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Collaborative Process - The New Alternative Legal Process for Amicably Resolving Disputes

by Richard M. Morgan & Loraine M. DiSalvo

In our July 2010 newsletter, we discussed various dispute resolution processes. We discussed traditional litigation, along with arbitration and mediation, which are two of the alternative dispute resolution processes which were developed to address some of the shortcomings of traditional litigation (to review the July 2010 newsletter, please follow this link:

http://webtechmarketing.com/email_blasts/MorganDisalvo/Estate_Trust_Dispute_Resolution_Philosophy_Options_Newsletter_July_2010.pdf).

As we discussed, each of these processes has some limitations and negative effects which can result in less than satisfactory outcomes in many cases, sometimes even for the “winning” party. We also provided an introduction to the collaborative law process in the July newsletter. In this August 2010 newsletter, we would like to focus in more detail on the collaborative law process.

Traditional litigation, in particular, often results not only in great financial costs to the parties in a dispute, but in extremely damaging emotional costs as well. Arbitration and mediation, while they can help reduce these costs, often still do not leave the parties to a dispute feeling as if their concerns were addressed and that they can be happy with the way the dispute was settled. In the late 1980s, Stuart Webb, a Minnesota lawyer, decided that there had to be a better way than litigation, arbitration, or mediation for families to deal with divorces and divorce-related matters. He eventually developed the concept of collaborative law, which has been used in divorce cases for about 15 years.

In the collaborative law process, the goal from the beginning is for the parties to the dispute to come up with a negotiated settlement that they can all live with. In order for a dispute to be resolved through the collaborative law process, all parties to the dispute must agree to use the collaborative process. Each party will still have his or her own attorney. Because the process has significant differences from other forms of dispute resolution, the attorneys must have been trained in the collaborative law process.

At the beginning of a collaborative matter, the parties and their lawyers all agree to certain rules regarding how information and documents will be shared between the various parties. They must also agree to approach negotiations and other interactions honestly and with an open mind, and to make a good faith attempt to reach a mutually acceptable agreement on settling the dispute. In addition, the parties must all agree that, if they are unable to reach a final settlement agreement through the collaborative process, all parties must hire new attorneys and other experts before they will be able to proceed with traditional litigation. These rules are intended to provide the parties with some extra incentive to work together, fully disclose information and documents which may be relevant to the matter, and really try to reach an acceptable resolution. The rules are agreed to in

writing, in a Participation Agreement which must be signed by all of the parties and their lawyers. The parties select a neutral third party, generally known as a facilitator, who will help them and their attorneys work through the collaborative negotiation process. Facilitators are usually mental health professionals by background (such as social workers, psychologists, or psychiatrists). The facilitator's job is to help ensure that each party's actual concerns are expressed and understood by the other parties, using the facilitator's training in listening to and interpreting both verbal and non-verbal communications. The facilitator, the parties, and the parties' attorneys have one or more meetings, at which the facilitator helps the parties and their attorneys work through their thoughts about the dispute and potential resolutions. If the parties believe that advice or information from other professionals, such as appraisers, financial advisors, or CPAs, is needed, then they mutually select and hire the appropriate experts. Those experts are then also expected to serve as neutrals, to provide the needed advice or other information in as objective a manner as possible.

Collaborative law sessions are similar to mediation sessions in that the goal is for everyone to work together to reach a mutually acceptable solution. They differ from mediation in that everyone in a collaborative law session should have access to all relevant information and documents, and all expert advice is provided by neutral parties, rather than each party providing his or her own experts. The facilitator and the neutral experts are also generally more free than a mediator to offer professional advice to the parties. Collaborative law also differs from traditional mediation in that the potential loss of all lawyers and other professionals if the process fails and litigation results can add some extra incentive for the parties to really try to reach an agreement.

The collaborative approach, unlike other dispute resolution methods, was specifically developed to help preserve or repair the parties' ability to get along with each other. The facilitator's efforts to ensure that each party's concerns are fully discussed and addressed can help significantly in this regard. In estate and trust disputes, the parties are often family members who may need or want to have a continuing relationship in the future, and we believe that the collaborative law process may be the dispute resolution process most likely to allow the parties to rebuild their relationships after the dispute has been resolved. The collaborative law process can also offer the same type of benefits in other civil matters, such as disputes over the control or ownership of a business, or disputes over an employment contract.

Because the collaborative law approach requires attorneys to put aside a lot of the tactics, rules, and techniques associated with a more traditional, litigation-oriented approach, lawyers who wish to practice the collaborative approach must be specially trained and certified in collaborative law. Both Richard Morgan and Loraine DiSalvo went through the Civil Collaborative Certification Training Process in February 2010. They now passionately believe that the collaborative law process can have many advantages over traditional litigation or other alternative dispute resolution processes, when used by the right parties in the right matter.

In the right situation, the collaborative law process can result in a more satisfying settlement for all parties, with lower financial and emotional costs. We at Morgan & DiSalvo are proud to be able to

offer our clients the collaborative law process as an alternative dispute resolution method, as part of our overall commitment to helping our clients and their families resolve disputes while avoiding litigation whenever possible. If you or someone you know fears that they may soon become involved in a dispute over an estate, trust, or business related matter, please call us at (678) 720-0750 for an appointment to discuss the potential dispute and the options available for dealing with it.