

**FLORIDA COLLABORATIVE FAMILY LAW: THE GOOD, THE BAD,  
AND THE (HOPEFULLY) GETTING BETTER**

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**I. INTRODUCTION**

*Collaborative law* has become a relatively common name in legal circles, recently entering the area of family law. While the name may be known, many laypersons have little understanding of what it really means and how it is used, let alone the benefits of it vis-a-vis litigated divorce. Lawyers as well, including many who advocate its goals, have little real comprehension of what it takes to make the move to a collaborative practice.

This Essay will lay out some of the benefits as well as the concerns of collaborative law, and will hopefully convince the currently uninformed or reluctant, both attorney and client, to look at the positive aspects of collaborative family law and take a willing look at what may lead them both to better results.

**II. WHERE WE HAVE BEEN . . .**

In a perfect world, everyone—including married couples—would live happily ever after. There would be no fighting, no divorce, no battles over money, property—or worst of all, children. Even in a near-perfect world, there would be divorce—but it surely would not be accompanied by anger, bitterness, or lingering resentment over all of the above.

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In reality, fighting, divorce, battles, anger, and long-lingering resentment exist. Even those with the best intentions cannot eliminate the deep emotional feelings that permeate the end of a relationship, and it would be foolhardy to pretend they could. But it is equally—if not more—irresponsible to tacitly accept there is nothing in between; that there is no way to accomplish the inevitable split without a concomitant destruction of the basic relationships involved.

For as long as most of us can remember, the established protocol for a lawyer handling a divorce has been to develop a winning strategy: one that will get a client most (if not all) of what he or she wants in the dissolution.<sup>1</sup> Yet over the years, many family law attorneys practiced with an eye towards negotiated settlement rather than end-game litigation.<sup>2</sup> Many attorneys have long recognized that the momentary win might well lead to a lifetime of further war between the parties; that perhaps more compromise now could lead to better relationships and peaceful coexistence later.<sup>3</sup>

This is not to say that a lawyer who believes in compromise for the sake of a negotiated settlement betrays his or her client's best interests. On the contrary, this approach helps clients to realize that more is at stake than their momentary wishes. Aiding clients in determining what those far-reaching needs are can lead to far more satisfaction in the long run than the momentary thrill of *victory*. A major goal of such a strategy is to help the clients arrive at an agreed-upon settlement rather than having one forced on them by a court, the idea being that most people are more satisfied with outcomes they concur in than those imposed upon them.<sup>4</sup>

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<sup>1</sup> See Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 82 (1997).

<sup>2</sup> See Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 326 (2004).

<sup>3</sup> See James K.L. Lawrence, *Collaborative Lawyering: A New Development in Conflict Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 431, 432-33 (2002) (citing Pauline H. Tesler, *Collaborative Law: What it is and Why Family Law Attorneys Need to Know About It*, 13 AM. J. FAM. L. 215, 221 (1999)).

<sup>4</sup> See generally Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 50-51 (1997).

An equally, if not more important concept, is the recognition that divorce may technically involve only spouses, but it critically affects all the members of a family, especially the children.<sup>5</sup> Acceptance of the specific premise that parents and children have a right to continued positive relationships with each other fuels the motivation to help parties arrive at their own consensus.<sup>6</sup>

Years after many family law attorneys began putting these ideals into practice, this philosophical goal of nonlitigated settlement found a name: collaborative law.<sup>7</sup> Surely many wished they thought of the name; however, all those engaged in the practice undoubtedly shared the common feeling of elation that others *got it*—that family law attorneys all over the country (indeed the world)<sup>8</sup> understood the harm inflicted upon divorcing families by traditional litigation methods and recognized the need to replace those methods with a more humane, commonsensical approach to dissolution.

That, unfortunately, was a naive assumption; most family law attorneys today are well aware of the recurring detriment caused by traditional litigation models of dissolution to divorcing families.<sup>9</sup> The media broadcasts continuing sagas of divorce gone wrong, individuals

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<sup>5</sup> See Weinstein, *supra* note 1, at 83; see also Marsha B. Freeman, *Reconnecting the Family: A Need for Sensible Visitation Schedules for Children of Divorce*, 22 WHITTIER L. REV. 779, 785-86 (2001) [hereinafter Freeman I].

<sup>6</sup> See Lawrence, *supra* note 3, at 433.

<sup>7</sup> See generally Stu Webb, *Collaborative Law: An Alternative for Attorneys Suffering 'Family Law Burnout,'* MATRIM. STRATEGIST, July 2000, at 7. The term itself generally refers to a number of methods of attaining a litigation-free divorce settlement and is usually attributed to Stuart Webb, J.D. See *id.* Mr. Webb promoted a formal methodology for collaborative practice, including contractual agreements among the parties and attorneys not to litigate the action. *Id.* This Essay contemplates both formal and informal forms of collaborative practice.

<sup>8</sup> See Susan Daicoff, *Law as a Healing Profession: The "Comprehensive Law Movement,"* 6 PEPP. DISP. RESOL. L.J. 1, 30 (2006). Other countries, such as Canada and Australia, are far ahead of the United States in the promotion and practice of collaborative law in general, frequently circumventing or even superseding the penal system where considered for the overall good. *Id.*

<sup>9</sup> But see Stolle et al., *supra* note 4, at 30 (explaining that despite the negative emotional toll a divorce may have on a child, many attorneys do not give these effects any consideration).

caught up in anger, and families suffering from the results.<sup>10</sup> Family law casebooks highlight the seemingly endless parade of cases illustrating the many divorced families who never get past the emotional and mental scars inflicted both in the actual proceedings and well after, continuing win-lose strategies well past the initial divorce and frequently ignoring any of the legitimate concerns from the original action.<sup>11</sup> Studies show that continuing these tactics affects not just the parties to the divorce but also—and perhaps most importantly—their children.<sup>12</sup> Studies also evince not only personal, but societal, impacts of litigious divorce—including higher rates of teen pregnancy and marriage, juvenile delinquency (often followed by adult criminality), and school dropouts.<sup>13</sup>

