
COLLABORATIVE DIVORCE AS AN ALTERNATIVE TO TRADITIONAL ADVERSARIAL DIVORCE OR OTHER FORMS OF ALTERNATIVE DISPUTE RESOLUTION

ABSTRACT

Traditional adversarial divorce is often a negative experience. It frequently leads to bitter fights over assets and custody. Even outwardly sane people may find themselves in the midst of a knock-down, drag-out fight over who gets to keep the dead dog's Christmas sweater, which makes it all the more surprising that more congenial alternatives exist but are not used. For the most part, American couples seeking divorce use traditional adversarial divorce methods instead of using alternative dispute resolution, ignoring a particularly beneficial method: collaborative divorce.

This Note will discuss the primary differences between collaborative divorce and traditional adversarial divorce, focusing on the fact that traditional divorce is more widely used and accepted by couples seeking divorce. This Note will explore the reason for this choice and why collaborative divorce is not more successful as an alternative. Additionally, this Note will touch on the benefits of collaborative divorce, especially in cases involving minor children and cases in which the couple still cohabitates. Lastly, this Note will discuss potential methods to encourage the use of collaborative divorce by eligible couples, including legislative enactment of the Uniform Collaborative Law Act and education and incentive by courts to encourage the use of the collaborative process.

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I. INTRODUCTION: WHAT IS COLLABORATIVE DIVORCE?

Collaborative divorce is an underutilized resource in family law. Divorce is expensive, often strains other family relationships, and sometimes results in neither partner getting what he or she wanted. In fact, former Chief Justice Warren Burger once said of traditional litigation: “Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people.”¹ Since this is especially true of traditional adversarial divorce,² collaborative divorce is, in the legal system, an alternative route that may reduce the risk of the unpleasant traditional results of divorce.

Collaborative divorce is a subsect under the umbrella of collaborative law, a form of alternative dispute resolution.³ “Collaborative law is a voluntary, contractually based alternative dispute resolution process for parties who seek to negotiate” a solution to their legal issue instead of “having a ruling imposed upon them by a court or arbitrator.”⁴ Collaborative law is different even from other areas of alternative dispute resolution, particularly in the role of the attorney.⁵ In contrast to other forms of alternative dispute resolution, such as mediation, collaborative law attorneys represent their clients during the course of negotiations without the aid of a

1. Warren E. Burger, *The State of Justice*, A.B.A. J., Apr. 1984, at 62, 66. Chief Justice Burger went on to note, “To rely on the adversary process as the principal means of resolving conflicting claims is a mistake that must be corrected.” *Id.*

2. Author Margaret Atwood summed up this gruesome process well: “A divorce is like an amputation, you survive but there’s less of you.” MARGARET ATWOOD, *SURFACING* 42 (1972).

3. *Prefatory Note* to UNIF. COLLAB. LAW RULES & UNIF. COLLAB. LAW ACT 9 (UNIF. LAW COMM’N 2010) [hereinafter *Prefatory Note*], http://www.uniformlaws.org/shared/docs/collaborative_law/uclranducla_amendments_jul10.pdf.

4. *Id.* at 1.

5. *Id.*

third party.⁶ Just as in a traditional adversarial divorce, each party retains a separate attorney from different firms, but a key difference is that parties must agree in advance, typically through a contract delineating terms of the proceedings, “that their lawyers are disqualified from further representing parties by appearing before a tribunal if the collaborative law process ends without complete agreement.”⁷

Collaborative divorce is a more particularized extension of this process. Rather than using the traditional adversarial divorce process, the collaborative divorce process is one by which the couple seeking a dissolution may get divorced in a more hands-on process without going to court.⁸ Collaborative divorce affords couples the opportunity to have more input in the outcome of the divorce and to maintain a cordial environment in the process.⁹

Not every attorney may participate in a collaborative law practice. In fact, an attorney must meet certain requirements before becoming eligible to practice as a collaborative attorney or being a member of a collaborative law practice group.¹⁰ According to the Uniform Collaborative Law Rules (UCLR) and Uniform Collaborative Law Act (UCLA), currently “each collaborative law practice group sets its own qualifications and training standards for membership, which can be quite extensive.”¹¹ Although those model rules explicitly and purposefully do not require a certain prerequisite for becoming a collaborative professional, the reasoning is not that such prerequisites are unimportant, but rather so that each practice group might have flexibility in deciding what will be required.¹² For instance, Iowa has its

6. *See id.*

7. *Id.*

8. *Collaborative Law*, STARCEVIC L., <https://www.starceviclaw.com/collaborative-divorce-lawyer/> (last visited Mar. 21, 2017).

9. *See id.*

10. *Prefatory Note*, *supra* note 3, at 23.

11. *Id.*

12. *Id.* at 24 (“For fear of raising separation of powers concerns . . . , the rules/act does not prescribe special qualifications and training for collaborative lawyers or other professionals who participate in the collaborative law process. The rules/act’s decision against prescribing qualifications and training for collaborative law practitioners should not be interpreted as a disregard for their importance. The rules/act anticipates that collaborative lawyers and affiliated professionals will continue to form and participate in voluntary associations of collaborative professionals who can prescribe standards of practice and training for their members. Many such private associations already exist and their future growth and development after passage of the act is foreseeable and encouraged.”).

own somewhat exacting requirements, which are different in separate areas of the state and not based on the UCLA recommendations.¹³ For instance, the Central Iowa Academy of Collaborative Professionals (CIACP) requires a minimum of 40 hours of mediation training, and while many members have experience as a family law mediator, substantial experience is no longer required to be admitted.¹⁴ Further, an attorney wishing to join the CIACP must be trained in collaborative law.¹⁵ In eastern Iowa, however, the requirements are slightly different. The attorney must: “1. [b]e admitted to practice in the State of Iowa; 2. [c]omplete a 12 hour collaborative practice training course; 3. [c]omplete six (6) hours of mediation training; and 4. [b]e a member of the International Academy of Collaborative Professionals.”¹⁶ Despite their varying degrees of rigor, all of these requirements ensure collaborative attorneys are qualified to assist clients in the collaborative process.

