

## *A Case Against Collaboration*

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The costs and shortcomings of divorce litigation are well known, and complaints about the divorce process are long standing. Those who highlight the problems of divorce note that the traditional model is one in which “no one is happy: not the clients, the attorneys, or the judges.”<sup>1</sup> One solution to the cost, hassle, and headache of divorce court has been to turn to mechanisms of alternative dispute resolution. For example, mediation (conducted by lawyers or mental health professionals) has been a tool for resolving child custody and other disputes for decades.

Collaborative divorce is part of a larger trend in family law away from court-managed processes and toward client-directed dispute resolution. However, collaborative divorce is distinct from mediation or arbitration in a number of ways. In collaborative divorce, separating spouses hire attorneys that agree to work together to reach a settlement agreement. In addition, a team of experts – mental health professionals (or divorce coaches), financial neutrals, and parenting coordinators – helps clients resolve conflicts and settle property, support, and custody issues. The entirety of the process concludes before a divorce petition is filed. If a client leaves the process, or negotiates in bad faith (disclosure is voluntary and not discovery driven), the lawyers and the other professionals pledge to withdraw from representation and agree not to assist clients in another, non-collaborative process.

A movement supportive of collaborative divorce is gaining momentum. States across the United States have enacted laws that specifically permit collaborative teams to work with divorcing couples, and the Uniform Collaborative Law Act, drafted in 2006, provides a model for that legislation. Advocates for collaborative divorce write in a near evangelical tone to describe collaborative law’s transformational effects. Collaborative divorce promises clients’ opportunities for emotional healing and the ability to circumvent an adversarial, court-based process. Thus, an important benefit of a collaborative process for parties (and their lawyers) is its therapeutic approach – reducing the acrimony of divorce, repairing the damage caused by the marital split, and building a foundation for a healthy, post-divorce relationship.

For this reason, collaborative divorce often appeals (and is marketed) to spouses with children who will have shared parenting responsibilities and continuing roles in each other’s lives. Materials promoting collaborative divorce assert that it is also appropriate for almost any couple, except for a few categories of spouses in dysfunctional relationships – for example, abused individuals, who suffer spousal abuse that is broadly defined.

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<sup>1</sup> Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DIS. RES. L.J. 317, 324 (2004).

Most legal scholarship on collaborative divorce focuses on questions of professional ethics – is collaborative practice zealous advocacy? What are the rules for disqualification and withdrawing from a case? This article takes up another line of inquiry and situates collaborative divorce as a response to critiques of no-fault divorce laws. As such, this research is in conversation with contemporary scholarship questioning the diminished role of marital misconduct in settlement negotiations and in divorce proceedings.

The move from fault to no fault divorce was, in part, a feminist strategy that sought to equalize the status of husbands and wives in marriage. This happened concurrently with changing ideas of marriage – from a patriarchal institution defined by coverture to an egalitarian and expressive partnership. It is a transformation, still in process, that this article briefly summarizes, without attempting to reflect fully, the voluminous commentary on the subject. The article’s focus is, instead, on the arguments of scholars and lawyers who have analyzed the dark sides of no-fault divorce laws. Gender neutral and indeterminate custody and alimony laws sometimes work against wives, as oft-cited studies of women’s post-divorce poverty attest. Some family law scholars have argued that the move to no-fault divorce has left ex-wives, and mothers specifically, worse off.

One way to understand support for collaborative divorce is that it can reduce the uncertainty of how courts will apply spousal support and custody laws. Participants in a collaborative divorce are encouraged to “put law to the side” and find creative, tailored solutions to the couple’s particular problems. This often provides the foundation for incorporating considerations of the during-marriage conduct of parties, although the role of parties’ marital misconduct in a collaborative divorce is complicated.

In collaborative divorce, a purported goal is to help heal the relationship between divorcing spouses, to give couples tools to reduce conflict, and to protect the emotional well being of the parties. Collaborative divorce lawyers distinguish the process from an adversarial one by asking spouses to think beyond their desires for vengeance and punishment. In this way, collaborative divorce appears to be relentlessly forward looking – examination of marital failure is for the purpose of healing old wounds and paving the way for a future relationship with one’s ex-spouse. Meeting those goals, however, means accounting for the past: weaved throughout the collaborative literature is the language of atonement for harms caused in marriage. Like many feminist scholars, collaborative law supporters lament that no-fault laws do not give parties a chance to air their grievances and to seek redress. In no-fault proceedings, marital misconduct does not establish a ground for divorce as it did under a fault regime, which had consequences for financial settlement. Collaboration takes up marital misconduct by guiding couples to express their anger and to seek or give forgiveness. Thus, collaborative divorce’s offer of a “healthy recovery” from the end of a marriage may incorporate spouses’ during-marriage conduct with implications for the settlement process.

However, efforts to improve spousal communication and engender forgiveness as described in the collaborative divorce literature may entrench stereotypes that were all too common in the fault era – the innocent wife and guilty husband. Many of the

examples offered in collaborative handbooks, guides, and manuals are of bad-behaving men. This arguably reduces marriage to the gendered, heteronormative roles that were the very source of feminist consternation. Another way in which implicit stereotyping occurs is in collaborative divorce's consistent alignment of the interests of children and wives in divorce.

There are also bargaining costs to the collaborative approach. Collaborative divorce's therapeutic process may work against, as fault did, the "wronging" wife, who is not "innocent" and does not conform to expected roles of wifely or motherly behavior. And it may invite patterned narratives about the end of a relationship, loosely analogous to the collusive explanations of marital failure in a fault regime, that aid in concluding the settlement process. Furthermore, building emotional trust with a soon-to-be ex-spouse, if in exchange for financial concessions or financial gains, may be a bad trade. Collaborative divorce may encourage the less wealthy spouse to agree to have a post-divorce relationship in order to receive support, or induce the wealthier spouse to settle or pay support for atonement.

These exchanges are worth examining because successful emotional outcomes are difficult to demonstrate; discovery of financial information is on good faith; and couples nonetheless may end up in court, and in conflict, over modifications to the settlement agreement and custody arrangements. Finally, collaborative divorce may shift the management of couples' financial obligations from court oversight to a self-defined, and arguably self-interested, bar of collaborative lawyers and collaborative professionals. In this vein, this article builds on scholarship examining the settlement consequences for parties when they pursue divorce options outside of courts.

Part I of this Article describes the origins of collaborative divorce, the collaborative process, purported benefits for clients (and their lawyers), and the quasi-therapeutic component of the collaborative divorce process. Part II describes the historical landscape from which collaborative divorce arose – the emergence of no-fault divorce and the attendant reforms to custody and alimony laws. It looks specifically at the feminist interventions in developing no-fault laws and in contesting the harmful effects on mothers of the best interests test for custody and the reluctance of courts to award alimony to wives. The final part, Part III, considers how collaborative divorce tries to work around the failures of no-fault. Collaborative divorce draws from contemporary scholarship that calls for consideration of marital misconduct in settlement negotiations and divorce proceedings. The article concludes by considering if and how the collaborative process might inadvertently reify the problematic stereotypes of wives and husbands that existed under a fault regime.