If lawyers are so aware of the present and potential damage to families from traditional litigation methods, why do these methods persist? Why do so many lawyers committed to collaborative methods of dissolution remain so frustrated at their legal communities that are not only ignorant, but often disdainful, of the idea of moving away from litigation to alternative dispute practices?<sup>14</sup>

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<sup>10</sup> See, e.g., Rosemary Black, 'Jon & Kate' Divorce Will be Hardest on the Gosselins' Eight Children, NYDAILYNEWS.COM, Jan. 24, 2009, [http://www.nydailynews.com/lifestyle/2009/06/24/2009-06-24\\_jon\\_kate\\_divorce\\_will\\_be\\_hardest\\_on\\_the\\_gosselins\\_eight\\_children.html](http://www.nydailynews.com/lifestyle/2009/06/24/2009-06-24_jon_kate_divorce_will_be_hardest_on_the_gosselins_eight_children.html); Alex Kuczynski, *Divorce American Style*, N.Y. TIMES, Oct. 5, 2008, at BR9, available at 2008 WLNR 18927521 (reviewing Alec Baldwin's book in which he discusses his on-going tumultuous divorce from actress Kim Basinger and the detrimental effects of their discord on their young daughter).

<sup>11</sup> See Weinstein, *supra* note 1, at 86-88.

<sup>12</sup> See generally Judith S. Wallerstein & Julia Lewis, *The Long-Term Impact of Divorce on Children: A First Report from a 25-Year Study*, 36 FAM. & CONCILIATION CTS. REV. 368 (1998).

<sup>13</sup> See *id.* at 371-73.

<sup>14</sup> Florida Circuits vary greatly in their adoption of collaborative and other alternative dispute resolution methods. Although Florida law mandates enforced mediation prior to court intervention in divorce, many lawyers report the circuits generally overlook or even discourage the promotion of other collaborative modes of dissolution. The Eleventh Judicial Circuit is one that has moved to adopt more formal adoption of methods, including the issuance of an Administrative Order. See Admin. Order No. 07-08, *In re: Authorizing the Collaborative Process Dispute Resolution Model in the Eleventh Judicial Circuit of Fla.*, No. 07-01 (11th Cir. Miami-Dade County, Fla. Oct. 2007).

Much of the answer lies in history, habit, and fear. Laws traditionally focus on individuals' rights to representation and relief.<sup>15</sup> Attorneys and courts have been the customary protectors of such rights. They are appropriately concerned about shifting the paradigm from one that is adversarial and potentially harmful, to one considered a *family*-centered philosophy, where parties are participants rather than litigants, and the concerns of nonparties—especially children—are paramount.<sup>16</sup>

Similarly, attorneys and judges are comfortable in their traditional roles of representatives and arbiters, both groups knowing their respective responsibilities and endeavoring to deliver them with competence and finesse.<sup>17</sup> The idea of a substantial change in those responsibilities and actions is daunting to many.<sup>18</sup> Not inconsequential is the legitimate concern of how the Model Rules of Professional Conduct play into such a deviation from traditional practice.<sup>19</sup> The importance of collaborative processes and the equally important anxieties raised by the conflicts within families prompted the American Academy of Matrimonial Lawyers to proffer a set of aspirational goals for family law

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<sup>15</sup> See Susan L. Brooks, *A Family Systems Paradigm for Legal Decision Making Affecting Child Custody*, 6 CORNELL J.L. & PUB. POL'Y 1, 3 (1996).

<sup>16</sup> See *id.* at 3-4.

<sup>17</sup> See John Lande, *Developing Better Lawyers and Lawyering Practices: Introduction to the Symposium on Innovative Models of Lawyering*, 2008 J. DISP. RESOL. 1, 9.

<sup>18</sup> See *id.* (“Getting lawyers (and parties) to seriously consider innovations is a major challenge, and innovative lawyers need to develop effective ways to overcome unwarranted skepticism and resistance.”).

<sup>19</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.7 (2009); MODEL CODE OF JUDICIAL CONDUCT CANON 3 (2008) (adopted in some form in every state). The Code and Rules guide lawyers and judges in their roles and conduct in the legal system. There are serious concerns about some of the practices of collaborative law. The Colorado Bar Association issued an opinion stating the disqualification agreement of collaborative law was inconsistent with the Model Rules of Professional Conduct, leaving lawyers in that state at a loss as to how to proceed in these cases. See Colo. Bar Ass'n Ethics Comm., Formal Op. 115 (2007). The American Bar Association (ABA) felt that collaborative law is so important to the practice of family law that it responded with an advisory opinion finding the clause was not in conflict with the Rules. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447, at 5 (2007). The ABA opinion notes that Colorado was the only State Bar to find a conflict arose from this collaborative law requirement. *Id.* at n.7.

attorneys, the Bounds of Advocacy (the Bounds).<sup>20</sup> The Bounds maintain that collaborative family law is a preferable method of dissolution and resolution of family conflicts and recognize the need for guidance in practicing these methods.<sup>21</sup>

Finally, many attorneys have a legitimate fear of damaging their livelihoods by moving towards a primarily collaborative practice.<sup>22</sup> Only actual experience can ensure them this fear is unfounded, but anecdotal accounts from collaborative lawyers assert that while the overall fee may be less than a litigated case, the payment is much faster, and the number of clients a lawyer can accommodate increases correspondingly.<sup>23</sup>

### III. WHERE WE ARE . . .

Attorneys are not solely to blame for allowing litigious divorce to continue fairly unabated. Parties entering the divorce arena are often at the angriest, and simultaneously most vulnerable, points they will ever experience in their lifetimes. The first, and probably natural, instinct is to exact penance from the other spouse—especially if the partner instigated the divorce. Friends and family, wittingly or not, often stoke the flames of resentment. Unless these parties employ collaborative-minded lawyers, they are likely to fall rapidly into a fighting quagmire, from which it becomes costly and difficult to emerge.