II. HISTORY OF COLLABORATIVE DIVORCE

Collaborative divorce began as the brainchild of Stu Webb, a Midwestern attorney who has come to be known as the godfather of collaborative divorce.¹⁷ Webb was a divorce attorney in Minneapolis in 1990, and he grew weary of the court system as it related to divorce.¹⁸ Because of this, he decided to change his methods and began telling his clients “he would help them reach agreement to the terms of their marital dissolutions,” but he would not do so in court.¹⁹ If the process failed and the parties chose to file their divorce in court, then the clients would have to agree that Webb would no longer represent them in the dissolution proceeding.²⁰

Webb’s reasoning for this change was simple: he hated being a lawyer.²¹

13. *Compare Frequent Questions*, IOWA COLLABORATIVE DIVORCE, <http://www.iowacollaborativedivorce.com/faqs> (last visited Mar. 21, 2017), *with Membership*, COLLABORATIVE LAWYERS E. IOWA, <http://www.collaborateiowa.org/membership/> (last visited Mar. 21, 2017).

14. *Frequent Questions*, *supra* note 13.

15. *Id.*

16. *Membership*, *supra* note 13.

17. Terri A. Lastovka, *Collaborative Law: A New Approach to Divorce*, GP SOLO, Jan./Feb. 2015, at 55, 55; cuttingedgelaw, *Stu Webb Part I*, YOUTUBE (Aug. 30, 2008), https://www.youtube.com/watch?list=PLDFCA02D05F4938A1&v=AAO_JG0xmNw [hereinafter *Stu Webb Part I*].

18. Lastovka, *supra* note 17, at 55.

19. *Id.*

20. *Id.*

21. *Stu Webb Part I*, *supra* note 17.

Webb was a litigator, but he disliked the contentious nature of his litigation practice.²² He, like many attorneys, became a lawyer to help people but felt he could not do so in his antagonistic role.²³ He shared his frustrations with a fellow attorney, and together they pioneered a method of collaboration in divorce settlements.²⁴ Webb used this preliminary method in about a dozen cases but initially did not plan for the replacement of the lawyer if the collaborative process failed.²⁵ During the first case in which he was forced to go to court following the breakdown of the collaborative process, he realized the necessity of such a provision and began incorporating it into the collaborative agreement.²⁶

It was at that point Webb realized the difference between litigators and settlement attorneys.²⁷ If attorneys are settlement lawyers, they have to get out of the case before it goes to trial.²⁸ For attorneys to be truly successful collaborative attorneys, they must be fully invested in making the collaborative process work without the niggling thought that the case may end up in court.²⁹ The approach to the entire matter is more candid and cooperative if attorneys are certain they will never have to use the kind of strategic advocacy involved in traditional adversarial divorce.³⁰ Therefore, Webb discovered that it was imperative to the success of the process to agree ahead of time that each attorney would withdraw from representation if the process proved unsuccessful for the couple.³¹

In 1990, Webb declared himself a collaborative lawyer.³² Through a series of meetings and informal get-togethers in the form of potluck dinners, Webb spread his message and encouraged other attorneys to become collaborative attorneys.³³ His practice started in Minnesota and expanded as

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. See *Collaborative Process*, CINCINNATI ACAD. COLLABORATIVE PROFESSIONALS, <https://collaborativelaw.com/collaborative-process/> (last visited Mar. 21, 2017); *Principles and Guidelines for Collaborative Family Law*, COLLABORATIVE L. INST. ILL., collablawil.org/about-collaborative-law-institute-of-illinois/collaborative-law-principles-and-guidelines (last visited Mar. 21, 2017).

30. See *Principles and Guidelines for Collaborative Family Law*, *supra* note 29.

31. *Stu Webb Part 1*, *supra* note 17.

32. *Id.*

33. *Id.*

word spread about what he was doing.³⁴ Although some geographical areas were slower to latch onto Webb's ideas and process in the beginning, he has since trained lawyers in his method in multiple states and even across the globe.³⁵

III. COLLABORATIVE DIVORCE AROUND THE UNITED STATES AND THE WORLD

Since Webb's pioneering days in collaborative divorce, the movement has gained traction across the country.³⁶ Several states have enacted versions of the UCLA and UCLR that specifically regulate collaborative family law because of the unique issues raised by the area of family law.³⁷ The drafting committee wrote the UCLA in two versions to give states the option of adopting the law as either legislation or court rules.³⁸ The drafting committee intended "that each state should make the choice of the source of regulation for collaborative law according to its own view of the separation of powers and the nature of collaborative law."³⁹ The drafting committee wrote the laws so that the enacting jurisdiction may choose either one version or the other, or enact some combination of the two.⁴⁰ Additionally, the committee provided further guidance in comments following appropriate rules or sections as to whether the committee recommended enactment by legislation or court rule.⁴¹

Not only has there been a growth of collaborative divorce stateside, but collaborative divorce has also taken off as an alternative in other countries

34. *Id.*

35. Cuttingedgelaw, *Stu Webb Part 2*, YOUTUBE (Aug. 30, 2008), <https://www.youtube.com/watch?v=1GpvEA9tPmw>. Webb found the Rocky Mountain areas and the Midwest to be the least receptive to his message at the start of his collaborative practice. *Id.*

36. *See id.* The process even warranted mention in the 2007 independent film *Juno*, in which one of the characters described collaborative divorce as "all the rage." *JUNO* (Fox Searchlight Pictures 2007). However, Jason Bateman's character incorrectly tells his soon-to-be ex-wife that the lawyer can represent them both. *Id.*

37. *Collaborative Law Act*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=Collaborative+Law+Act> (last visited Mar. 27, 2017). Fifteen states plus the District of Columbia have enacted the UCLA; several states (Alabama, Arizona, Michigan, Ohio, and Texas) and the District of Columbia have enacted versions that are specifically tailored to address family law matters. *Id.*

38. *Prefatory Note*, *supra* note 3, at 22 (emphasis omitted).

