that follows an overall road map to resolution. (See forms 10 and 1.) There's also a code of conduct to keep discussions civilized and productive between the parties. (See form 11.) Collaborative law's overall framework promotes creative, custom solutions to divorce issues such as property settlements, child support, and visitation arrange-

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ments. The collaborative process is a respectful, private, and efficient way to resolve family law matters.

How Did Collaborative Law Begin?

In 1989, Minnesota family lawyer and mediator Stuart Webb found himself in one of the ugliest litigation cases of his career. Webb said, “I had been a divorce lawyer for about eighteen years and was getting pretty sick of it. I saw what the adversarial court battles that were the focus of divorce were doing to my clients, and I knew the resulting negativity was having an effect on me, too.”¹ He wanted to come up with a creative way to settle family disputes without all the grief and destruction, so in 1990 he wrote a letter to a friend who was a Minnesota judge proposing a radical, new approach to settling family law disputes. Webb’s letter to Justice Keith marks the birth of the collaborative law concept and is reproduced in the “Essential Documents” part of this book.

In the mid-1990s, two parallel lines of collaborative work converged and created the collaborative team idea. Pauline Tesler, a California lawyer, had started a lawyer’s collaborative practice group, and Peggy Thompson, a California psychologist, had developed a divorce coaching model that used financial and mental health experts. When Tesler and Thompson’s work merged, an interdisciplinary team approach (i.e., lawyers plus additional professionals) to collaborative divorce was the result. See Pauline H. Tesler and Peggy Thompson, *Collaborative Divorce: The Revolutionary New Way to Restructure Your Family, Resolve Legal Issues, and Move on with Your Life* (New York: HarperCollins, 2007). Tesler and Thompson then trained Webb and his Minnesota colleagues in this new, interdisciplinary model. In Texas, the interdisciplinary model was adapted to use a neutral financial expert and only one neutral mental health expert instead of a child specialist and mental health experts for each party.

In January 2000, ten years after Webb wrote his letter, he and Tesler came to Dallas to conduct the first collaborative law training in Texas and taught about sixty lawyers how to do it. Eleven lawyers and one judge attended from Houston. These eleven Houston attorneys invited Webb and Tesler back for another training that year. Then collaborative practice groups began to form. A Houston practice group wanted to get a collaborative law statute passed, and they succeeded. In 2001, the Texas legislature passed the first collaborative law statute in the country.

In 2011, Governor Rick Perry signed the Uniform Collaborative Family Law Act, Family Law Code title 1-A, which retains all of the earlier act, but is more comprehensive. Importantly, privilege rules now apply to collaborative law communication. Some highlights of the revised statute are that the clients must execute a signed

1. Stuart G. Webb and Ron D. Ousky, *The Collaborative Way to Divorce: The Revolutionary Method That Results in Less Stress, Lower Costs, and Happier Kids—Without Going to Court* (New York: Hudson Street Press, 2006), xiv-xv.

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agreement to negotiate in good faith toward settlement; there are no hired guns, only neutral experts; there's full disclosure of all relevant information; and the collaborative attorneys must withdraw if a settlement isn't reached. During a collaborative case, the court can't set any hearings, impose discovery deadlines, or dismiss the case for two years.

Having a statute is helpful because it adds credibility to the collaborative process. More important, though, the statute allows the lawyers to do things they couldn't do without it such as communicate candidly with the other lawyer and the neutral professionals even without the clients present. No careful lawyer would be comfortable doing that without the protection of a statute.

To support the growth of collaborative law, a statewide nonprofit organization, the Collaborative Law Institute of Texas, was established around 2000. T. Boone Pickens, the Texas oilman, provided the original seed money. Today, the Institute has approximately four hundred members—lawyers, financial professionals, and mental health professionals. The Web site for the organization is www.collablawtexas.com.

Collaborative law continues to grow across Texas, the United States, and the world as an alternative to litigation for family cases. It's growing in Canada, Europe, Australia, and New Zealand. In addition to the statewide collaborative organization, there's an international collaborative group, the International Academy of Collaborative Professionals; its Web site is www.collaborativepractice.com.

