NFLR Nevada Family Law Report

VOLUME 19, NUMBER 1 FEBRUARY 2004

Collaborative Divorce in Nevada: Silver Bullet or Passing Trend?

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Judge Robert E. Lueck calls it a potential "poison pill" to help compel settlement and reduce the expense, delays and stress of domestic litigation. Judge Jennifer Elliott calls it a very valuable tool which can shift family law issues from the adversarial process to a proactive, problem-solving, and even therapeutic, process. Judge Nicholas A. Del Vecchio believes it to be the "wave of the future" in Family Court.

On the other side of the coin, Judge Gerald W. Hardcastle, Judge Steven Jones and Judge Cheryl B. Moss, although supporting the general idea, believe that the concept of collaborative divorce, in its present form, is potentially disruptive to litigation and may even increase costs. What is causing this divergence of viewpoints among the judiciary, as well as the domestic bar? The answer is the concept known as "collaborative divorce."

If you have not heard of the concept of "collaborative divorce," you are probably in the majority. However, it is a concept which might very well be here to stay in Nevada. In a nutshell, "collaborative divorce," as it is being fashioned in the State of Nevada, is a system whereby parties with counsel, and without a judge or mediator of any sort present, conduct negotiations and conferences to resolve the issues of a divorce case without the necessity of litigation.

"Big deal," you might be heard to say, since we already have several alternative dispute resolution methods. However, there are some critically important differences which will have significant impact on how we practice family law. The distinguishing features of "collaborative divorce" are as follows:

1. As stated, there are no judges or mediators present, only the parties and their attorneys;

2. The "collaborative divorce" ne-

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NEVADA FAMILY LAW REPORT is a quarterly publication of the Family Law Section of the State Bar of Nevada.

Subscription price for non-section members is $35 payable in advance annually from January 1 to December 31. There are no prorations.

The *NEVADA FAMILY LAW REPORT* is intended to provide family law related material and information to the bench and bar with the understanding that neither the State Bar of Nevada, Family Law Section editorial staff nor the authors intend that its content constitutes legal advice. Services of a lawyer should be obtained if assistance is required. Opinions expressed are not necessarily those of the State Bar of Nevada or the editorial staff.

This publication may be cited as Nev. Fam. L. Rep, Vol. 19, No.1, 2004 at ___.

Nevada Family Law Report is supported by the Family Law Section of the State Bar of Nevada and NFLR subscriptions.

Collaborative cont.

gotiations will in fact occur before a complaint is filed or any formal litigation is commenced;

3. The parties sign an agreement to solemnize their intent to resolve and settle issues in good faith;

4. The parties sign an agreement that there has been "full disclosure" of assets; and

5. If the parties fail to resolve the case, they must retain new counsel in order to proceed with the litigation. As will be discussed, this last feature is by far the most controversial.

ORIGIN AND STATUS

The origin and current status, of "collaborative divorce" in Nevada is follows: Judge Robert W. Lueck happened upon an article on "collaborative divorce" in the April 2000 issue of the national publication, *Lawyers Weekly*. He brought it to the attention of Judge Cynthia Dianne Steel, who was also very interested, and they independently researched the issue. Judges Lueck and Steel eventually brought the matter to the attention of the Nevada Supreme Court Justice Robert E. Rose. Justice Rose drafted a proposed "collaborative divorce" rule to be included in EDCR Chapter 5.

It is not yet part of such rules, but if it does become part of the rules, it will still remain a method which is not mandatory, but available upon stipulation. And as Judge Lueck stresses, even though it is not yet part of the formal rules, lawyers can already use a "collaborative divorce" concept, or a variation thereof, when resolving litigation on account that NRS 3.225 provides a very general and flexible framework empowering lawyers to agree to various types of alternate dispute resolution – and for the lawyers to participate in crafting the parameters of a dispute resolution method to be applied to a given case.

