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Collaborative Family Separation Professionals

Collaborative Family Law
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Welcome to the Fall 2015 edition of our newsletter, featuring articles by one of our lawyers and a lawyer/coach team for this second of two legal editions. Crystal Buchan (lawyer) and Don Deines (coach) write about how lawyers and coaches work together to help separating couples manage the stress and emotional issues of a matrimonial breakdown. Laura Taylor writes about the difference between interest-based negotiations and positional bargaining. If these articles spark further questions about collaboration, mediation and legal options in general, you may contact any one of our collaborative lawyers, or consider an appointment with one of our divorce coaches who can meet with you to discuss your situation and consider what process might work best for you before deciding on the kind of professional assistance needed. (See the Getting Started tab on our website.)

The Lawyer/Coach Team

We Crystal Buchan and Don Deines, are a lawyer and a coach who have worked together in many collaborative teams.

In responding to the request to write an article on the lawyer/coach team for the collaborative law website in Victoria, we were immediately reminded of the 'Yogism' from Yogi Berra, the famous catcher for the New York Yankees whose summary of baseball was the following: Baseball is ninety percent mental and the other half is physical.

Apart from the mathematics, we think Yogi's summary applies perfectly to resolving family law matters of separation where it is virtually impossible to separate the legal challenges facing couples from the psychological challenges. This intertwining of the legal and psychological shows up in at least three large aspects of the process of separation and divorce.

First, separation and divorce is very common. Over half of Canadian couples will face this at least once in their lifetimes. In spite of how common this is, it is also a very difficult transition. Psychologists for as far back as 1979 have ranked separation and divorce as the number 2 stressor for individuals with only the actual death of a spouse outranking it (Girdano and Everly, 1979).

The stress from this event is so daunting for couples that there is some merit to label this stress as a form of trauma. When people are traumatized, they feel something vital is threatened. This forces them into a defensive poster. This defensiveness is not a choice. It is a reflexive reaction to the perception of a vital threat. And it is the most difficult challenge that a couple and their legal teams will have to manage in arriving at a separation agreement. Specifically, a successful separation agreement will require that a couple recovers from their sense of trauma. Otherwise, the reflexive defensive poster will reoccur over and over again. This often spills out in the legal arena where couples are expecting the lawyers or the courts to resolve issues of trauma.

Assisting couples to manage and recover from trauma requires the expertise of mental health professionals. Because the trauma of separation and divorce occurs in the legal context, the partnership of lawyers and mental health professionals makes perfect sense because of the very nature of separation.

Second, we think it is very important to consider what the final objective is in separation and divorce. Looking only at this from a purely legal point of view, it is easy to say the objective is to arrive at a separation agreement. Agreement is a key word, because if it not an agreement, it is an enforcement. Enforcements are not very stable. For an agreement to occur, a couple must also find a way to accept psychologically the transition from couple to a post couple relationship. This again is one of the most difficult transitions to accept because it always involves intense grief and loss, usually a sense of shame or blame built up from a long history of failure that lead up to the separation, and fear of what lies ahead exacerbated by the sense of failure coming out of the relationship. Even couples who arrive at a separation agreement relatively quickly suffer intensely through this process. And many couples find intricate ways to try to avoid this psychological loss. For example, ongoing anger and bitterness, or fighting over money and the children are very intense ways to remain attached although they are also very negative. Bitterness and vengeance is a cheap and cowardly response to loss and it never leads to acceptance, comfort or healing. If acceptance of the separation with the added dimension of actual action to re-create a positive post relationship state is not deliberately set as a goal, one or both members of a separating couple can remain in the highly agitated state of the trauma of separation. This will threaten the stability of any separation agreement, and it has devastating mental health implications for the couple and the family.