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<sup>20</sup> See generally Robert H. Aronson, *Introduction: The Bounds of Advocacy*, 9 J. AM. ACAD. MATRIM. LAW. 41, 46-47 (1992). See also American Academy of Matrimonial Lawyers, *Bounds of Advocacy: Goals for Family Lawyers*, <http://www.aaml.org/go/library/publications/bounds-of-advocacy/> (last visited April 20, 2010).

<sup>21</sup> See Aronson, *supra* note 20, at 46-47. While these goals are presently aspirational, many commentators are advocating adoption of the Bounds as an alternative guideline for family law issues. Florida is one state that has already done so. Marsha B. Freeman, *Love Means Always Having to Say You're Sorry: Applying the Realities of Therapeutic Jurisprudence to Family Law*, 17 UCLA WOMEN'S L.J. 215, 239 n.162 (2008) [hereinafter Freeman II].

<sup>22</sup> See David A. Hoffman et al., *Collaborative Family Law*, in MASSACHUSETTS DIVORCE LAW PRACTICE MANUAL § 4.5 (2d ed. 2008) (discussing the potential for an attorney to lose income from litigation or their client if the negotiations fail).

<sup>23</sup> The author has been fortunate to have a number of collaborative attorneys willing to talk to her upper level family law students and explain how the differences in practice still allow for a good income along with a better lifestyle (to be explained later).

Likewise, the courts find it difficult to change habits as well as perceptions. Judges are experts in the law, not psychology, and they serve as decisionmakers, not counselors.<sup>24</sup> Many find it uncomfortable to change those roles, being accustomed to the former and untrained in the latter. Many surely find even the idea of changing roles difficult.<sup>25</sup> Yet studies and surveys show that all the players in a divorce would benefit from such changes.<sup>26</sup>

Divorcing parties are speaking with their feet—turning away from the use of lawyers in droves, preferring to represent themselves pro se when possible.<sup>27</sup> Much of this is due to monetary concerns and a perception that lawyers will make things harder and more expensive rather than easier.<sup>28</sup> Clients who do hire attorneys are undoubtedly keeping a far sharper eye on billable hours than they likely once did (a trend only likely to increase with hard economic times). Clients are, additionally, far more knowledgeable of the law<sup>29</sup> and cognizant of its lasting effects on their families than they once were and are looking for ways to lessen the impact of the divorce on their children. Academic studies, such as those performed by Judith S. Wallerstein and Julia

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<sup>24</sup> See Freeman II, *supra* note 21, at 240.

<sup>25</sup> See Lande, *supra* note 17, at 9. The lack of uniformity for the idea of collaborative or cooperative family law, where the court is a facilitator rather than mere decisionmaker, has led to problems for some judges who do try to make that jump. Some have been threatened with censure, or worse, by judicial grievance committees bent on ensuring judges do not step too far outside of their traditional roles. The author was asked to testify as to the benefits of a collaborative/cooperative system of family law on behalf of a Kentucky judge faced with censure for following its goals.

<sup>26</sup> See Freeman II, *supra* note 21, at 220.

<sup>27</sup> See *In re* Report of the Family Court Steering Comm., 794 So. 2d 518, 527 (Fla. 2001) (noting that about sixty-five percent of domestic relations cases are filed initially by pro se parties); Associated Press, *More Couples Seeking Kinder, Gentler Divorces: Lawyers, Clients Collaborate To Craft a Fair Outcome for Everyone Involved*, MSNBC.COM, Dec. 18, 2007, <http://www.msnbc.msn.com/id/22315262> [hereinafter *More Couples*] (explaining that many courts have created self-help programs to accommodate the significant number of pro se litigants).

<sup>28</sup> See Stolle et al., *supra* note 4, at 50.

<sup>29</sup> See generally Barbara Edelman & Chauncey Curtz, *Client Sophistication Grows in Today's Legal Industry*, BUS. LEXINGTON, May 28, 2009, [http://www.bizlex.com/Articles-c-2009-05-27-87304.113117\\_Client\\_sophistication\\_grows\\_in\\_todays\\_legal\\_industry.html](http://www.bizlex.com/Articles-c-2009-05-27-87304.113117_Client_sophistication_grows_in_todays_legal_industry.html).

Lewis,<sup>30</sup> have been turned into easily accessible books for divorcing parents to read,<sup>31</sup> and there are many similar books in this genre.<sup>32</sup>

#### IV. THE NEED TO MOVE ON . . .

Attorneys, in general, frequently score low on job satisfaction surveys, probably none so often as family law attorneys.<sup>33</sup> Dealing with the personal breakdown of people's lives, particularly their clients' fears about losing time and contact with their children, is undoubtedly among the most stressful parts of a lawyer's work. The appeal of being part of a solution-based system, rather than an adversarial one, has drawn an estimated twenty thousand lawyers thus far into collaborative training nationwide, many of those working in the family law arena.<sup>34</sup>

Courts, as well, have wrestled with the limitations and problems associated with litigious divorce, recognizing that a court cannot solve the emotional needs of the parties or their children in the present or future through the legal means currently available.<sup>35</sup> While many judges are leery of changing their roles in the process, they are also becoming far more aware of the benefits to their own job satisfaction derived from the use of problem-solving methods that place solutions in the hands of the parties instead of their own.<sup>36</sup>

Even law students have shown significant changes in attitude over the years about the practice of family law. When I started teaching a course in collaborative divorce approximately six or seven years ago, students were skeptical as to first, the ability to redirect people to a preferable nonlitigious dissolution, and second, whether it could really

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<sup>30</sup> See generally Wallerstein & Lewis, *supra* note 12.