39. *Id.*

40. *Id.*

41. *Id.*

around the world.⁴² “Today, there are more than 5,000 members of the International Academy of Collaborative Professionals . . . located in 24 countries throughout the world.”⁴³ Since the inception of collaborative law, approximately 22,000 lawyers around the world have been trained in collaborative law.⁴⁴ While this is admittedly a small percentage of the lawyers around the world, it nevertheless demonstrates the growth in the practice in a relatively short period of time.

IV. WHY ISN’T COLLABORATIVE DIVORCE MORE WIDELY USED?

Despite this slight surge in international and U.S. legislative attention, collaborative divorce is an underutilized resource with many benefits, including higher client satisfaction, more positive impact on the children of a divorcing couple, lower costs, and greater efficiency.

A. Benefits of Collaborative Divorce

1. Client Satisfaction

One of the reasons collaborative divorce is a positive alternative to traditional adversarial divorce is that client satisfaction is higher in collaborative divorce situations.⁴⁵ Clients are often satisfied by the process itself and not just in the result.⁴⁶ “The first empirical research on collaborative law found generally high levels of client and lawyer satisfaction with the process and that negotiation under collaborative law participation agreements is more problem solving and interest based than those in the more traditional adversarial framework.”⁴⁷ A 2007 survey conducted by the International Academy of Collaborative Professionals (IACP) indicated similar results, with three-quarters of the 98 clients responding to the survey expressing that they were “extremely or somewhat satisfied generally with the outcome of their case.”⁴⁸ In contrast, one study indicated a very low

42. Lastovka, *supra* note 17, at 55.

43. *Id.*

44. *Prefatory Note*, *supra* note 3, at 4.

45. *Id.* at 5.

46. *See id.*

47. *Id.*

48. Linda Wray, *What Clients Say About Their Experience in the Collaborative Process*, ABA 17, http://www.americanbar.org/content/dam/aba/publishing/dispute_resolution_magazine/07_What_Clients_Say_About_Their_Experience_in_the_collaborative_practice.authchECKdam.pdf (last visited Mar. 21, 2017).

satisfaction rate for traditional divorce, with only 12 percent “fe[eling] they ended the process with the hopeful expectations with which they began the process.”⁴⁹ Another older study found that less than 40 percent of parties were satisfied with their adversarial divorce.⁵⁰

In addition to clients’ increased personal satisfaction with the process, many clients develop a more abstract appreciation for the justice system as a whole.⁵¹ “Parties who participate in consensual dispute resolution processes like collaborative law have a more positive view of the justice system. They generally prefer consensual processes to resolution of disputes by court order, even if they result in unfavorable outcomes.”⁵²

2. *Think of the Kids*

Another benefit to collaborative divorce is that it has a less severe impact on the children in the midst of their parents’ divorce. Although divorce is stressful, painful, and often heartbreaking for the couple,⁵³ the direct parties to the dissolution are not the only ones affected by a bitter divorce.⁵⁴ In fact, “spouses who choose court-based divorce presumably run the greater risk of harming themselves and their children in bitter litigation or rancorous negotiations.”⁵⁵

Collaborative divorce is a positive alternative to traditional adversarial divorce because it fosters a more favorable environment for the children in

49. Marsha Kline Pruett & Tamara D. Jackson, *The Lawyer’s Role During the Divorce Process: Perceptions of Parents, Their Young Children, and Their Attorneys*, 33 FAM. L.Q. 283, 295 (1999) (“Compared to favorable responses, the overwhelming majority of responses pertaining to the court process and the attorney’s role in it were negative Thirty-four percent of the parents said that no aspect of the legal process helped bring about resolution, with the most prevalent feelings being that the process left parents out of the decision-making and fueled anger and conflict between parties.”).

50. Lynn A. Kerbeshian, *ADR: To Be Or . . . ?*, 70 N.D. L. REV. 381, 386–87 (1994) (citing Jessica Pearson & Nancy Thoennes, *Divorce Mediation Research Results*, in DIVORCE MEDIATION: THEORY AND PRACTICE 429, 437 (Jay Folberg & Ann Milne eds., 1988)).

51. *Prefatory Note*, *supra* note 3, at 10 (citing E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 97 (1988)).

52. *Id.*

53. Actor William Shatner once commented, “Divorce is probably as painful as death.” Mickey Rapkin, *William Shatner Bares His Soul*, ELLE (Oct. 31, 2011), <http://www.elle.com/culture/celebrities/a11805/william-shatner-bares-his-soul-609562/>.

54. See Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289, 318 n.142 (2008).

55. *Id.*

the divorce.⁵⁶ Collaborative divorce “clients presumably bind themselves by a mutual commitment to good faith negotiation in hopes of reducing the risk that they will cause such harm, just as Ulysses had his crew tie him to the mast so he would not succumb to the Sirens’ call and have his ship founder.”⁵⁷ Collaborative divorce is a beneficial alternative to the negative impact traditional adversarial divorce may have on children.