However, if the "collaborative divorce" model becomes formally codified under the Nevada rules as a method to which the parties can stipulate to, if the parties do stipulate to such method, it appears that they must abide by the main hallmarks of the "collaborative divorce" model – such as the negotiations occurring prior to litigation and without the involvement of a judge or mediator, the signing of full-disclosure agreements, and the parties being compelled to retain new counsel to proceed with litigation if the negotiations fail.

Since "collaborative divorce" is not yet specifically codified in the rules, this raises at least two questions. Can attorneys at this time stipulate to a "collaborative divorce" type of process with the elimination of the controversial requirement that new counsel be retained if the negotiations fail? The answer at this time is probably "yes". The second question is that if "collaborative divorce" becomes part of EDCR Chapter 5, can that controversial requirement (that new counsel be retained if negotiations fail) be eliminated prior to such rule being adopted? The answer may possibly be "no", unless the attorneys make their feelings and input known to the Family Court Judges, specifically the "Collaborative Divorce" Committee comprised of Judge Lueck, Judge Elliott and Judge Del Vecchio.

At this point, the concept of "collaborative divorce" appears to be moving along at a fairly brisk pace, and the Clark County Family Court Judges are learning about it, researching it, and several have moved for its adoption. Judge Lueck and Presiding Judge Steven E. Jones recently attended the "collaborative divorce" conference which was held in St. Louis, Missouri in November 2003.

"Collaborative divorce" in fact appears to be gathering steam on a national level. In addition to the St. Louis conference, there is a full-fledged Collaborative Divorce Institute located in Cincinnati, Ohio. "Collaborative divorce" is

also prominent in Georgia and the Bay Area of California, among other locations.

The domestic bar in Nevada should assume that if some of the Judges are going to the trouble and expense of attending lengthy out-of-state conferences on the concept of "collaborative divorce", that any movement to codify "collaborative divorce" within the local rules will occur in the near future. And it is therefore even more vital that family court practitioners learn more about the process and let their feelings be known to the Family Court Judges.

VIEW FROM THE BENCH

What do the various Nevada Family Court Judges think of the concept? As discussed, it is not surprising that the "Collaborative Divorce" Committee of Judges Lueck, Elliott, and Del Vecchio support "Collaborative Divorce." Judge Lueck appears to be one of its strongest judicial supporters in Clark County. He believes it may help eliminate delay and streamline labor-intensive cases.

Judge Lueck believes the requirements of disclosure, and the commitment to resolve in good-faith, may have a strong psychological impact. He is very committed to his belief that "collaborative divorce" may help control the emotional side of litigation. He is hoping that attorneys and litigants may change their philosophy and how they approach certain cases and begin to view them as "relationship problems, and not just legal problems", and that they will also view the litigation as "not battles to be fought, but problems to be solved."

Judge Lueck stresses that the more hostility that is generated in a given case, and the more negative allegations which are made against a party in affidavits and during court hearings, that the more entrenched the parties become, and the more difficult it is to resolve matters. It is submitted that no experienced domestic practitioner would disagree with him on this last point, but can "collaborative divorce" really be a valuable tool to help reduce such hostility and to focus the parties? Judge Lueck believes it can, in that it forces parties to be creative and work harder at solutions, and to understand the other person's point of view.

His vision is to see Nevada Family Court cases move more from an adversarial model to more of a pure negotiating model, whenever possible, although he concedes that the concept of "collaborative divorce" (and other alternate dispute resolution methods) are probably not proper in the really high conflict cases.

Judge Jennifer Elliott also shares many of the views of Judge Lueck as to "collaborative divorce" aiding litigants by moving litigation from a pure adversarial model to more of a therapeutic model. And she notes that this concept has actually had tangible benefits in transforming the Mental Health Courts and the Drug Courts over the last decade, whereby she observes that such courts are now based on more of a therapeutic, rather than a punitive, model. Judge Elliott considers "collaborative divorce" as a potential "social intervention model which can help humanize proceedings."

Although few lawyers would disagree with the general concepts expressed by Judge Lueck and Judge Elliott as to reducing the stress and expense of family court litigation, the concern remains whether "collaborative divorce" is substantively superior to, or at least substantively different from, current alternate dispute resolution models. Judge Elliott stressed two important distinctions. The first is that the "collaborative divorce" concept "solemnizes the process" by requiring the parties to negotiate in good faith to resolve the issues. This appears to be a rather nebulous commitment since it is always a subjective question as to whether a party has negotiated in good faith.