Collaborative Law's Three Defining Principles

Three defining principles distinguish collaborative law from typical divorce and family law litigation: (1) nobody goes to court except for the formalities; (2) the process relies on transparency and cooperative joint discovery, and (3) settlement discussions use interest-based negotiation instead of positional bargaining.

Process Happens Outside the Courtroom. The most important and unusual defining principle is that the parties agree in advance in writing that they won't take any issue to court while they're engaged in the collaborative process. According to Houston collaborative lawyer Norma Levine Trusch, "Just entering into an agreement not to threaten to go to court changes everything." Because the lawyers can't use trial tactics to force agreements, the lawyers and clients are more invested in settlement and working through their differences.

Transparency and Cooperative Joint Discovery. Another important feature of the collaborative law process and its second defining principle is that it's transparent. Professional privileges still exist, but there's an agreement to informally exchange all relevant information and update any information that has changed. Instead of extracting information from the opposing party through expensive, stressful depositions or voluminous discovery, everyone agrees to informally exchange all the relevant information and answer even the hard questions. For example, one difficult, but relevant,

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question would be to ask if one of the parties had an affair. This needs to be answered truthfully, but the approach taken will vary with the circumstances of the case.

Case Examples: How to handle transparency when there's an affair.

- The wife wanted acknowledgment by the husband in the collaborative session that he had an affair (three, actually). He did acknowledge the affair in the session. The neutral mental health professional felt this made sense and would be helpful for the wife's emotional closure.
- The husband knew his wife had an affair (she was living with her lover), but this was never discussed in the collaborative session because it would only cause more upset. The neutral mental health professional advised against bringing up the subject of infidelity in the collaborative session because it would be harmful to the collaborative process in this case.
- A potential client was attracted to collaborative law because of its privacy. When the attorney explained to her that discovery was informal, but an affair would have to be disclosed, she decided a collaborative divorce was not for her.

What the neutral mental health professional and neutral financial professional do is transparent, too, and any information they discover or work they do is available to both parties. The mental health professional isn't providing counseling, so there are no counseling records at issue. Instead, the mental health professional helps the clients communicate in and outside the collaborative meetings and advises the lawyers as in the first two cases described above.

Because the collaborative process is confidential, the transparency role applies within it only. For example, if a case were to go to litigation, the collaborative mental health professional and financial professional cannot be made to testify in court about their collaborative cases. The neutral professionals are truly neutral and their work is confidential.

Exchanging information informally saves the couple money and is less stressful than the formal discovery process in litigation. Also, the neutral financial professional can work with both the husband and wife to gather and organize the financial information instead of having both lawyers do this independently, thus doubling the cost. The financial professional often prepares the joint inventory and appraisal with the lawyers reviewing the documentation in as much detail as they choose.

Interest-Based Negotiation: Collaborative law's third defining principle is that settlement agreements are reached through a process of interest-based negotiation, which was popularized by Roger Fisher, William Ury, and Bruce Patton in their book *Getting to Yes: Negotiating Agreement Without Giving In* (New York: Penguin Books, 1983). Interest-based negotiation addresses a person's underlying goals and interests, often leading to more than one solution and, in particular, win-win solutions for both parties.

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Interest-based negotiation is the opposite of positional bargaining, which is common in litigated divorces. Using a positional approach, a party might say, “I want the house.” In interest-based negotiation, you look at the reasons for wanting the house, such as financial security or access to a good school for the children. There may be other ways to satisfy those goals and interests than getting the house.

Is interest-based negotiation a weak, wimpy way to negotiate? The Harvard negotiation experts say no and that in fact you end up with more “marbles” for your client at the end using an interest-based approach. Also, deals based on trust are more stable. This is especially important in divorces where you don’t want things to blow up later. Settlement discussions based on the couple’s underlying goals and interests tend to be more productive and can result in surprising acts of generosity.

Case Examples: Interest-based negotiation can lead to generosity.

- The husband provided income for life for his disabled wife well above anything a court could order.
- The husband provided \$1.3 million to his wife when he was obligated to give her virtually zero due to a premarital agreement.
- A high-earning wife provided a house and support for several years for her house-husband spouse until his income increased.

