

The Struggle to Preserve Collaborative Law Benefits When Litigating a Divorce

By Arnold D. Cribari

The Spring/Summer 2006 edition of the Westchester Bar Journal included my introductory article on collaborative law entitled: "Collaborative Law: Divorce Lawyer as Peacemaker." This follow up article gives my impressions and observations of the collaborative law movement in Westchester, those regarding the avalanche of divorce litigation in Westchester shared by Hon. Anthony A. Scarpino (Supervising Judge of the Matrimonial Part in Westchester who also serves as our Surrogate's Court Judge), how collaboratively trained lawyers can serve and benefit in the adversarial court system, and an illustrative case study.

The case study demonstrates the benefits available in the collaborative process, the struggle to keep those benefits from being eroded and lost during divorce litigation, and how one attorney involved in litigation – with collaborative training – can still have a positive impact, both in the case and the overall court system.

Impressions and Observations

Judge Scarpino, speaking before the Yorktown Bar Association in November 2006, stated that, among other things, each matrimonial Judge in Westchester (there were only two then) had a case load of approximately 400, and he was hoping to add Judges and take other steps to bring each Judge's case load down to 200. It was apparent to the audience even then that our Courts are bursting at the seams with divorce litigation.

Judge Scarpino informed me on January 19, 2007 that he has achieved his goal of reducing the case load of each matrimonial Judge – from 400 to 200 – by doubling the number of matrimonial Judges from 2 to 4. However, according to Judge Scarpino, there is no indication that divorce litigation in Westchester County is going to decline any time soon. Indeed, Judge Scarpino mentioned that the number of divorces may rise substantially in New York if gay marriage happens in our state.

As an active member of a local collaborative law group since early 2004 who is also well-acquainted with members of other local collaborative law groups, I have observed the following: 1) local collaborative law groups sponsor and offer seminars and group meetings where members receive excellent training, feedback and support; 2) most members truly love the concept; 3) most members want more collaborative cases than they have even though they, by and large, are getting more such cases than they did before; 4) very few Westchester lawyers at this time have enough collaborative divorce cases to limit their practices to that field and still stay busy; many do mediation and collaborative law, others do litigation and collaborative law, and others do all three (mediation, collaborative law and litigation).

Based on the foregoing, I believe that collaboratively trained lawyers who also do litigation can serve a vital role in helping to achieve more divorce settlements (in court, and in collaborative and non-collaborative cases out of court), thereby reducing the enormous case load of local divorce Judges. They can also serve a vital role in settling many of the issues in litigated divorce cases, shortening the trials of those that can't be

completely settled, and making everyone's case load more manageable. Collaborative training gives lawyers the tools to effectuate more settlements, creating win-win situations for clients, lawyers and the court system.

I further believe that, now and for the foreseeable future, collaboratively trained lawyers who also do litigation are more likely to have busy practices and to prosper. As the case study below will demonstrate, even in litigated cases, collaboratively trained lawyers can practice their peacemaking techniques for the benefit of their clients.

Case Study

The husband (H) consulted with me approximately two years ago about a divorce. He wanted to do it collaboratively. He talked to his wife (W) and supplied her with a collaborative law group brochure and web site. I wrote to her, introducing myself and the collaborative process, describing its possible benefits, and I also supplied her with the same brochure and web site. We were patient – waiting six months for a response – to no avail. H had no alternative but to bring a divorce action to move the matter along.

H retained me to bring a divorce action, and a summons was filed and served on W. Like many clients who initially opt for collaboration, H liked its benefits. He particularly liked having an economical divorce where he could save money and preserve the marital estate, and having more control than a typical litigant who naively puts his/her destiny in the hands of a Judge. H hoped for a quick out of court settlement with modest legal fees after service of the summons. He believed that a divorce litigator with collaborative training, like me, could facilitate such a settlement.

Unfortunately for H, these two benefits of the collaborative approach were lost at the outset of this contested divorce. Costs escalated dramatically when W's attorney responded to the summons by bringing a pendente lite motion (in addition to serving the Answer and Counterclaim) without first communicating by letter or phone call any request for temporary relief. This motion was also made in spite of H's long history of making generous voluntary support payments substantially greater than basic child support as calculated under the Child Support Standards Act (CSSA).