However, the second feature, which Judge Elliott feels is important, does appear to have significant value. That is, the requirement that the parties are to sign a written agreement that there has been full disclosure of assets. Practitioners who were questioned about this felt that Judge Elliott hit the nail on the head in indicating that this would be a very valuable tool for attorneys. If "collaborative divorce" fails, and the matter proceeds to litigation, a sworn statement that a party has engaged in full disclosure could have a serious impact on the litigation, particularly if it is established that the party did not exercise anywhere near full disclosure.

This would, however, be an ironic benefit since it would be a feature of "collaborative divorce" which winds up benefiting a party once "collaborative divorce" fails and the case proceeds to litigation. Nevertheless, there does appear to be a consensus of opinion that any written commitment that there has been full disclosure is in general something which is very valuable in domestic proceedings.

Judge Elliott is extremely well-versed in alternate dispute resolution matters, such as working as an Outsource Evaluator and as a Supreme Court Settlement Judge prior to her taking the bench. Therefore, it is assumed that she is very adept at evaluating an alternate dispute resolution model and noticing its strengths and weaknesses. To this end, she does in fact concede, as does Judge Lueck, that the requirement that the parties retain new counsel (if "collaborative divorce" fails) is "potentially problematic". But in general, both Judge Lueck and Judge Elliott remain enthusiastic supporters of "collaborative divorce", although they acknowledge that the concept needs to be fine-tuned before it is formally implemented in Nevada.

Judge Nicholas A. Del Vecchio, also on the Committee, supports

"collaborative divorce", although interestingly, he does so for somewhat different reasons than Judge Lueck and Judge Elliott. As discussed, Judges Lueck and Elliott support "collaborative divorce" as a device to make litigation more expeditious and economical, and to reduce the emotional stress of such process. However, Judge Del Vecchio, while acknowledging those benefits, stresses a practical benefit a "collaborative divorce" can have for domestic court practitioners.

Judge Del Vecchio states that "the 'collaborative divorce' phenomenon is the alternate dispute resolution wave of the future, and skilled domestic practitioners should avail themselves of this ever-growing market." He views "collaborative divorce" as an opportunity for the legal profession to take back some of the "pro per" market by making legal services more affordable. He believes the plethora of untrained, unlicensed drafters have harmed the public, and have created a higher rate of backlog within the system.

Judge Del Vecchio's basis for this viewpoint is that "collaborative divorce" will be utilized on the more simple cases, and those involving less conflict and less assets. He believes people are more likely to retain an attorney once they learn that there are court processes in place which can resolve cases quicker and for a lot less money.

Judges Lueck and Elliott believe that "collaborative divorce" can also work on the more involved cases, and in fact, the model of "collaborative divorce" was probably fashioned with these more involved cases in mind. However, both Judges readily concede that in the really acrimonious cases, "collaborative divorce" is probably not appropriate.

Not all the Judges are ready to jump on the "Collaborative Divorce" bandwagon. Balancing the views of the Judges on the Committee, and indicating the potential problems, are Judges such as Judge Gerald W. Hardcastle, Judge Steven Jones and Judge Cheryl B. Moss. Judge Hardcastle, seasoned by over a decade on the bench, preceded by two decades in the trenches as a litigator, in addition to being a trained social worker, is not ready to embrace "collaborative divorce" as the silver bullet cure.

Judge Hardcastle points out that alternate dispute resolution methods of various sorts are already readily available, that most cases do settle prior to trial, and that those that do not settle, do in fact need to be litigated, and will not be resolved by adding yet another layer of bureaucracy in the form of yet another alternate dispute resolution method. And, perhaps more importantly, he adds that "collaborative divorce", unlike the existing dispute resolution methods, may actually cost lawyers money and can be disruptive to litigation. He is specifically referring to the requirement that if "collaborative divorce" fails, the parties are required to retain new counsel for the litigation.