What Collaborative Law Is Not

Collaborative law is a novel and effective way to resolve family disputes, but it’s not bargain basement law. There are obvious savings by avoiding costly courtroom fights and through cooperative joint discovery. In addition, having neutral experts on the case avoids litigation’s dueling experts, but collaborative law isn’t cheap. However, collaborative law provides good value when you consider the custom-fitted outcomes and often improved communications between the parties after a divorce. In addition, children, families, and business associates are insulated from the divorce because collaborative sessions are private and confidential.

As mentioned above, collaborative sessions aren’t an unstructured chat. The collaborative process has a clearly defined structure with agendas for meetings and a road map to move the case from start to finish.

Collaborative law is not a fringe movement. Among the Houston lawyers at the beginning of collaborative law in Texas were Harry Tindall of the popular *Sampson & Tindall’s Texas Family Code Annotated* published by West and Norma Levine Trusch, co-chair of the *Texas Family Law Practice Manual* published by the State Bar of Texas. They both currently practice collaborative law and support its growth and adoption in Texas.

Collaborative law is not mediation. Mediation is assisted settlement negotiation, not a start-to-finish process like collaborative law. In the Texas model for mediation, a trained, neutral mediator helps adverse parties find common ground to settle their dis-

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pute, usually in one day. By contrast, collaborative law is nonadversarial and conducted in a series of joint meetings every few weeks. A collaborative divorce case might settle after one session, but more likely it will take longer, perhaps three or more sessions spaced every few weeks. Mediation rarely produces an optimum settlement for both parties, while collaborative law, which focuses on the goals of both parties, can.

Mediation can play an important role in collaborative cases. If the parties are stuck in their negotiations, the lawyers can recommend a collaboratively trained mediator to help resolve all the issues. The collaborative lawyers are allowed to participate in mediation. This is a proven strategy for especially difficult collaborative cases.

Case Example: Mediation can be helpful in settling collaborative divorces.

- The parties could no longer be in the same room without one of them having a total meltdown, but we were almost done. We used a collaboratively trained mediator to reach a successful settlement.

What Does a Collaborative Case Look Like?

Before you can have a collaborative case, you need collaborative clients. Clients find their collaborative lawyers in a variety of ways: referrals from other lawyers, referrals from mental health providers, Internet searches of collaborative organizations, satisfied collaborative clients, and friends. Often a couple who needs a divorce will already know they want to hire collaborative lawyers and will seek them out or ask one collaborative lawyer for a list of other collaborative lawyers. When only one member of a couple wants a collaborative divorce and the other member doesn't, litigation is their only option.

Before a divorce client signs a collaborative family law participation agreement, which begins a collaborative case, the lawyer is required by statute to review certain matters with the client. The lawyer must discuss with the client whether the collaborative process is appropriate and what the risks and benefits of collaborative law are compared with litigation, mediation, and other ways to resolve the case. This is a mandatory informed consent requirement. The client must be advised that going to court would terminate the collaborative process, the process is voluntary and can be terminated by the client at any time, and the collaborative lawyer may not represent the client in court in the family law matter. (See form 3 in this book.)

The lawyer must make a reasonable investigation about whether the client has a history of family violence. If family violence is present, the lawyer must take certain measures or the collaborative case cannot proceed. (See form 4.)

After both parties have hired their collaborative lawyers, the lawyers confer to select the neutral collaborative professionals to assist them as team members. Although the Texas model for collaborative divorce uses two lawyers assisted by a neutral mental health professional and a neutral financial professional, the neutral

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members are not required, as explained above. Experienced collaborative lawyers agree that there is great benefit in having both neutral professionals on the case.

However, if one party is a financial professional, for example a CPA, and is believed to be trustworthy by the other party, sometimes the lawyers will not use a neutral financial professional. Also, some collaborative cases simply cannot support the cost of neutral professionals, so the lawyers proceed without them. Additional experts, say, a child expert or financial advisor, can be added as needed for specific cases.

Next, the lawyers and the parties agree on a date for the first collaborative session. These sessions generally last two hours with a period of between fifteen minutes and one-half hour for the professionals to have a premeeting and postmeeting debrief without the clients present. In advance of the meeting, the clients are often provided with several forms to review: the collaborative family law participation agreement (to be signed at the meeting), the road map to resolution (overview of collaborative process), and the goals and interests worksheet (to form the basis for interest-based negotiations). (See forms 12, 13, 1, and 15.) It's up to the individual collaborative lawyers to decide which forms, if any, are provided before the first meeting.