Many children in divorce situations find themselves torn between their parents, both physically and emotionally.⁵⁸ When children endure conflict between parents, they may be more likely to suffer lasting emotional consequences as a result.⁵⁹ According to some experts, “Children exposed to high levels of interparental conflict are at risk for developing a range of emotional and behavioral problems, both during childhood and later in life.”⁶⁰ These risks include “higher levels of anxiety, depression, and disruptive behavior” than children who are not exposed to the combative environment.⁶¹ Furthermore, “children who witness hostility and aggression between their parents are more likely to be abusive toward romantic partners in adolescence and adulthood . . . and to have higher rates of divorce and maladjustment in adulthood.”⁶² In fact, marital separation itself is not necessarily the cause of the negative effects, as “some of the adverse effects attributed to divorce can be traced to the conflict that often precedes and follows marital dissolution, rather than to marital separation per se.”⁶³

For many couples, the relationship does not and cannot end when the marriage does. When a couple has children, they often must still cooperate and communicate in raising the children.⁶⁴ As well-known divorce attorney Laura Wasser advised those seeking a divorce,

Once you do embark upon the separation or divorce process, it is very

56. *See id.*

57. *Id.*

58. *See* KATE SCHARFF & LISA HERRICK, NAVIGATING EMOTIONAL CURRENTS IN COLLABORATIVE DIVORCE 155 (2010) (noting collaborative divorce does not put children in the middle of parental disputes or ask them to choose sides).

59. John H. Grych, *Interparental Conflict as a Risk Factor for Child Maladjustment: Implications of the Development of Prevention Programs*, 43 FAM. CT. REV. 97, 97 (2005).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *See* Laura A. Wasser, *Laura Wasser Blogs: What You Can Learn from a Celebrity Divorce*, PEOPLE (Sept. 27, 2013, 12:50 PM), <http://people.com/celebrity/laura-wasser-blogs-what-you-can-learn-from-a-celebrity-divorce/>.

important to remember three key things: Be kind, be reasonable, be brief.

... Remember that this person will no longer be your spouse, but he or she will continue to be your co-parent, family member and perhaps business partner in certain assets or entities. Try not to let emotion, hurt, fear or anger dictate the circumstances of your discussions or negotiations.⁶⁵

Collaborative divorce is a good method to effectuate these goals,⁶⁶ as the process fosters respect between the parents.⁶⁷ There is no winner or loser because both parties work toward a mutually beneficial result.⁶⁸

In addition to the more positive process, collaborative divorce also has more beneficial results for the children. When couples work together in a civil environment to make custody and visitation arrangements, the likelihood of a positive outcome for the child increases, for “[h]ighly conflicted families are less likely to have joint custody arrangements and regular visitation by the non-custodial parent. Continuing abrasive interactions make non-custodial parents more likely to withdraw from the child’s life and simply ‘give up.’”⁶⁹ If the parents make a conscious effort to keep the level of conflict at a minimum, the child will benefit from contact with the non-custodial parent.⁷⁰ For example, “Non-custodial parents are . . . far more likely to pay child support if they have joint custody or visitation arrangements than if they do not. Over three-quarters of parents who had such arrangements received at least some support payments, compared with less than half of the parents who did not.”⁷¹

In keeping the children in mind, collaborative divorce is an excellent option. The process allows the parties to talk about the children together

65. *Id.* Laura Wasser is a popular Hollywood divorce attorney with such high-profile former clients as Angelina Jolie, Britney Spears, and Ashton Kutcher. Rory Carroll, *Queen of Divorce: Angelina Jolie Hires Expert in Separating Hollywood Royalty*, GUARDIAN (Sept. 23, 2016), <https://www.theguardian.com/film/2016/sep/23/angelina-jolie-brad-pitt-divorce-lawyer-laura-wasser>.

66. See Creative Divorce, *William Massey Looks at the Long-Term Advantages of the Collaborative Process on Divorce*, YOUTUBE (Jan. 7, 2015), <https://www.youtube.com/watch?v=zpDb3943bTI>.

67. See *id.*

68. *Id.*

69. ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 35 (2004).

70. *Id.*

71. *Id.*

openly, and the process takes some of the burden off of the children in the divorce process.⁷² According to Suzy Power, an experienced mediator and family consultant, it is beneficial to the children for them to feel “paramount to whatever arrangements the parents are making in the collaborative process.”⁷³ Many children feel responsible for taking sides and playing the part of peacemaker between the parents.⁷⁴ The collaborative divorce process allows children to stay out of the conflict when they can be assured that the parents are handling the issue.⁷⁵

3. Fiscal Responsibility

One of the main reasons many couples choose to participate in the collaborative divorce process is because of the clear financial benefits.⁷⁶ Although statistics of costs associated with divorce are not readily available, the general consensus is that the average divorce costs somewhere between \$15,000 and \$30,000, with some divorces accompanying costs much higher than that, depending on the issues the couple faces.⁷⁷ However, Wevorce, a method of collaborative divorce, costs on average \$7,500 per divorce.⁷⁸ Other law groups touting collaborative divorce claim the “financial savings over a traditional adversarial divorce are in the range of 20 [to] 40 [percent].”⁷⁹

In many traditional divorce cases, the expenses add up quickly because of the numerous facets involved in divorce considerations.⁸⁰ For instance, in

72. Creative Divorce, *Suzy Power Considers the Children's Perspective on Divorce*, YOUTUBE (Jan. 7, 2015), <https://www.youtube.com/watch?v=6nhIq1Hva7k>.

73. *Id.*

74. *Id.*

75. *Id.*

76. Geoff Williams, *Why a Collaborative Divorce Makes Financial Sense*, U.S. NEWS & WORLD REP. (Aug. 19, 2013), <http://money.usnews.com/money/personal-finance/articles/2013/08/19/why-a-collaborative-divorce-makes-financial-sense>.