The main issues in this case were temporary and permanent maintenance. The applicable facts were the following: 19 year marriage; two teenage children, one of whom will attend college next year; H earned approximately \$120,000 per year with good benefits as a W-2 employee with stable employment; W earned \$15,000 to \$20,000 during the past year at several different jobs. Assessing W's earning ability was an important consideration.¹ She acquired a two year business-related college degree, and a certificate from a well known secretarial school before having children. More recently, she completed a program and obtained a certificate from a beauty school and acquired a New York State License in a beauty-related field.² However, W's latest employment was as an office assistant. The parties were in their mid-forties, and everyone was in good health.

The thrust of H's defense to W's pendente lite motion was that W had the earning ability to be self-supporting, and H's obligations should be limited to paying temporary child support under CSSA. H's dream of having an economical divorce was further shattered upon receiving the court's pendente lite Decision and Order. W got temporary maintenance and child support, and the child support was too high! The Court miscalculated child support under CSSA by not deducting the temporary maintenance

award from H's parental income before applying the CSSA formula.³ To the Judge's credit, he accepted correspondence from counsel citing authority for their positions regarding whether this maintenance deduction was proper under CSSA. This obviated the need and expense of perfecting an appeal or making a motion to reargue. The Court amended its temporary Decision and Order sua sponte, adopting the correct CSSA calculation thereby reducing temporary child support by \$500 per month from the amount initially awarded.

As in many litigated divorces, the escalation of costs for the parties went into overdrive during the discovery process. The Court's mandates for liberal financial discovery and W's attorney's boilerplate demands for documents and depositions required time consuming and expensive compliance. To keep a level playing field, I made similar demands on behalf of H requiring W's compliance.⁴ As commonly happens, both parties' retainers were exhausted by the time their examinations before trial were completed.

H realized his worst fears as his litigation costs began to soar, and W's attorney demanded lifetime maintenance for his client at settlement conferences. At this point, collaborative techniques were invaluable tools. Active listening and looping⁵ helped keep my attorney client relationship intact, helped me maintain a cordial relationship with W's lawyer, and helped settle issues including grounds for divorce, and custody and visitation. It also helped limit the financial issues to essentially one – the duration of maintenance – and set reasonable parameters for others. In this regard, H still derived collaborative benefits even though he was in litigation.⁶

Notwithstanding the Judge's recommendation – and H's offer – of five years of maintenance, W was obstinate in demanding lifetime maintenance, so the case proceeded to trial. This trial shows how a major benefit in collaborative law – power and control over one's own destiny – is lost when turned over to the judge once the trial begins.

Unbeknownst to me and my litigating counterpart (there was no animosity between us), the Judge wanted to complete testimony in one day. Although there were only two witnesses (the parties), both attorneys were armed with notes and documents and needed two days to complete their thoroughly prepared direct and cross-examinations. Trial counsel had an important decision to make: does one extemporaneously make an abbreviated presentation and accommodate the Judge's preference for "a quickie trial," or proceed as planned and make a record for an appeal whenever the Judge asserts his authority to shorten the trial? Both lawyers opted for the quickie trial.

Before concluding this saga with the outcome of the trial, I need to emphasize that it is the aftermath of this trial where the most important collaborative benefits were lost. Important benefits divorcing couples can obtain through collaborative law include making a smooth transition from marriage to divorce and protecting their children (in the short and long term) from anger, stress and conflict. There was no smooth transition from marriage to divorce for H and W, and their children were not protected from W's anger, ignorance and vindictiveness, as explained below.

The Judge got the quickie trial he wanted and recessed for forty-five minutes to review the evidence, consult privately with his law clerk, and gather his thoughts for his decision. And you guessed it, it was a quickie decision, which he delivered orally from the bench that day.

My client won,⁷ or at least it seemed that he won at the time. He did, indeed, win the trial. Maintenance was limited to five years or the earlier occurrence of the other usual terminating events. H expressed his gratitude to me and I felt euphoric.

Two weeks later, I was on a vacation with my family. As I periodically retrieved my office voicemail, as I usually do when on vacation, I heard my client's voice describing the latest crisis in despair. While exercising his Christmas holiday visitation, the parties' teenage daughter delivered an ultimatum: unless he paid approximately \$500 per month more in support than the court-ordered amount, she was immediately terminating that visitation – and refusing to see him for future visitation. Her younger teenage brother went along with this ultimatum. An argument ensued between H and his teenage children, and the next day W applied to the Family Court, on behalf of the children, for a temporary order of protection with a stay away order against H, which was granted.