Although Judges Lueck and Elliott did concede that such a requirement is "potentially problematic," Judge Hardcastle appears to view it as a problem which should obviously be eliminated from the start. He believes that by forcing parties to retain new counsel, that they are in effect reinventing the wheel, and that if anything, the case becomes more protracted and more expensive, which would be an ironic result based on the philosophies of a "collaborative divorce" model. Judge Hardcastle does not merely view such requirement as "problematic", but is firm that it should be eliminated from any "collaborative divorce" model.

Those practitioners who were canvassed for this article uniformly agree that Judge Hardcastle is right on this point, and that they would not be interested in proceeding with a "collaborative divorce" if they were required to remove themselves from the case if the "collaborative divorce" was not successful. The practitioners believe that this would undermine their clients' faith in the attorneys and the justice system, would cause confusion to the client, disruption to the litigation, would also cost the lawyers money since they could not proceed any further on the case, and would cost the litigants more money by the necessity of having to retain new counsel who would have to familiarize themselves with a case that another lawyer is already familiar with.

Judge Cheryl B. Moss also agrees with Judge Hardcastle that by having this requirement in the "collaborative divorce" model that it might actually "increase costs" in those cases where the "collaborative divorce" negotiations are not successful. Although she made clear that she supports any alternate dispute resolution method that saves time and money, and reduces stress and allows parties to get on with their lives, Judge Moss remains very concerned about this requirement of discharging the lawyers if the negotiations fail.

Judge Moss notes that there are already several alternate dispute resolution methods in place, and that before another layer of bureaucracy is added, that "we should make sure that we are really adding something more unique and helpful than existing models." She believes that if the "collaborative divorce" model is adopted and it requires the discharge of attorneys if settlement is not effectuated, that this is just "plain ill-advised". Judge Moss observes that many cases resolve late in the litigation, or even on the eve of trial, and that they do not all settle during the initial or middle stages when emotions are still running hot.

She is concerned about a "collaborative divorce" model which requires the disruption of litigants retaining new counsel unless settlement is reached early on in the process. Judge Moss expresses that "I have overwhelming confidence in the lawyers who have appeared in

front of my court, and most of them are very well-prepared and conscientious. The 'collaborative divorce' model, as the proposal now exists, holds a mallet over these attorneys' heads – essentially treating them with less than the full respect they are due by telling them that they must settle or else they are out of the case. If that provision is removed, I will jump on the bandwagon with 'collaborative divorce'."

Judge Steven Jones comments mirrored those of Judge Hardcastle and Judge Moss, stating that in order for the "collaborative divorce" model to work, you must have reasonable parties involved in the process with attorneys that are both reasonable and have client control. However, he states that he has observed that many of the litigants he sees have unreasonable expectations, either because they refuse to listen to their attorney's advice or because the attorney has allowed them to unrealistic expectations.

Having said that, Judge Jones stresses that while most attorneys that appear in front of him have the level of client control which he believes is imperative to the process, many times it requires an initial ruling by the court to lead the parties into a position where they can agree rather than be forced fed. He believes that the main problem with the "collaborative divorce" model is that is premised on the idea that you have 2 people willing to mediate and that in many cases, the court, by its initial rulings, has to compel reasonableness on the part of the litigants. He further adds that in the cases where there is unreasonable expectations, collaborative divorce exploits the process because it breeds protracted litigation and costs.

BOTTOM LINE

The bottom line is that none of the Judges canvassed for this article were opposed to the concept of "collaborative divorce" provided that the controversial requirement as to retention of new counsel is eliminated. Granted, the Judges on the "collaborative divorce" Committee appear to be bigger boosters for "collaborative divorce" than some of the other Judges presently are, but none of them appear to be actively opposed to the concept if the controversial requirement (of retaining new counsel if the negotiations fail) is not part of the "collaborative divorce" model. Further, most Judges and practitioners appear to agree with Judge Elliott's assessment that the signed statement that there has been full disclosure can prove to be a very valuable tool.