77. *Id.*

78. *Id.*

79. 5. How Much Will My Collaborative Divorce Cost? in *Frequently Asked Questions*, COLLABORATIVE FAM. L. GROUP SAN DIEGO, <http://www.collaborativefamilylawsandiego.com/faqs.htm#5> (last visited Mar. 21, 2017). This is assuming the collaborative divorce is successful and accompanies an out-of-court settlement. *Id.* It should still be noted that despite the financial savings, the Collaborative Family Law Group of San Diego stresses to its clients that they should not consider the collaborative divorce process as a “‘low cost’ alternative.” *Id.*

80. KATHERINE E. STONER, *DIVORCE WITHOUT COURT: A GUIDE TO MEDIATION & COLLABORATIVE DIVORCE* 90 (Marcia Stewart ed., 4th ed. 2015).

a case involving the marital home, retirement benefits, child support, and alimony, the parties will face significant costs for a traditional adversarial divorce using litigation.⁸¹ Dealing with those issues using two lawyers at \$350 per hour each, the grand total could feasibly be as high as nearly \$95,000.⁸² In stark contrast to this staggering expense, in the collaborative divorce process using two attorneys at the same hourly rate of \$350 per hour, the end total would be a fraction of the cost of litigation at around \$23,395.⁸³

4. *Faster Process*

Another of the many benefits of the collaborative process is the shortened or flexible timeframe for the process. According to *Forbes Magazine*, “[T]he legal process can be much quicker and less expensive than traditional litigation if the collaborative process works.”⁸⁴ Court processes are often lengthy (and therefore expensive), and a collaborative divorce allows the couple to avoid the stress of the necessarily lengthy process of a traditional adversarial divorce.⁸⁵

Additionally, the collaborative process allows for more flexibility.⁸⁶ If a couple desires to test the workability of the settlement of the visitation or

81. *Id.* at 83–84, 90.

82. *Id.* at 90.

83. *Id.* at 91.

84. Jeff Landers, *The Four Divorce Alternatives*, FORBES (Apr. 24, 2012), <http://www.forbes.com/sites/jefflanders/2012/04/24/the-four-divorce-alternatives/>.

85. Creative Divorce, *Anna Worwood Explains How Collaborative Law Helps Divorcing Couples Avoid Court Delays and Expense*, YOUTUBE (Jan. 7, 2015), <https://www.youtube.com/watch?v=Dk6fnXbVqZg>. A traditional adversarial divorce in Iowa requires a 90-day waiting period before a decree may be entered. IOWA CODE ANN. § 598.19 (West 2017). This does not include the time before the decree is submitted, during which the parties will seek discovery, issue interrogatories, take depositions, etc. *See id.* Additionally, if the parties go to trial, the parties must wait for the scheduling of a trial. The court administrator will attempt to schedule a trial within nine months, but in the event of good cause, that may be extended to as much as 15 months. IOWA CT. R. 23.2.

86. Interview with Anjela A. Shutts, Attorney, Whitfiled & Eddy, P.L.C., in Des Moines, Iowa (Jan. 13, 2016). Shutts is an experienced divorce attorney, mediator, and certified collaborative divorce attorney. Shutts recently published an article entitled *The Help: The Addition of Third Party Neutrals for Collaborative Divorce Practices* in Drake Law Review’s Discourse series, *The New Normal: How Alternative Dispute Resolution Is Not so “Alternative” Anymore*. Anjela A. Shutts, *The Help: The Addition of Third Party Neutrals for Collaborative Divorce Practices*, 65 DRAKE L. REV. DISCOURSE 101 (2017), <https://lawreviewdrake.files.wordpress.com/2015/01/shutts-online-final-edit-ready-for-upload.pdf>.

custody schedule they have devised in the course of settlement discussions, the collaborative process is more desirable than the traditional adversarial divorce process.⁸⁷ The collaborative process allows the couple to take as much time as necessary to determine whether the schedule is in the best interests of the children and whether the settlement meets everyone's needs.⁸⁸ If the schedule is the result of the traditional adversarial process, the couple is at the mercy of the scheduling of the court.⁸⁹ But in the collaborative process, the couple may arrange the schedule of the divorce to meet their own needs.⁹⁰ The process may be as quick or as slow as the couple needs it to be.⁹¹

5. Privacy

Another reason a party may choose collaborative divorce is the advantage of the privacy afforded the parties. For those who choose collaborative divorce based on this reason, they do so because of "the belief that remaining outside the court system for dispute resolution permits greater privacy and control over the outcome."⁹² The main reason why this process retains the parties' privacy is that the parties "are not in court, so the dispute, the process, and the resolution remain private."⁹³

Divorces are often a matter of public record, but there are certain

87. Interview with Anjela A. Shutts, *supra* note 86; see also *Comparison of Collaborative and Adversarial Divorce Process*, ROCKY MOUNTAIN COLLABORATIVE L. PROFESSIONALS, <http://www.rmclp.com/comparison-of-collaborative-and-adversarial-divorce-process/> (last visited Mar. 21, 2017) (noting participants are able to work together to come up with a settlement that is best for all parties involved).

88. Interview with Anjela A. Shutts, *supra* note 86; see *Collaborative Law*, HG.ORG LEGAL RESOURCES, <http://www.hg.org/collaborative.html> (last visited Mar. 21, 2017) [hereinafter *Collaborative Law*, HG.ORG LEGAL RESOURCES] (noting parties may spend more time creating a solution or may compromise and expedite the process).

89. Interview with Anjela A. Shutts, *supra* note 86; see *Collaborative Law*, HG.ORG LEGAL RESOURCES, *supra* note 88 (noting the parties must work at the court's pace in traditional litigation).