(cont'd on page 2)

Collaborative Family Separation Professionals

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Third, a lawyer-coach partnership can be invaluable in keeping a professional team on track. Specifically, couples who arrive at the decision to separate have most often participated for many years in emotionally corrosive ways of trying to get what they what. One way of defining this is called 'emotional blackmail'. When a person does this, they try to get what they want by making the other person feel bad if they do not get it. Or they make the other person pay emotionally for disappointment. Professional teams can fall into the exact same patterns of their clients. We sympathize with our own client because that is what we need to do to form a professional relationship. But our own client will put pressure on us to demonize their partner. If we go this far, it will appear that there is a victim in the relationship and a perpetrator, and of course our client is the victim. This is like having a 'snoopy-pigpen' image of separation. Our client is Snoopy, of course. This is a big trap to fall into, and it is rarely true. If the professional believes this, they will eventually mirror the distress in the relationship that destroyed the relationship in the first place, starting with blaming and shaming the client's partner.
Another challenge is what we do when our clients do not do what we want them to do. In listening to the conversations we have in such situations, we often hear statements like, 'If only so and so was not so irrational', or 'those damn emotions only get in the way', etc. When professionals get frustrated, it is very easy to blame clients for their problems, which is also emotionally coercive.

Clients in distress from separation feel anything but safe. They are often intimidated and baffled by the whole legal process. And they feel a profound sense of failure in their relationship. In confronting these challenges, a standard set by Virginia Satir, a founding professional in the field of family therapy, comes to mind. She stalwartly believed in working with families that 'no one is to blame, but everyone is responsible'. Virginia Satir refused to blame any one person for the failures in a relationship. And she felt equally strongly that everyone had some responsibility in creating the difficulties and had an equal responsibility to help create a solution. Virginia Satir started her interventions with establishing or re-establishing emotional safety.

Lawyers constantly have to help their clients to stay real about legal solutions just as coaches have to help clients stay real about what went wrong, and on the importance of staying solution focused to move forward. Sometimes lawyers and coaches have to actively work together to help prevent their clients from continuing in negative patterns, and from the legal process getting caught up in one upmanship with their clients trying to settle old scores. Clients may not understand that the legal process is best accomplished in an atmosphere of emotional safety. Sometimes it takes a concerted team approach to keep clients and the team for that matter on track.

Interestingly, safety is the very basis of law, and it is the basic human emotional need. At the most basic level, lawyers and mental health professionals have a fundamental, common interest.

References:
Girdano, d & Everly, G., **Controlling Stress and Tension, A Holistic Approach**. Prentice-Hall, New Jersey, 1979

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Collaborative Family Separation Professionals

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Volume 2, Issue 4

Positions vs. Interests: Working with your Collaborative Lawyer to Negotiate Agreement

The collaborative lawyer plays a key role in helping couples to negotiate a mutually acceptable separation agreement, which is the ultimate goal of the collaborative process. To achieve successful negotiations it is important for couples to understand the difference between interest-based negotiations, as compared with positional bargaining. A lack of understanding can create significant obstacles to reaching a mutually acceptable agreement in the collaborative process. An understanding of the differences between the two negotiation approaches will also help couples understand the role of the collaborative lawyer in helping them reach their goals.

Typically the concept of "negotiation" in family law conjures up traditional notions of exchanging proposals through lawyers. Proposals are positions taken based upon what each person has decided he/she wants. This approach is known as "positional bargaining" or "positional negotiation". Strategies are often employed to try to influence the other party to give up his/her position such as making demands, making concessions, holding back information, and using threats of court. The lawyer's role is traditionally understood as "fighting" to get what the client has decided he/she wants as being fair and reasonable.

When the ultimate goal is to agree on a position that is mutually satisfying, the tendency is to think and talk only about the positions.

Wife: "I want my spouse to pay me spousal support".

Husband: "I don't want to pay spousal support".

The statements above reflect this type of positional thinking and talking. When talking in terms of positions only, the options to find mutually satisfying solutions are limited to the two positions that each party is advancing. The limited options often lead to impasse as neither party wants to give up what he/she wants to reach an agreement.

In exchanging proposals, when one party takes a firm position that the other considers unreasonable, there is a natural tendency to conclude that the party knows that his/her position is extreme and that he/she is just being "greedy", "controlling", "unreasonable", "uncaring", or "vindictive". Such thinking drives the dispute to escalate as each party holds steadfast to his/her positions believe that the other person is the problem, creating a contest of will.

When this happens, the parties end up in court arguing their positions to a Judge hoping to "win" what they have decided they wanted. A win becomes proof to them that they were right about the other party being "greedy", "controlling", "unreasonable", "uncaring", or "vindictive" in the first place. This approach to resolving matters does not bode well for couples having to co-parent when the animosity lingers long after the court case has ended. In these cases, the children suffer.