<sup>31</sup> See JUDITH S. WALLERSTEIN ET AL., *THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY* (2000).

<sup>32</sup> See, e.g., STEPHANIE STAAL, *THE LOVE THEY LOST: LIVING WITH THE LEGACY OF OUR PARENTS' DIVORCE* (photo. reprint 2001) (2000).

<sup>33</sup> See Freeman II, *supra* note 21, at 237; Stolle et al., *supra* note 4, at 50.

<sup>34</sup> *More Couples*, *supra* note 27.

<sup>35</sup> See Tesler, *supra* note 2, at 322-23.

<sup>36</sup> See Deborah Chase & Peggy Fulton Hora, *The Best Seat in the House: The Court Assignment and Judicial Satisfaction*, 47 FAM. CT. REV. 209, 234 (2009); see also Victor Eugene Flango, *Creating Family Friendly Courts: Lessons from Two Oregon Counties*, 34 FAM. L.Q. 115, 123 (2000).

accomplish better lives after divorce for all involved. What my fellow teachers<sup>37</sup> and I experienced over the years was a distinct change in attitude, to a point where today's students are particularly eager to hear from those who practice nonlitigious divorce, and many students seek to find a way to do so themselves. They see it not only as a benefit to the families they will serve but clearly as a better lifestyle choice for themselves. While many are committed to working in family law, they are far more cognizant also of the pitfalls of doing so on their own psyches and hope to avoid the worst of them.

It would be wonderful to say that having seen the light, so to speak, all litigants and attorneys would then be steadfast in their determination to avoid even the idea of litigation and aim for the smoothest divorce possible. Unfortunately, that frequently is not the case; litigation entrenches many parties and attorneys too severely for them to leave it behind permanently.<sup>38</sup> For some, there are matters that are simply not resolvable without the intervention and judgment of a court. Other issues, domestic violence for example, may not lend themselves to collaborative resolution.<sup>39</sup>

But it is not just those who *will not* change the standard that frustrate those so in favor of change. It is the fact that many of those who argue so convincingly for collaborative processes continue to rely in great part on court intervention to resolve their clients' issues. So many attorneys, both new and experienced, are reluctant to abandon the known for the unknown, even where they believe in its efficacy. For those who promote collaborative law, it is especially frustrating to realize there are many judicial circuits in Florida that neither favor nor promote the collaborative law process.<sup>40</sup> Even the legislature, in its

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<sup>37</sup> The course is generally taught by a judge, a psychologist, and myself. When able, we also invite students in Masters and Ph.D. programs in marriage and family counseling to attend. The mix of students has a profound effect on all the students; they begin to see the different needs of the divorcing family from the viewpoints of the different professionals involved with them.

<sup>38</sup> See Hoffman et al., *supra* note 22, § 4.5.

<sup>39</sup> Freeman II, *supra* note 21, at 218. Domestic violence, with its concomitant power imbalances, makes a number of forms of alternative dispute resolution, including mediation and collaborative law, difficult to apply. *Id.*

<sup>40</sup> Florida requires mediation for divorcing parties before they may seek judicial intervention for issues involving childcare, visitation, or responsibility. See FLA.

continuing efforts to effectuate more equitable laws, often unintentionally succeeds in establishing more practices resulting in litigation than alternative resolution.<sup>41</sup>

For many attorneys working with families over the years, the idea of collaboration signaled a new age of enlightenment in family law. But in reality, the idea, while far more common than it once was, is still a long-term goal for many participants in many areas.<sup>42</sup> While it is wonderful to think that everyone finally realizes the detriments of traditional litigation for divorcing families, the actuality is that collaboration is still a mere idea for many. Although many proponents of collabora-

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STAT. § 61.183 (2009). Florida Family Law Rule of Procedure 12.740 provides for mediation referrals of family law matters. FLA. FAM. L. R. P. 12.740 (2009). A number of Florida judicial circuits have moved beyond this point by issuing administrative orders that further the call for alternative dispute resolution of family law issues by promoting, or even requiring, collaborative law processes for the parties before court intervention. *See, e.g.*, Admin. Order No. 07-08, *In re: Authorizing the Collaborative Process Dispute Resolution Model in the Eleventh Judicial Circuit of Fla.*, No. 07-01 (11th Cir. Miami-Dade County, Fla. Oct. 2007). Nevertheless, there remain a number of judicial circuits that have chosen not to promote nor advocate alternative dispute resolution through the use of such orders.

<sup>41</sup> Many lawyers and commentators have shown frustration with some recent legislative enactments, such as changes in contact time, corresponding child support, and, more recently, the requirement of parenting plans where none may have been needed before. *See, e.g.*, Admin. Order No. 2009-07.12, *In re: Admin. Order Adopting Parenting Plans & Related Forms* (12th Cir. Desoto, Manatee & Sarasota Counties, Fla. Oct. 1, 2008). These and other legislative changes often force more litigation than would have occurred previously. One legislative act designed to provide more equitable child support levels actually is considered to promote more litigation. *See* FLA. STAT. § 61.30(11)(a)(10) (2009) (adopting adjusted child support to correspond with the number of overnight contact visits). Despite the legislature's intentions, a common concern among lawyers is this provision will likely result in one parent seeking the exact number of overnight contacts required to significantly lessen child support obligations.