The agony that my client and I experienced, even after having won at trial, reminds me of a conversation I once had with a highly regarded criminal trial lawyer, Tony Morosco, Esq.,⁸ now deceased, who endured the pressure of highly publicized murder trials during his career, but kept his distance from matrimonials like a frightened animal. I remember Tony telling me: “Arnold, I don't know how you are able to deal with your divorce clients; criminal clients are much easier to deal with. They commit their heinous act, like murder, and then their terrible sin is over, and they are repentant. Divorce clients, on the other hand, are not repentant at all, and their sins and suffering are on-going and never ending.”

When Tony made that comment to me in the early 1990s, collaborative law was in its embryonic stage, was only being practiced by a few pioneers from other states, and had not yet been conceived in the State of New York. As I write this article,⁹ I feel heartfelt gratitude for Stu Webb (the Minnesota divorce attorney who invented collaborative law) and our New York pioneers – the first few New York collaborative law practitioners who have nurtured the collaborative movement in New York with their careful planning, study, knowledge, wisdom, enthusiasm and dedication. Thanks to them, the collaborative law movement is growing stronger everyday, and we now have vibrant multi-disciplinary practice groups. These multi-disciplinary groups consist of teams of dedicated collaboratively trained professionals (collaborative lawyers, financial specialists, and mental health professionals serving as divorce coaches and child specialists) available to help divorcing couples deal with their emotions, finances, and parenting issues as well as their legal issues.

In the above case study of H and W, if the case had been handled collaboratively, divorce coaches, in particular, could have helped them reduce their anger and hostility, improve their communication, and focus on what is most important: a healthy and positive relationship for each of them with their children.

The benefits of collaborative law – minimize conflict and stress, protect children, save money, and make a smooth transition from marriage to divorce – are more likely to become a reality if both spouses choose the collaborative process. When they do so, a win-win situation can happen for everyone: the couple, their children, the lawyers, and the court system. When the couple does not choose the collaborative process, as in the above case study, some collaborative law benefits may still be preserved if at least one of the attorneys uses active listening, looping, and other mediation techniques in an effort to

resolve issues. It's a struggle to preserve the benefits of collaborative practice in litigation, but even in this adversarial process some of them can be salvaged to the benefit of everyone involved.

Endnotes

¹ I discussed the possibility of getting an opinion from a vocational expert, but H decided against it because of the expense. He also found his wife's old resume that turned out to be important evidence at trial.

² He also opted against requesting the appointment of a neutral expert to value W's certificate and license because of the expense.

³ Unlike many Judges who have the daunting task of knowing the technical rules of many areas of law with an enormous case load, collaborative lawyers usually focus their practice in the divorce field, and they have the luxury of giving much more attention to each case and client because their case loads tend to be a small fraction of those of Judges.

⁴ Upon receiving W's attorney's boilerplate discovery demands, I considered not responding in kind to keep H's litigation costs down. Keeping costs down was always H's paramount concern. We ultimately decided that it was too risky strategically for H not to make similar discovery demands on his wife.

⁵ Active listening and looping is essential for collaborative practice. If you don't know what it is, please read: "Collaborative Law: Divorce Lawyer as Peacemaker," that appeared in the Spring/Summer, 2006 edition of the Westchester Bar Journal, and consider taking an intensive mediation training seminar sponsored by the Center For Mediation in Law, or comparable mediation training course.

⁶ The financial and emotional burdens of a divorce client are often a matter of degree. H's retainer was exhausted and his stress was mounting, but his legal fees could realistically range from the low 5 figures to the high 6 figures. H could still benefit significantly by having a more peaceful and respectful resolution in the divorce litigation, even one that went to trial, which an attorney with collaborative training can help achieve.

⁷ Winning divorce trials creates a great opportunity for introducing collaborative law to another divorce lawyer. What better time to encourage your opposing counsel to check out collaborative law and become your collaborative colleague in future cases?

⁸ Anthony Morosco, Esq., who practiced in White Plains, New York, had a wealth of interesting stories to tell his lawyer friends over a drink or two, and was considered by his attorney brethren as being witty and brilliant. I affectionately think of him as the "Rumpole of the Bailey" of the Westchester County Bar.

⁹ This article was written shortly after the first multi-disciplinary group meeting of the New York Collaborative Law Group on January 10, 2007, where enthusiastic lawyers, financial specialists and mental health professionals packed the conference room of Kramer Kozek's law office in White Plains, N.Y. As they say in the theatre, it was a Standing Room Only night.

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