90. Interview with Anjela A. Shutts, *supra* note 86; see *Collaborative Law*, HG.ORG LEGAL RESOURCES, *supra* note 88 (noting parties may spend more time creating a solution or may compromise and expedite the process).

91. Interview with Anjela A. Shutts, *supra* note 86; see *Collaborative Law*, HG.ORG LEGAL RESOURCES, *supra* note 88 (noting parties may spend more time creating a solution or may compromise and expedite the process).

92. Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL'Y & L. 967, 972 (1999).

93. Lastovka, *supra* note 17, at 56.

aspects of the process a couple may wish to remain private.⁹⁴ This is especially true because things that happen during the marital relationship are often deeply private and will likely come to light during the divorce.⁹⁵ Traditional adversarial divorce is not ideal for dealing with this scenario.⁹⁶ For example, “[w]hen divorce arises, tensions are high and often the adversarial format of divorce proceedings exacerbates the stresses that come from leaving a long term, significant marital relationship.”⁹⁷ Lawyers who are not trained in the collaborative process “may oversimplify the matter into legal issues, where the clients experience a more complicated dispute based on emotional reactions and marital history. Furthermore, the monetary cost of divorce, including attorney fees, is enough to set both parties on edge.”⁹⁸

6. Control

Another major benefit of collaborative divorce is the amount of control the parties may exercise over the results of the divorce. In a collaborative divorce, the parties work together to come to a mutual result.⁹⁹ In contrast, in a traditional adversarial divorce, a judge makes the ultimate decision.¹⁰⁰ In that scenario, leaving the decision in the hands of the judge has the potential to split the baby and make neither party happy. Participants in the collaborative process “value the self-determination inherent in consensual dispute resolution, as they believe they know what is best for themselves and want to be able to incorporate that understanding into the settlement of their disputes.”¹⁰¹ Clients feel they are playing a big part in both the process and the outcome and appreciate that not only are they being heard, but also that their ideas and desires will be incorporated into the

94. Christina L. Preville, Note, *Collaborative Law in Pennsylvania and the Frozen Embryo Debate*, 8 PITT. J. ENVTL. & PUB. HEALTH L. 80, 94 (2013) (citing PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* 1 (2001)) (discussing the privacy implications of disputes over frozen embryos and the inability of the adversarial system to address such implications adequately).

95. *See id.*

96. *See id.*

97. *Id.*

98. *Id.* (citing TESLER, *supra* note 94, at 1).

99. *Comparison of Collaborative and Adversarial Divorce Processes*, *supra* note 87.

100. *Id.*

101. *Prefatory Note*, *supra* note 3, at 11 (citing Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 367–68 (1989)).

actual result.¹⁰²

Although the temptation for some couples wanting control over the results would be to use a “do-it-yourself” divorce, a collaborative divorce is a better alternative.¹⁰³ In a collaborative divorce, clients are a part of the process but will have the help of a professional.¹⁰⁴ With this professional help, clients will not have to navigate the unfamiliar territory of complicated legal issues without a guide, which is the big failing of do-it-yourself divorce.¹⁰⁵ In collaborative divorce, each party has an individual lawyer for support in the process and guidance in making wise decisions.¹⁰⁶

7. *Rapport with the Lawyer*

Another benefit is the relationship built between the lawyer and client. In a collaborative divorce scenario, each party must fire his or her attorney if the collaborative process falls apart.¹⁰⁷ In the ideal situation, the parties have developed a rapport with their own attorneys and are loathe to be forced to hire another attorney for the dissolution proceedings.¹⁰⁸

8. *Commitment to the Outcome*

By the same token, parties who work hard alongside their attorneys to come to a mutually beneficial agreement will feel a responsibility and connection to the settlement reached by the parties.¹⁰⁹ According to the UCLA drafters, this is an important aspect of collaborative divorce.¹¹⁰ “Parties who participate in consensual dispute resolution feel a commitment to the agreement they have come to and to the other party in the conflict and are more likely to comply with that agreement as compared to one imposed

102. Creative Divorce, *Grant Howell Speaks About How Collaborative Divorce Helps People Keep Control of Their Outcomes*, YOUTUBE (Jan. 7, 2015), <https://www.youtube.com/watch?v=KKBd9sXzq0U>.

103. See Creative Divorce, *Sara Hannell Looks at the Many Advantages of Staying out of Court on Divorce*, YOUTUBE (Jan. 7, 2015), <https://www.youtube.com/watch?v=rTqBVX4UWcM>.

104. *Id.*

105. *Id.*

106. *Id.*

107. Creative Divorce, *John Nicholson Explains How Collaborative Divorce Differs from the Conventional Process*, YOUTUBE (Jan. 6, 2015), <https://www.youtube.com/watch?v=LtNbNyGEVQE>.

108. *Id.*

109. *Prefatory Note*, *supra* note 3, at 10–11.

110. *Id.*

on them.”¹¹¹

B. How Do Courts View Collaborative Divorce?

Whether the court will be supportive of the collaborative process depends in varying degree on the jurisdiction and location of the court.¹¹² However, in some districts, the court is supportive of the idea of collaborative divorce, as it reaches an ideal result without adding to the already-overloaded court dockets.¹¹³

Even in states where the UCLA has not been enacted, some judges are showing overt support through administrative orders.¹¹⁴ One judge made his positive views of collaborative divorce clear in his administrative order:

[F]amily cases need[] “a system that provide[s] nonadversarial alternatives and flexibility of alternatives; a system that preserve[s] rather than destroy[s] family relationships; . . . and a system that facilitate[s] the process chosen by the parties.”