<sup>42</sup> Many states have not yet included even mediation as a regular part of family law proceedings, especially in dissolution. New York, for example, adheres to a formal litigation method for divorce, with any deviation coming in the form of informal negotiations among lawyers and clients, not through legislative or court initiation. *See* N.Y. DOM. REL. LAW § 170 (McKinney 2009) (identifying the grounds for which divorce may be granted in New York, but neglecting to require mediation between the parties or any other alternative resolution procedure prior to granting the divorce).

tive law are advocating even greater strides in collaborative processes,<sup>43</sup> it is arguable that until the vast majority of the parties, lawyers, and courts accept that divorce is truly about all family members—not merely the litigants—the damage of litigious dissolution or the long-term effects of a divorce will not be alleviated. The law has come a long way in terms of collaborative resolution of family law issues, but it is an understatement to recognize that there is still a long way to go until all of the parties involved in the legal process are in concurrence in their attempt to lessen the emotional and financial pain of a divorce on families.<sup>44</sup>

## V. WHAT LIES AHEAD . . .

Florida was one of the first states to initially require mediation. Florida has long been at the forefront of states requiring mediation<sup>45</sup> in divorce cases, and today a number of judicial circuits in Florida issue administrative orders encouraging or requiring litigating parties to partake in collaborative methods before the court becomes involved with the case.<sup>46</sup> Yet, years after the Florida Supreme Court urged the Florida courts to adopt changes in how they resolve family law cases,<sup>47</sup> many areas of the state remain stalemated in attempting such changes. Many

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<sup>43</sup> The author, among others, advocates bringing in the theories and goals of therapeutic jurisprudence and restorative justice to collaborative family law. *See generally* Freeman II, *supra* note 21.

<sup>44</sup> The author promotes an extension of collaborative law to include therapeutic jurisprudence with the goal of addressing the underlying emotional issues of the family members and working towards more peaceful coexistence among them. *See id.* at 229-34.

<sup>45</sup> FLA. STAT. § 44.102 (2009); FLA. FAM. L. R. P. 12.740.

<sup>46</sup> *See* Admin. Order No. S-2008-163, Mediation of Family Law Cases (13th Cir. Tampa & Hillsborough Counties, Fla. Jan. 1, 2009) (“The Family Diversion Program has been established as a court program under Mediation and Diversion Services to implement an equitable and expeditious alternative dispute resolution process for family law cases.”); *see also* Admin. Order No. 07-08, *In re: Authorizing the Collaborative Process Dispute Resolution Model in the Eleventh Judicial Circuit of Fla.*, No. 07-01 (11th Cir. Miami-Dade County, Fla. Oct. 2007).

<sup>47</sup> *In re* Report of Family Court Steering Comm., 794 So. 2d 518 (Fla. 2001) (emphasizing the “importance of embracing methods of resolving disputes that do not cause additional emotional harm to the children and families who are required to interact with the judicial system”).

opportunities remain for Florida to implement collaborative family law practices.

In addition, after numerous attempts by the Family Law Section of the Florida Bar, the Florida Legislature recently passed a collaborative law statute, the Collaborative Process Act, setting forth the requirements for statewide use of collaborative methods.<sup>48</sup> The National Conference of Commissioners on Uniform State Laws also tackled this issue.<sup>49</sup> Only time will tell how many states will incorporate the proposed Uniform Collaborative Law Act, in whole or in part, into their own requirements for resolving family law disputes.

What do all of these changes hold for the actual state of collaborative law in Florida and elsewhere? As noted, collaborative practices have existed for a number of years. Despite general recognition by the legal and nonlegal communities of the long-term benefits of collaborative practices for parties to divorce—especially for the children of divorce—such practices have nevertheless been difficult to implement in many areas. Even communities that push for implementation of collaborative law practices often find them more popular theoretically than literally.<sup>50</sup>

How then will the rigorous efforts to make collaborative law a part of mainstream family law—including state and uniform collabora-

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<sup>48</sup> FLA. STAT. §§ 44.1011-406 (2009).

<sup>49</sup> See UNIF. COLLABORATIVE LAW ACT (2009), available at [http://www.law.upenn.edu/bll/archives/ulc/ucla/2009am\\_approved.pdf](http://www.law.upenn.edu/bll/archives/ulc/ucla/2009am_approved.pdf). The proposed Act establishes minimum terms and conditions for Collaborative Law Participation Agreements designed to help ensure that parties considering participating in collaborative law enter into the process with informed consent, describes the appropriate relationship of collaborative law with the justice system, and describes the reasonable expectations of parties and counsel for confidentiality of communications during the collaborative law process by incorporating evidentiary privilege provisions. See *id.* §§ 4, 5, 12-19.

<sup>50</sup> Author's note: a number of Florida jurisdictions have established collaborative family law organizations (Orange and Brevard, to name a couple) dedicated to promoting the practice in place of litigious divorce. Orange County has a dedicated Family Law Inns of Court, devoted to promoting collaborative law. Although members of all these organizations espouse total support for the change, a survey would likely show that relatively few do exclusively or even primarily collaborative cases; far more have never had a case. It is clear the ideal is still far more advanced than the reality.

tive law acts—play out? Will all the participants run willingly to this comparatively utopian methodology for resolving family law disputes, or will they remain committed to the devil they know?

On a practical level, states like Florida that have a history of employing nonlitigation processes, such as required mediation, should theoretically have an easier time adjusting to the requirements and constraints of the new legislative initiatives promoting, and even requiring, collaborative law. Other states that have not embraced the concept of required nonlitigation techniques in the past will likely find it harder to encourage, let alone require, a sudden adoption of primarily nonlitigation methodologies for family law disputes.

It is worth examining how collaborative methods could positively affect family law. Aside from the overall benefits to the participants in a dissolution proceeding, there are numerous ways in which collaborative law could forestall not only the initial fights in family law cases but also prevent later returns to court to rehash and retry the action.