One of the lawyers prepares an agenda for the first collaborative session in consultation with the other lawyer and circulates it so everyone understands what will be covered. (See form 10.) The scope of the first collaborative session varies widely depending on the clients and the facts of the case. Some cases require only one session, and others require multiple sessions. If a neutral mental health professional is present, he will likely run the meeting according to the agenda, with the lawyers handling legal aspects. If there is no neutral mental health professional, the lawyers divide the agenda items as they see fit.

Typically, a first meeting would include introducing the team and the clients to each other, reviewing ground rules that govern how the parties should interact with each other during the case, and discussing a road map that describes the steps to resolve the case collaboratively. The lawyers review the collaborative family law participation agreement with the clients and answer questions. The agreement is typically signed at this first meeting. The lawyers discuss with the clients any court filings, such as a petition, answer, and notification of collaborative procedures to the court.

During the first meeting the team asks the clients about any pressing issues, such as temporary support, use of bank accounts, and parenting time with the children. Decisions about these matters are typically recorded in the minutes of the session so everyone can refer to them later.

If there's time and the clients are prepared, they may begin discussing their goals and interests based on their answers to a form questionnaire. (See form 15.) This is a particularly important step because it's emotional for the clients, and the goals and interests serve as guideposts for each client as they work toward settlement. With the help of the neutral mental health professional, each client lists their goals and interests. Sometimes it takes real effort for the clients to avoid positional statements ("I want the house") and instead look at interests ("I want a familiar neighborhood and

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surroundings for the children”). Over the course of the case, the clients may change their goals and interests, which is fine. To see if that has happened, at each meeting there’s an agenda item to review the goals and interests to see if they need to be revised.

Case Examples: Client goals and interests vary widely from altruistic to selfish.

- Part of one client’s list of goals and interests: “Ensure child’s well being and my access to her, fair settlement, quick and cost-effective divorce.”
- Part of another client’s list of goals and interests: “Financial security for life, medical insurance, home remodeling projects, money to care for my mother.”

Between meetings, the clients work with the neutral financial professional to gather financial discovery. If there’s no financial professional, the lawyers explain to the clients what documents they need to collect. The clients are encouraged to work together on discovery if they both agree. Financial data collection follows the standard items in an inventory and appraisal. Careful lawyers review the financial discovery and back-up documents and follow up on any discrepancies. The financial professional or the lawyers may also want copies of tax returns, partnership agreements, deeds, and any other relevant financial information. When all is assembled and checked, even in a collaborative case, it’s sound practice to get a sworn verification from each client that discovery is accurate and complete. (See form 16.)

There may be other information besides financial data that needs to be assembled before moving to settlement discussions. Each family has its own customs, preferences, and needs, particularly if there are children. Any information relevant to settlement should be gathered and assembled, for example, the cost of private school tuition or a teenager’s car insurance.

Once there’s an agreed set of financial data, and miscellaneous discovery is complete, it’s time to generate settlement options. This occurs in the collaborative session so options can be floated and evaluated efficiently with expert advice and feedback from the lawyers and neutral professionals. The options are then compared with the clients’ goals to see which options best meet both their needs. The idea is to craft an efficient resolution that’s as close to win-win as possible under the circumstances.

This part of the case is where the collaborative process shows the most benefit over other methods because the parties have great latitude to customize, and the goal isn’t zero-sum (I win—you lose). The entire team works with the clients to fashion a suitable settlement. The financial professional may give advice about budgeting or the tax consequences of various settlement options. The mental health professional may work with the couple on a parenting plan if there are children. Through it all, the couple has the emotional and professional support of the team as they make these important decisions.

After a settlement is reached, the lawyers may choose to memorialize it in the minutes or draft a formal collaborative family law settlement agreement, which is enforceable much like a mediated family law settlement agreement. (See form 17.)