. . . . The Thirteenth Judicial Circuit supports the philosophy that the interdisciplinary collaborative practice model may be a suitable alternative to full scale adversarial litigation in family law cases if the parties agree to such a model.¹¹⁵

An appellate judge similarly noted his distress at the divorce and paternity cases that made it to the appellate level because in his view, both parties have already lost.¹¹⁶ During a meeting involving several family law attorneys and circuit court judges of two Florida counties, the judge said, “You have families that are being torn apart, and the parties are arguing often for the

111. *Id.*

112. Interview with Anjela A. Shutts, *supra* note 86.

113. *Id.*

114. Lastovka, *supra* note 17, at 57 (“In states such as Florida, where the UCLA has not yet been enacted, local judges are teaming up with local collaborative professionals and creating local rules and administrative orders endorsing and regulating collaborative law.”).

115. Collaborative Family Law Practice, Admin. Order S-2012-041, slip order at 1 (Fla. 13th Cir. Ct. July 31, 2012) (citation omitted), <http://www.fljud13.org/Portals/0/AO/DOCS/2012-041-S.pdf>.

116. *Judges from Florida’s Second District Court of Appeals Discuss Collaborative Divorce in Tampa Bay*, NEXT GENERATION DIVORCE (Apr. 6, 2012), <http://nextgenerationdivorce.com/judges-from-floridas-second-district-court-of-appeals-discuss-collaborative-divorce-in-tampa-bay/>. Judge Chris Altenbernd served as chief judge of Florida’s Second District Court of Appeals from 2003 to 2005. *Id.*

sake of arguing, not putting children's issues and the families' financial future first."¹¹⁷ The judge also said he supported collaborative divorce, especially in cases involving issues of child custody and parenting plans.¹¹⁸ "I just think more people need to seriously consider the family-focused process of collaborative divorce rather than fight it out in the court system."¹¹⁹

The New York judiciary took impressive steps to demonstrate support of the collaborative process through its institution of "the first court-based Collaborative Family Law Center in the nation."¹²⁰ In her 2007 State of the Judiciary, Chief Judge Judith S. Kaye noted the "anticipat[ion] that spouses who choose this approach will find that the financial and emotional cost of divorce is reduced for everyone involved—surely a step in the right direction."¹²¹

C. What Drives People to Use Traditional Adversarial Divorce Instead of the Collaborative Process?

For some, the collaborative process is not ideal. For those couples, there are many reasons why the collaborative process may be inappropriate. In some situations, it may be a unilateral decision to obtain a divorce or there may be insurmountable malice between the parties.¹²² Other couples may have complicated financial situations and large assets, best divided by a traditional court decision or adversarial situation.¹²³ Other couples may be involved in coercive or violent relationships.¹²⁴

Many couples never consider collaborative divorce as an alternative because the divorce is not wanted by both parties, which immediately hinders the necessary level of cooperation for a successful collaborative divorce.¹²⁵ According to *Forbes Magazine*,

In 80 percent of cases, the decision to divorce is unilateral—one party wants to divorce and the other does not. That, by its very nature, creates an adversarial situation right from the start and often disqualifies

117. *Id.*

118. *Id.*

119. *Id.*

120. Judith S. Kaye, Chief Judge, State of N.Y., The State of the Judiciary 2007, at 11–12 (Feb. 26, 2007), <http://www.nycourts.gov/admin/stateofjudiciary/soj2007.pdf>.

121. *Id.* at 12.

122. Landers, *supra* note 84.

123. *Id.*

124. *See id.*

125. *Id.*

mediation and collaborative divorce, since both methods rely on the full cooperation of both parties and the voluntary disclosure of all financial information.¹²⁶

But even if both parties want the divorce, the same principle applies if the parties have too much animosity toward one another.¹²⁷

Another reason a couple may decide not to seek a collaborative divorce is if the divorce involves complicated financial situations and large assets.¹²⁸ “Unfortunately, though, I have found that the collaborative method often doesn’t work well to settle divorces involving complicated financial situations or when there are significant assets. In collaborative divorce, just as in mediation, all financial information (income, assets, and liabilities) is disclosed voluntarily.”¹²⁹

Additionally, most agree that a couple previously involved in a coercive and violent relationship should avoid a collaborative divorce.¹³⁰ The UCLA places an obligation on the collaborative attorneys to “make reasonable inquiry whether the [party or] prospective party has a history of a coercive or violent relationship with another [party or] prospective party.”¹³¹ If the lawyer “reasonably believes” a client does have such a relationship or history, the lawyer is prohibited from further representation until he or she can reasonably believe that the client’s safety “can be protected adequately during [the collaborative] process.”¹³²

A history of domestic violence can seriously hinder the collaborative process.¹³³ According to the Collaborative Law Institute of Minnesota,

126. *Id.*

127. *See id.* I once asked a lawyer when he knew that divorce law was not for him. He told me that he saw the hostility inherent in divorce law during a mediation that seemed to drag on and on. Finally, after hours of arguing back and forth between the parties about finances and property, the last fighting issue boiled down to which party would get to keep the dog’s Christmas sweater. After the parties continued to bicker, the lawyer suggested the sweater should follow the dog. He was then informed that the dog had been dead for years.

128. *Id.*

129. *Id.*

130. *Id.*; *see* UNIF. COLLAB. LAW ACT § 15 (UNIF. LAW COMM’N 2010), http://www.uniformlaws.org/shared/docs/collaborative_law/uclranducla_amendments_jul10.pdf.

131. UNIF. COLLAB. LAW ACT § 15(a).

132. *Id.* § 15(c).