Many of the individual disputes in an initial divorce, paternity, or other proceeding likely lend themselves to easier—and more importantly, more satisfying—results using collaborative or other nonlitigation methods. For instance, child support, legislatively defined for many years,<sup>51</sup> nevertheless remains a serious bone of contention in many dissolution and paternity actions. Payor parents frequently feel they have to pay more than they can afford, while receiving parents—not surprisingly—feel they cannot survive on the amount allocated. To some degree, both are probably right. Other than high income families, both parties likely feel the significant change in income brought on by the proceeding.<sup>52</sup> Where a primary custodial parent ran the household on a certain income comprised of the custodial parent's salary and the

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<sup>51</sup> See FLA. STAT. § 61.30 (2009) (setting out child support guidelines). The current amended statute that became effective July 2008 references Florida's parenting plans and governs how child contact time shall be divided between the parents. *See id.* § 61.30(11). The current statute eliminates the theories of custody and visitation or shared parental responsibility of the prior statute and refers only to a parenting plan that determines contact time for each parent. *See id.* § 61.30(11)(a)(10).

<sup>52</sup> Recent studies have shown that custodial mothers are likely to experience an approximate thirty percent decrease in income, while payor fathers will undergo an

custodial parent's spouse's salary, after a divorce, the custodial parent must run the same household on likely half of the original income figure or less. It is unlikely the amount of money the payor parent pays will make up for the missing income.<sup>53</sup> Likewise, the payor parent, setting up a new home and conscious of also having to live on a tighter budget, faces paying out a significant amount of money for the support of children he or she may not see for significant periods of time each month.<sup>54</sup>

Even when the parties understand there will be a legislatively mandated outcome, as in child support cases, the very use of litigation frequently inflames the negative perceptions of the couple going into the proceedings.<sup>55</sup> One spouse becomes convinced that he or she will never be able to afford the payments, while the other is equally convinced the payment amount can never be enough to meet the needs of the children.<sup>56</sup>

Simplistic as it may sound, merely avoiding litigation in favor of a collaborative setting can make a significant difference in these initial attitudes.<sup>57</sup> The process of carefully and neutrally explaining the legislative intent to protect the children while recognizing the inherent limi-

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average ten percent drop, actually less of a disparity than was previously thought. JUDITH AREEN, FAMILY LAW: CASES AND MATERIALS 761 (4th ed. 1999).

<sup>53</sup> See § 61.30(1)(a) ("The trier of fact may order payment of child support which varies, plus or minus five percent, from the guideline amount, after considering all relevant factors, including the needs of the child or children, age, station in life, standard of living, and the financial status and ability of each parent.").

<sup>54</sup> Changes in custody and visitation routines have succeeded in changing some of these realities. It was not unusual for noncustodial parents to receive what used to be the default visitation schedule, generally every other weekend and one day during the off week. See Freeman I, *supra* note 5, at 798-800 (proposing an alternative to the "default visitation schedule"); see also Weinstein, *supra* note 1, at 83, 131-33. In many cases, this has evolved into more of a *shared custody* arrangement, similar to Florida's mandated parenting plans.

<sup>55</sup> See Weinstein, *supra* note 1, at 132-33 ("Nothing better illustrates the law's role in aggravating pre-existing problems than does divorce litigation.") (citation omitted).

<sup>56</sup> See Ira Mark Ellman & Tara O'Toole Ellman, The Theory of Child Support, 45 HARV. J. LEGIS. 107, 143-44 (2008). But see Pamela Foohey, *Child Support and (In)ability to Pay: The Case for the Cost Shares Model*, 13 U.C. DAVIS J. JUV. L. & POL'Y 35, 35 (2009) (arguing that lowering the support payment amount enables the obligor to make these payments in full and on time, which may actually increase the total amount paid).

<sup>57</sup> See Weinstein, *supra* note 1, at 154-55.

tations in trying to stretch two single salaries to match one combined salary can have an ameliorative effect on parties. Instead of expecting to be taken advantage of, the parties get an understanding of the problems *each* of them will face with child support. Instead of fighting for more or less, they will hopefully recognize that both individuals have to make serious adjustments. While resentment may still exist, the mere avoidance of the litigation setting and win-lose mentality that seems to *require* parties to fight over seemingly clear issues such as legislatively defined child support amounts will lessen this resentment.

When life changes occur on either side, a collaborative mentality would continue to allow the parties to seek an understanding of what the other needs and—very importantly—*why* and *how* to best find an acceptable middle ground, rather than running back to another court fight. Cognizant of the difficulties the other side deals with and the emotional and financial damage they can entail, parties will hopefully avoid frivolous claims.

While it seems almost impossible to imagine that divorcing spouses can resolve such contentious issues in a far more civilized and healthy manner for all involved, collaborative methods—including the theory of therapeutic jurisprudence—have made noteworthy inroads in many legal areas traditionally marked by significant fighting.<sup>58</sup> Therapeutic jurisprudence is a theory that analyzes the law as not merely punitive but as an agent for therapeutic change, addressing not only the resolution of a problem but also the emotional and psychological needs of the parties involved.<sup>59</sup> This theory developed out of its original role in mental health law, dealing especially with civil commitment, in-

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<sup>58</sup> See David Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125, 128-29 (2000) (noting that therapeutic jurisprudence has also been applied in the areas of criminal and mental health law). Collaborative Law, with a capital “C”, is generally regarded as a specific process whereby the clients and attorneys enter into a formal agreement on how to handle the case. The author sees collaborative law, with a small “c”, as any number of useful methods that promote nonlitigious solutions and can include the formal processes of Collaborative Law as well as other alternative dispute resolution procedures or even informal negotiations. Therapeutic jurisprudence is one of the methods that can be incorporated into the collaborative process in an effort to affect a negotiated settlement.