However, practitioners must let their thoughts be known to the judges in general, and those on the Committee in particular, as to any ideas, input, or how the current model can be fine-tuned. Judge Lueck and Judge Jones have no doubt obtained a great deal of valuable information during the November 2003 Conference in St. Louis, and they, as well as the other Judges, would be happy to share their thoughts with concerned members of the Bar. Since collaborative divorce may in fact become part of the Nevada local rules, the time to act is now.

LOVE MILLENNIUM STYLE: MARRIAGE AND DIVORCE

Rebecca Miller, Esq., Schofield and Miller

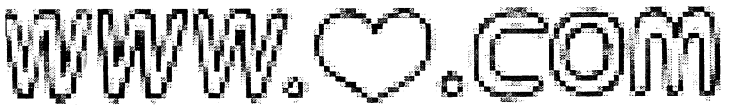
INTERNET DATING/ MARRIAGE

The good news is that you can marry as a result of the internet. With a little assistance from what I define as "formal" internet matchmakers, one is able to meet someone of the opposite sex, or not of the opposite sex, as the case may be, fall in love and marry, hopefully living happily ever after, despite the growing number of divorces in our current society. The bad news is that it is even easier to obtain a divorce with the aid of the internet by accessing several hundreds, if not thousands, of websites promising accurate forms from every state in this country, self-help type aides, such as "Should I Stay or Should I Go?", and almost begging the internet user to purchase these forms and other useless information because it is less expensive than hiring an attorney.

My research regarding the use of the internet for marriage and divorce purposes began with my personal interest in finding your "sole mate" as a result of a close relative meeting someone through a formal "dating service", and marrying her, all within a year's time. She seems to be a perfect match for him, they are very happy and in love, a very nice change of pace from what we all do on a daily basis as a means of making a living. Since I am a hopeless romantic when it comes to my personal beliefs about love, marriage and the theory of "sole mates", I interviewed the sappy couple to quench my curiosity and found a subject of interest and entertainment for you readers, as my colleagues in the area of Family Law.

The married couple in question, being of the opposite sex, were both tired of the dating scene we have all detested at one time or another. They both were also weary of meeting a potential soul mate in a bar, casino, or at the grocery store. Introductions through friends, who thought very highly of both persons, had not been successful. My relative was already 40 and had never been married. He is very intelligent, slightly anal, disciplined to an excessive degree, and just not willing to "settle". The new wife had been married, unhappily, a few years ago, with no children and was looking for her best friend and lifetime partner. Being very sweet, with a wonderful sense of humor and adorable, she kept on meeting what she termed, "real winners, not".

So what are these two people, 40 years old, wanting children, with no prospects, to do? Turn to the internet, of course! The internet offers everything these days, why not love and marriage? They both signed up with a matchmaking company, which charged them a reasonable fee, and they completed quite extensive questionnaires. It seems that the answers reviewed by an interested party reviewing the other's questionnaire basically takes the place of at lest the first 3-5 dates, depending on how much information one wishes to divulge about one's self during those initial dates. Therefore, before even deciding whether or not to contact the other person via e-mail, the interested parties know what the other one does for a living, their cultural background, what they are look for (a date, a steady partner, just sex, marriage with or without kids, etc.), and a general idea of where each other lives.



Basically, in subscribing to the internet matchmaker, you build a personal profile, answer multiple-choice questions regarding looks, religion, sex preferences, and are also asked to describe yourself and the "perfect" person. You also state that you wish to be matched to someone who answered one or all of the questions a particular way, and to list what you absolutely do not want – no smokers, nobody practicing voodoo, etc. Of course, there is no guarantee that a particular subscriber is telling the truth, but the couple described herein were very serious about finding a mate, and both represent that they did

not lie because they believed that would not assist them in finding a compatible match.

My relative had been a subscriber for a year, casually dated a few women he met through the internet matchmaker, dated one woman for about four months, but was not successful for over a year until he met his current wife. The new bride told me she would receive as many as 25 e-mails in one day from prospective dated and received 75 e-mails on one particular day! In researching the difference of the number of e-mails received by men versus women, it appears that the women subscribers receive more "bites". For their protection, women are able to contact a chosen man while remaining anonymous until she chooses to either divulge her personal e-mail address or speak to him by telephone.

