

Collaborative Divorce Gains Foothold

By John Woods
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America's newest method for dissolving a marriage is beginning to gain a foothold with New York lawyers.

Collaborative family law, a technique in which couples ending marriages and their attorneys agree to reach a resolution without involving the court system or a mediator, has been gaining popularity around the country since its invention by a Minnesota family lawyer in 1991.

In the past year, at least two groups of New York attorneys dedicated to the collaborative practice have formed: the Manhattan-based New York Collaborative Law Group and the Association of Collaborative Family Law Attorneys in western New York.

"At this point I've done about five cases," said attorney Marc Fleisher, one of the founding members of The New York Collaborative Law Group. "It really is new in New York City."

In the collaborative process, attorneys represent their clients' interests without treating the other side as an adversary. Instead of hiring their own experts, each party saves money by agreeing to use neutral appraisers. While collaborative lawyers charge their usual hourly rates for the service, their clients save money because their cases are usually resolved quickly and the attorneys do not have to spend additional hours preparing for possible litigation.

What gives the method teeth, however, is the attorneys' pledge to withdraw from the case if the parties ever decide to take their divorce to court. Without the ability to use the threat of litigation in negotiations, the attorneys are forced to abandon their adversarial attitudes and focus on the goal of reaching a resolution amicable to both sides. The divorcing couple is also motivated to reach an amicable settlement, or risk the time and cost of starting over with new attorneys and experts.

"The biggest issues in that respect are the financial cost of starting over and the emotional cost of going to court," said Rochester attorney Lisa Morris, a member of the Association of Collaborative Family Law Attorneys. "Financially and emotionally [divorce] is the biggest litigation someone could have. As soon as you decide to go to court, you are handing the decision to a [judge] who doesn't know you or have the time to get to know you."

In other states, the collaborative method has become so popular that it rivals traditional divorce litigation as the primary method of dissolving marriages. Recently, Texas has become the first state to codify the process by statute.

Barry Berkman of Manhattan's Berkman Bottger & Rodd, also a founding member of The New York Collaborative Law Group, first encountered the technique last year during a mediation training retreat in California.

"Out there it's as much a part of the culture as litigation is part of our culture," said Berkman. "I found that none of the matrimonial attorneys there went to court."

After returning from the West Coast, Berkman bounced the idea off of some of his fellow litigators and mediators who agreed to begin practicing the collaborative method in New York City. The group members hired a California attorney to come east and train them in collaborative law.

"Everyone in the group is required to have at least 40 hours of mediation training, and on top of that there is specialized collaborative law training that everyone is required to go through," said Berkman.

The Association of Collaborative Family Law Attorneys followed a similar method of training and recruiting when it was set up last fall, primarily by Rochester attorney Suzanne L. Brunsting, according to Morris.

Some Are Critics

Collaborative law is not without its critics, however. Some matrimonial lawyers who favor the traditional approach argue that the collaborative process tries to avoid conflict even when it is inappropriate to do so.

Emotionally weaker parties, they argue, might feel pressure to reach agreements that are not in their best interest if their attorneys do not focus primarily on what is in their best interest.

Opponents acknowledge that collaborative law does relieve the courts of cases, but they think the popularity of the process draws attention away from the best way to streamline divorce litigation: providing additional funding and judges so the courts' caseload can be handled more efficiently.

"I really believe in what a lawyer does," said Theodore Sternklar, chair of the matrimonial department at Manhattan's Moses & Singer, who prefers traditional litigation to out-of-court alternatives. "The system is overburdened with a caseload that is monstrous in New York, so people are looking for anything to get out of the court system. I understand that, but the real answer may be to better equip the system to accommodate peoples' needs."

Proponents of collaborative law, argue that delays in the court system, adversarial attorneys, and experts they claim are already biased toward the attorneys who hire them will make the collaborative method more attractive to divorcing couples.

Operating outside the courts, they predict, will ultimately make collaborative law a success.

"The system is the most to blame," said Fleisher. "Seasoned litigators have chosen to [practice collaborative law] because they have seen how destructive the court system can be."