133. *Domestic Violence, COLLABORATIVE L. INST. MINN.*, <http://www.collaborativelaw.org/resources/domestic-violence/> (last visited Mar. 28,

Successful collaborative practice relies on transparency, interest-based negotiation and problem solving. Power imbalances between participants, including coercive control and the dynamic of domestic abuse, can compromise the emotional safety of participants. Collaborative practice is not unique in this regard. The efficacy of all dispute resolution processes in family law is negatively impacted by family violence.¹³⁴

Therefore, collaborative divorce is not a viable option for every couple seeking a divorce and should only be considered by couples capable of collaboration. Although a couple eligible for a collaborative divorce might not encounter many of the pitfalls of a traditional adversarial divorce (because an amicable couple in one method is feasibly an amicable couple in all methods), collaborative divorce is still the superior option by its very nature. It encourages a continuance of the amicable relationship.¹³⁵ Conversely, in a traditional adversarial divorce, even if a couple starts out as amicable, the traditional adversarial system will cause that relationship to degenerate because of the emphasis on winners and losers.¹³⁶

V. WHERE TO GO FROM HERE? HOW TO MAKE COLLABORATIVE DIVORCE A VIABLE OPTION IN DIVORCE LAW

Despite the many benefits of collaborative divorce discussed above, collaborative divorce is not commonly used in Iowa¹³⁷ and is an underutilized alternative to traditional adversarial divorce, or even other options of alternative dispute resolution. However, there are a couple potential solutions, including the legislative enactment of the UCLA, amendment of family law codes to accommodate collaborative divorce, or encouragement from Iowa courts to pursue this alternative.

One way to encourage couples to utilize collaborative divorce as a

2017).

134. *Id.*

135. See Landers, *supra* note 84.

136. See *Client Satisfaction Survey: A Consumer Evaluation of Mediation and Investigative Services*, CAL. CTS. (Mar. 1991), <http://www.courts.ca.gov/documents/satsur.pdf>.

137. See Laura Parrish, *A New Trend in Family Law: Collaborative Divorce*, IOWA LAW., Apr. 2016, at 14, 14 (noting a small group of family law attorneys has practiced collaborative law for several years and only recently have more attorneys in other parts of the state begun to recognize its benefits).

viable alternative is through enactment of the UCLA or amendment of family law codes to accommodate collaborative divorce.¹³⁸ Currently, the Iowa Code does not contain any discussion or direction on the use of collaborative law in divorce.¹³⁹ Furthermore, Iowa is not one of the states that has either enacted the UCLA or introduced it in the legislature.¹⁴⁰ Enactment of the UCLA or similar legislation would show governmental support of the process and provide direction to those litigants considering the collaborative process.

Another way to make collaborative divorce a more viable option is through court encouragement. As former Supreme Court Justice Sandra Day O'Connor once said, "The courts of this country should not be the place where the resolution of conflict begins. They should be the places where disputes end, after alternate methods of resolving disputes have been considered and tried."¹⁴¹ Since many divorcing couples are not aware of the alternatives and therefore turn first to traditional litigation, proactive court involvement and encouragement would be beneficial to utilizing collaborative divorce in Iowa. If the courts waived or reduced fees, couples would have more incentive to pursue collaborative divorce as an alternative, and it would additionally make couples more aware of the options available to them.¹⁴² In using this as an incentive, the courts would show clear support of the collaborative process, and the courts themselves would make parties aware of collaborative divorce as an option.¹⁴³ Literature distributed by the courts on the process could help parties make an initial determination of whether or not they are eligible for a collaborative divorce.¹⁴⁴

Along this vein, just as courts mandate mediation, courts could mandate reading of this information about collaborative divorce prior to dissolution proceedings.¹⁴⁵ The same reasoning as to why courts have

138. Luke Salava, *Collaborative Divorce: Why the Underwhelming Advance?*, GPSOLO, Jan./Feb. 2015, at 70, 71.

139. See IOWA CODE ANN. ch. 598 (West 2017).

140. See *supra* note 37 and accompanying text.

141. LAWRENCE R. MAXWELL, JR., THE FIRST OPTION: COLLABORATION, A REVOLUTION IN DISPUTE RESOLUTION PROCESSES 1 (2008), http://www.collaborativelaw.us/articles/the_first_option.pdf.

142. Salava, *supra* note 138, at 71. When seeking a divorce, the petitioner must pay a fee to the clerk of court, typically \$185. *Summary of Iowa Divorce Law*, IOWA LEGAL AID, <http://www.iowalegalaid.org/resource/summary-of-iowa-divorce-law> (last updated Aug. 3, 2011).

143. See Salava, *supra* note 138, at 71.

144. See *id.*

145. *Id.*

mandated and encouraged mediation applies to the use of collaborative divorce.¹⁴⁶

It is important to note that court-ordered collaboration is an inappropriate solution because of the nature of the resolution process. If the parties are not willing participants, the process is even less likely to be successful than mediation.¹⁴⁷ The key to successful collaboration is a willingness to work together and the ability to be open-minded, which cannot be achieved if the parties do not willingly choose to participate in the collaborative process.

VI. CONCLUSION

In conclusion, collaborative divorce is a positive alternative to the pitfalls and negative consequences often accompanying traditional adversarial divorce. There are many reasons collaborative divorce might be better than traditional adversarial divorce, chief among them being the financial benefits and the environment it fosters for the minor children of the participants. For this positive and effective method of alternative dispute resolution to be used more by eligible parties, states, including Iowa, should consider enacting versions of the UCLA, and courts should encourage litigants to pursue conflict resolution outside traditional litigation through collaborative divorce.

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146. See Holly A. Streeter-Schaefer, Note, *A Look at Court Mandated Civil Mediation*, 49 DRAKE L. REV. 367, 378 (2001) (noting crowded dockets, childhood trauma, and increased cooperation among the reasons for mandated or encouraged mediation).

147. See Landers, *supra* note 84 (noting collaborative divorce is not likely to be successful if both parties do not fully cooperate).

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