When the focus is on positions, the problem in the negotiation is treated as though it is a conflict of positions, two people wanting different outcomes. However, the problem is really a conflict between each side's needs, desires, concerns, and fears which form the underlying reasons for each party's stated position.

When clients make positional statements such as the one's cited earlier, collaborative lawyers are tasked with helping to shift the thinking and talking from positions to interests. We do this by helping our clients to discover what it is that is really important to them about what they are wanting (needs); what they hope to achieve in getting what they want (desires); what they are worried about (concerns); and what they are afraid will happen if they don't get what they are wanting (fears).

In doing so, we may discover that the wife wanted spousal support as she has no income and is worried about how she will pay her living expenses. We also may learn that the husband, who doesn't want to pay spousal support, is worried about how he would be able to afford to pay all the household bills in the family home after he pays his wife support. By understanding each spouse's interests, we can begin to brainstorm solutions in considering other available resources, besides income, that could be used to meet the couple's expenses until the family home is sold.

This deeper inquiry into each party's interest, why each party wants what he/she wants, is the focus of interest-based negotiation. The goal of interest-based negotiation is to reach a mutually satisfying agreement that meets the interest of each party while taking into account each one's needs, desires, concerns, and fears. This is the approach to negotiation that is used in the collaborative process and which requires lawyers to adopt a different role than what is traditionally expected of them in helping couples negotiate an agreement.

(cont'd on page 4)

Collaborative Family Separation Professionals

October 6, 2015

Volume 2, Issue 4

For the reasons described above, lawyers in the collaborative process do not encourage couples to make and exchange proposals or to advance any positions. In fact, the lawyer's role is to steer clients away from becoming positional. This can seem very confusing to couples who hold on to traditional notions of negotiation mistaking the exchange of proposals as the most effective and cost-efficient route to reaching a mutually satisfying agreement when it isn't so.

What we lawyers do in the collaborative process is to reframe the dispute in such a way that the dispute is seen as a joint problem to be solved rather than a battle to be won. In the spousal support example, we could frame the joint problem as, "What are the available resources to both parties?" and "How can those resources be allocated in a way that meets both spouse's expenses?". With the focus off positions (i.e. spousal support), the couple can now explore other options that wouldn't otherwise have been available to meet their needs.

The collaborative lawyer's approach to helping parties negotiate an agreement is to replace swords and shields with curiosity. Curiosity is the means of helping couples explore and express what is important to each clarifying their respective needs, desires, concerns and fears. In this way, options can be explored that are mutually satisfying in terms of meeting both parties' interests. In doing so, we lawyers also work with our clients to express goals, needs and options in ways that can be heard by the other party. It is important that both sides hear and understand the interests of the other.

In the collaborative process, lawyers do not use the strategies that are employed in positional negotiation such as withholding information and threats of court. Working collaboratively, lawyers are obligated to disclose all relevant information and not mislead or take unfair advantage of the other. Demands and ultimatums are not strategies accepted within the collaborative process and do not form part of the negotiation process.

In the collaborative process, the exchange of proposals is replaced with brainstorming options to explore solutions that meet the parties' interests. Looking to interests rather than positions allows for more options to be generated. Generating options and evaluating them takes place as a group discussion with both parties' input rather than through the exchange of correspondence or discussions between counsel. Meetings play a pivotal role in the negotiations throughout and lawyers draw upon their mediation skills in helping to facilitate discussions between the couple rather than dominating them.

Lawyers play a critical role in trying to ensure that couples haven't attached themselves to a predetermined position, entering settlement discussions to brainstorm options. In order to overcome the tendency to think in terms of positions, information needed for brainstorming is typically given to both parties at the same time in the meeting so as to avoid the trap of formulating positions in advance. Positions are counterproductive to brainstorming options which is why it is so important for couples to resist the urge to determine what each wants in advance. What may appear as the most direct route to reaching agreement can easily turn into a dead end.

Successfully negotiating a mutually acceptable agreement within the collaborative process requires embracing an interest-based approach to negotiation and rejecting the tendency to want to make proposals and think in terms of positions. An interest-based approach offers greater solutions by identifying each party's needs, desires, concerns, and fears. Equipped with an appreciation of the pitfalls of positional thinking and negotiating, couples can avoid the traps that lead to impasse with a clearer understanding as to how the collaborative lawyer carries out his/her role in helping clients negotiate a mutually acceptable agreement.

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