There are many different internet matchmaking sources and companies with varying monthly charges. Willing participants can subscribe for as long as they wish. The goal is to allow people to access, on a gigantic scale, especially if you live somewhere like southern California, potential sole mates. The websites are very positive, and try to make the process fun and not too time-consuming.

INTERNET DIVORCE

Unfortunately, research regarding internet divorce websites revealed negative statements, unrealistic promises, incorrect and incomplete forms, and espoused "anti-attorney" sentiment. The research revealed an amazing number of divorce websites and "resources". I never imagined that my search would lead to such a wealth of "knowledge" pertaining to seeking and obtaining a divorce. Simply typing in "internet divorce", without the word "law", provided me with 689 entries into the world of divorce mis-information.

One internet divorce website advertised that it was the web's largest divorce resource since 1995, promising a comprehensive state-by-state divorce informational network. This website also provided self-help type sites, and further sought attorneys who may be interested in obtaining business from them. In this regard, the website provided "information" that divorce rates may increase because of the availability of internet dating sites. The site offered no evidence or statistics to support this theory.

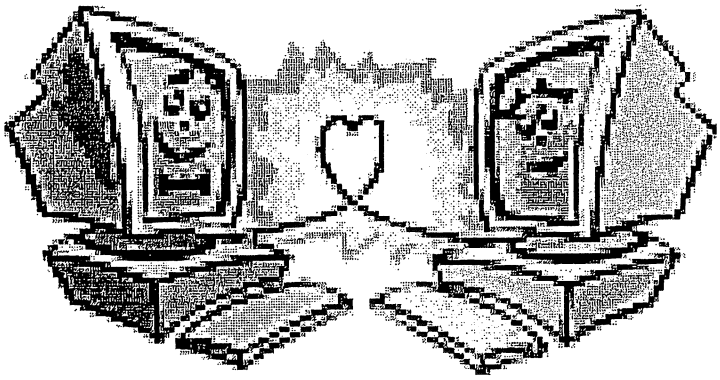
Another divorce website advertised forms for "only $249", and stated that a "client" would save $4,000 using the website because a family law attorney charges "$200.00 an hour, typically." Of course, the website did not further explain what a "typical" family law attorney may provide, and did not discuss to what jurisdictions this rate or alleged average cost may apply.

One other website had several articles discussing the fact that the internet causes divorces because people choose to chat with others, thereby creating internet affairs. Again, no statistics were provided for how many divorces are as a result of the birth of chat rooms, but the writers of these articles seem very sure that divorce in the millennium was due to the use of the internet.

On a positive note regarding internet divorce networks, one somewhat "classy" looking website, within the first paragraph, stated that it was a non-lawyer service and that it did not give legal advice. It did advertise that when compared to the cost of a lawyer service, its fees were unbeatable. This website basically admitted to providing no legal advice, but existed for the mere purpose of acting as paperwork specialists assembled to assist an individual seeking a divorce in their time of need.

After what seemed like hours of research on the internet regarding the new-age divorces, I decided to end my time on the computer until I came across an article written by a former criminal attorney, providing her opinion of internet divorce services. I had to keep reading, as you can imagine, and discovered that she truly believes that divorce lawyers are not counselors, and simply provide the necessary legal expertise to those choosing divorce and then prepare the appropriate paperwork. By doing the same thing, the author continued, the internet is making these same forms available to the average divorce party for a reasonable cost, (not those exorbitant fees we all charge!). The former criminal attorney also vehemently proclaimed that it is ridiculous to suggest that the internet divorce services encourage divorce, just because they make self-created forms more readily available to the public.

In signing off these most informative, and definitely entertaining websites, only one phrase came to mind: buyer beware! Whether you are trying to marry or divorce with the assistance of the internet, you are encouraged to be careful, know to a certain degree what you are looking for, whether you are looking for love or divorce, and to always and wisely seek independent legal advice.



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