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The parties are entitled to judgment on a properly drafted and executed collaborative family law settlement agreement. *See Tex. Fam. Code § 15.105(b)*. Whether to record the agreement in the minutes or use a formally executed agreement is a judgment call the lawyers make depending on the facts of the case.

The final part of the collaborative case is like most family law cases, with the lawyers dividing drafting duties in an appropriate way. There usually is no need for further meetings after an agreement is reached.

The final step in most collaborative cases is a debrief for the full team or just the lawyers if there were no neutral professionals on the case. The debrief is not billed to the clients; its purpose is for the professionals to candidly discuss the case among themselves including what went well and areas to improve.

Is Collaborative Law for Everyone?

Collaborative law offers many advantages, but it's not right for all clients or all lawyers. In a case where power is imbalanced due to domestic violence or coercion, a collaborative atmosphere would be impossible. If one party is dishonest, self-righteous about it, and unrepentant, collaborative law is inappropriate because voluntary, informal discovery won't work. Also, some clients simply want to have their day in court and need an aggressive lawyer to go to bat for them.

For many cases, however, collaborative law's benefits outweigh the negatives of litigation. Informal discovery, where the clients can cooperate and do much of the leg-work, saves money over formal discovery. Constructive communication is encouraged between the clients (if both agree), unlike litigated cases in which communication must be routed through the lawyers and hostilities can be exacerbated. If the parties hit a rough patch in their communications during the collaborative process, the mental health professional can help at lower cost than calling in the lawyers. Children are insulated from the legal process in collaborative cases as compared with litigated cases in which they can be dragged in and evaluated by experts. Battles of the experts are avoided in collaborative cases, saving money and reducing stress. The financial expert is neutral, and outside experts can be called in by agreement for special purposes like valuing a home or business so the financial professional's neutrality is preserved. Fees are handled openly in the collaborative case and arrangements to pay the lawyers are discussed at sessions, so one party isn't disadvantaged. A collaborative case is conducted in private, and the confidential agreement need not be filed with the court. Collaborative cases are more convenient than litigation for clients, the lawyers, and the experts because sessions are held at agreed times. Collaborative law saves time and money for most clients. Finally, the collaborative process is designed to accommodate the interests and preferences of the clients instead of taking a cookie-cutter approach to settlement.

Do collaborative clients need to get along with each other for the process to work? Not at all. Few divorcing couples are friendly, and the collaborative process

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does not depend on smooth interactions between the parties. If the couple is motivated to proceed collaboratively—even if their communication skills are poor—the collaborative team generally finds a way to make it work. In the more difficult cases, the neutral mental health professional’s assistance is invaluable.

About lawyers and collaborative law: Some lawyers are immediately attracted to the collaborative law concept. Maybe they’ve been practicing along these lines for years and are ready to take their settlement skills to the next level by adding collaborative law to their practices. Maybe, like Stuart Webb, they’re burned out by the acrimony in family law. Other lawyers who hear about collaborative law say, “No way! Long live litigation!” They’re happy in the courtroom and prefer that setting for family disputes. Fortunately for family law clients, there will always be settlement-oriented lawyers and strong courtroom advocates to answer clients’ individual needs.

The Future of Collaborative Law

Historically, “collaborative law” meant “collaborative divorce.” Collaborative law for divorce and other family law matters has made great strides since Stuart Webb sent his letter to his friend Minnesota Supreme Court justice A.M. “Sandy” Keith in 1990. In 2001, Texas got its first collaborative statute. In 2011, the statute was updated and collaborative law become Texas Family Code title 1-A. Every year, more lawyers are becoming trained in collaborative law and adding it to their family law practices. Clients are seeking collaborative practitioners for their family law disputes.

Now there’s a movement in Texas to extend collaborative law to all civil litigation areas, not just family law. Already lawyers are using collaborative methods in business litigation, among other areas, but there is no statute for collaborative civil litigation beyond family law. Chapter 10 explores these important new applications of collaborative law.

Collaborative law is a powerful and effective new process for resolving family law disputes and more. What began as part of the alternative dispute resolution toolkit has blossomed into a full-featured, start-to-finish process since becoming title 1-A of the Texas Family Code in 2011. Now lawyers have the ability to help families find the best solutions possible to their family law problems through a private, respectful, well-ordered, proven process.