<sup>59</sup> See generally *id.* at 125-34.

sanity, and incompetency.<sup>60</sup> Just as many areas of law are intertwined, so too are theories of resolution. Practitioners can realistically apply therapeutic jurisprudence principles to the complexities of children's mental health and juvenile justice issues.<sup>61</sup>

Therapeutic jurisprudence has evolved as a helpful tool in a number of areas of law, including criminal, juvenile, health care, and contract law.<sup>62</sup> David Wexler even contended therapeutic jurisprudence would recognize subtle, likely unintended consequences of controversial policies like *Don't Ask, Don't Tell*<sup>63</sup> such as feelings of isolation and depression in the serviceperson.<sup>64</sup> He also maintains therapeutic jurisprudence provides a format for better understanding the potential collateral implications of the law in addition to the law's original intended purpose regarding sexual orientation.<sup>65</sup>

Even the area of illegal immigration is undergoing a change in how laws are enforced. A company in Los Angeles employs more than five thousand factory workers in its plant.<sup>66</sup> When federal officials learned of the alleged illegal status of many of the workers, they did not initiate a surprise raid and arrest everyone, as was the previous practice.<sup>67</sup> Instead, they sent a letter to the owner of the company informing him of the violations, noting the significant fines faced by the company, and requiring the company to terminate the workers.<sup>68</sup>

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<sup>60</sup> See *id.* at 128. For a discussion of opposing viewpoints and a number of both beneficial and problematic uses of therapeutic jurisprudence in mental health law, see Elaine M. Dahl, Note, *Taking Liberties: Analysis of In Re Mental Health of K.G.F.*, 64 MONT. L. REV. 295, 300-02 (2003).

<sup>61</sup> See generally Scott Nolen, *Adolescent Mental Health and Justice for Juveniles*, 7 WHITTIER J. CHILD & FAM. ADVOC. 189 (2008).

<sup>62</sup> See *id.* at 211-12.

<sup>63</sup> See 10 U.S.C. § 654 (2009).

<sup>64</sup> Wexler, *supra* note 58, at 126-27.

<sup>65</sup> See *id.* at 127 (citing Kay Kavanagh, *Don't Ask, Don't Tell: Deception Required, Disclosure Denied*, 1 PSYCHOL. PUB. POL'Y & L. 142, 142-43 (1995)).

<sup>66</sup> Julia Preston, *A New Strategy on Illicit Work by Immigrants*, N.Y. TIMES, July 3, 2009, at A1 (describing, also, how the Obama administration desires to uphold immigration laws while changing the confrontational stance employed by the previous Bush administration).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

The benefits to all were readily apparent.<sup>69</sup> The workers, first and foremost, were not arrested, separated from their families, or deported, and the company's work was not summarily stopped.<sup>70</sup> Instead, government officials apprised the company of the federal requirements and gave the company a reasonable amount of time to meet them, after which other sanctions would apply.<sup>71</sup> The federal government, in this instance, realized the benefits of employing a policy that tries to avoid unnecessary and divisive battles while achieving the best results possible.

In medical malpractice cases, one of the most emotional and bitterly litigated legal fields, claims dropped *by half* when doctors merely accepted responsibility for their actions and apologized to their patients—something lawyers would never allow doctors to do previously—even where doctors' negligence severely damaged the patient.<sup>72</sup>

Criminal law, especially juvenile justice, has benefited from the inclusion of therapeutic jurisprudence practices. From informal teen courts<sup>73</sup> to court systems that attempt to balance punishment, prevention, and adjudication, the juvenile system has made use of the theories and practices of therapeutic jurisprudence to achieve more appropriate and effective resolutions for delinquency issues.<sup>74</sup> Even the challenging area of foster care can benefit from the theories and practices of therapeutic jurisprudence, especially in understanding children's needs and

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<sup>69</sup> *See id.* Critics of the new and gentler illegal immigrant policy expressed concerns about the amount of the fines levied to ensure compliance. *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *See id.*

<sup>72</sup> David N. Goodman, *Saying 'Sorry' Pays Off for U.S. Doctors*, MSNBC.COM, July 20, 2009, <http://www.msnbc.msn.com/id/32011837/print/1/displaymode/1098>.

<sup>73</sup> Many jurisdictions, frequently with the help of local bar associations, have teen courts where peers hear cases and decide the punishment phase for minor infractions. Much of the resolutions include restitution, apology, and an attempt to change the lives of the offenders as well as make the victim whole. *See generally* Jeffrey A. Butts & Janeen Buck, *The Sudden Popularity of Teen Courts*, JUDGES' J., Winter 2002, at 29, 29-31.

<sup>74</sup> *See* Gloria Danziger, *Delinquency Jurisdiction in a Unified Family Court: Balancing Intervention, Prevention, and Adjudication*, 37 FAM. L.Q. 381, 400-01 (2003).

allowing them to have a voice in their futures as they age out of the system.<sup>75</sup>

Even where children wind up in the court system, therapeutic jurisprudence can make a marked difference both in the initial outcome and in how they develop into adults. A number of states, including Florida, still practice indiscriminate shackling of detained children.<sup>76</sup> The National Juvenile Defender Center recommended that states abolish this emotionally dehumanizing blanket practice for due process, rehabilitative, and therapeutic reasons.<sup>77</sup>

The concept of a family-centered system of resolution is at the heart of collaborative law and therapeutic jurisprudence in the family law context.<sup>78</sup> Family court is intrinsically designed to meet therapeutic goals, and much of family court reform seeks to further the use of the law as a therapeutic agent.<sup>79</sup> The idea of a unified family court system<sup>80</sup> is desirable not only for its efficiency in judicial administration, but just as much for its ability to deliver therapeutic justice for children and families.<sup>81</sup> In *In re Family Court Steering Committee*, the Florida Supreme Court recommended the formation of a unified family court sys-

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<sup>75</sup> See generally Jill K. Jensen, Notes & Comments, *Fostering Interdependence: A Family-Centered Approach to Help Youth Aging out of Foster Care*, 3 WHITTIER J. CHILD & FAM. ADVOC. 329 (2004).

<sup>76</sup> See Bernard P. Perlmutter, "Unchain the Children": Gault, *Therapeutic Jurisprudence, and Shackling*, 9 BARRY L. REV. 1, 4 (2007).

<sup>77</sup> See *id.* at 16-18.

<sup>78</sup> See generally Stolle et al., *supra* note 4; Daicoff, *supra* note 8.

<sup>79</sup> See Susan L. Brooks & Dorothy E. Roberts, *Social Justice and Family Court Reform*, 40 FAM. CT. REV. 453, 455-56 (2002) (citing Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469 (1998)).

<sup>80</sup> The Florida Supreme Court, in a 2000 decision, held that family courts should be unified, in that preferably one judge would hear all issues involving the family members. See *In re Report of the Family Court Steering Comm.*, 794 So. 2d 518, 521 (Fla. 2001). The goal was to centralize for practicality and efficiency all of the actions that might affect the family members and to draw in outside resources to help the family members in more than just a legal resolution. See *id.* at 519-21.

<sup>81</sup> See Andrew Schepard & James W. Bozzomo, *Efficiency, Therapeutic Justice, Mediation, and Evaluation: Reflections on a Survey of Unified Family Courts*, 37 FAM. L.Q. 333, 336-41 (2003).

tem and found that therapeutic jurisprudence empowers families and assists them in efficiently and effectively resolving their own disputes.<sup>82</sup>

There has been a marked shift away from the litigation paradigm to a philosophy of therapeutic jurisprudence in a number of family court systems already, where judges act as conflict managers and case facilitators rather than fault-finding decisionmakers.<sup>83</sup> An interesting corollary to this change in dynamics is that some courts are actually downplaying the parties' reliance on third-party intermediaries, such as mediators, in favor of self-determination of the issues.<sup>84</sup> The unified family court is seen as part of a larger community justice model—one that revolves around problem solving and includes the concepts of therapeutic jurisprudence, including greater access to community services.<sup>85</sup> Such a system allows for court collaboration with outside agencies as well as social workers and psychologists and provides access towards overall therapeutic outcomes.<sup>86</sup>

The idea of a therapeutically based collaborative system of family law is not without its detractors. Some worry that judges may disperse therapeutic justice in a coercive rather than voluntary manner or even in disparate ways to people of different means.<sup>87</sup> Others see the very system of therapeutic jurisprudence in the courts as leading to excessive court-ordered therapies and treatments, as well as a real threat to the long-honored legal concepts of independence and due process.<sup>88</sup>

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<sup>82</sup> See *Report of the Family Court Steering Comm.*, 794 So. 2d at 535-36.

<sup>83</sup> See Jana B. Singer, *Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift*, 47 FAM. CT. REV. 363, 363-64 (2009) (citing Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395, 397-400 (2000)).

<sup>84</sup> See *id.* at 364.

<sup>85</sup> Deborah J. Chase et al., *Community Courts and Family Law*, 2 J. CENTER FOR FAMILIES, CHILD. & CTS. 37, 45 (2000).

<sup>86</sup> Diana Telfer, *In re T.M.: Who Protects the Indigent Parents?*, 6 J.L. & FAM. STUD. 161, 169 (2004) (quoting *Unified Family Courts and the Child Protection Dilemma*, 116 HARV. L. REV. 2099, 2110 (2003)).

<sup>87</sup> See Anne H. Geraghty & Wallace J. Mlyniec, *Unified Family Courts: Tempering Enthusiasm with Caution*, 40 FAM. CT. REV. 435, 441 (2002).

<sup>88</sup> See Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes the Most Dangerous*, 29 FORDHAM URB. L.J. 2063, 2068-69 (2002).

A more widely accepted view is that collaborative practices, including therapeutic jurisprudence, lead to better outcomes immediately and in the long term.<sup>89</sup> Although one might think it would be even more difficult to abandon litigation and engage in collaborative methods with high-conflict divorce cases, the fact is that, just as with other couples, when given facts about the effects on their children and respect for their feelings, most parents are more receptive than not and are willing to change a previously predetermined bad outcome for a better one.

Similar to parties involved in immigration or medical malpractice cases, divorcing couples want to feel their views are respected and their pain understood. Collaborative processes, especially when integrated with therapeutic jurisprudence principles, allow people to preserve their dignity and arrive at their own best results, helping them to move forward with a more positive, if not altogether happier, attitude. It is a marked change that parties, attorneys, state and federal legislatures, as well as courts recognize, and will hopefully continue on a course of becoming a part of the natural landscape in family law cases.

## VI. CONCLUSION

While the move to a fully collaborative mindset may well be years away, a fuller and deeper understanding of the benefits of a collaborative approach, whether by formal agreement or other nonlitigation methods, will lead to less harm and better results than the present litigation system in family law. Lawyers and clients alike will be able to regain control over their lives and lower the stresses related to both the divorce and the work of the attorney in it. We may not be able to avoid divorce or legislate happiness, but we can be proactive in promoting better methods of dealing with hurtful issues.

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<sup>89</sup> See generally Kenneth S. Mitchell-Phillips Sr., *Five Steps To a Healthy Divorce: A More Supportive Legal Approach To Post-Divorce High-Conflict Relationships*, 6 WHITTIER J. CHILD & FAM. ADVOC. 147 (2006).