Lawyers Taking a Collaborative Approach

It helps family law clients negotiate their own settlements and stay out of court

By Terrence Belford Special to The Globe and Mail Monday, September 9, 2002

The woman was nearing the end of her emotional and financial rope when she came to Port Colborne, Ont., lawyer Margaret Opatovsky. Six months into a divorce, she had already spent $2,000 and her first lawyer was still in the letters-to-the-other-lawyer stage. She had heard from a friend that Ms. Opatovsky practised a new, faster, cheaper way to resolving family law problems.

The process is called collaborative family law, and it turns the old adversarial process on its head. No more months of letter writing, expensive court preparation, elaborate positioning of each side and waiting for court dates and judges to hear petitions and arguments. Instead, both parties agree at the start not to go to court. In fact, if the process breaks down and the parties opt for litigation, neither the lawyers involved nor their firms can handle the court case.

Legal jousting is replaced by a collaborative process where the lawyers on each side act as coaches and not advocates for their clients. The clients do the actual negotiating. They meet face to face and must commit to a solution that reflects the best interests of all parties, children especially.

The upshot of this particular case was that the woman retained Ms. Opatovsky and negotiated a separation agreement acceptable to both parties. It took eight months and four meetings of 1½ hours each to hammer out. It would have taken less time, but the parties had to wait for the report of an independent pension fund evaluator.

"The cost was about $3,000, including my hours, the pension fund evaluation and disbursements, too," says Ms. Opatovsky, a partner in the firm Wilson Opatovsky. "For the whole process the cost was only a bit more than she had already paid to get through the letter-writing stage under the old way of doing things. If the case had continued the way it was going, settlement would have taken years."

Key to the process is that initial commitment to settlement, she says.

"Statistics show us that between 92 and 97 per cent of all cases are settled before trial," she continues. "Why not start out looking for a settlement. Do it that way and you do not have to anticipate a trial and spend all that time doing the work to prepare for one even though chances are it won't be needed.

"Collaborative family law means costs and time frames are slashed and there is much less emotional stress."

With 28 files to date, Ms. Opatovsky can claim to be Ontario's most experienced collaborative practitioner. Granted, they represent about half her total cases. The remainder will be litigated, with that process continuing to play a major role until more lawyers sign up to practise collaborative family law.

In the Niagara Region, which takes up all of Southern Ontario from Hamilton to the U.S. border, there are about 40 lawyers who include family law as part of their practice, she says. By October, half of them will be qualified to practise collaborative family law. That fact explains the

split between litigation and negotiation. For collaborative law to work, lawyers for both sides must be qualified practitioners.

It also explains why the approach has taken root faster in small communities than large ones, says Sharon Cohen, a partner in the Toronto firm Dixon McGregor Appell & Burton and secretary of the Toronto Family Law Collaborative Group, which has 39 members.

"It is more attractive in small centres where lawyers deal with each other regularly and see each other on a social basis," she explains. "They would naturally rather work together than as adversaries. In Toronto, you might work with a lawyer from another firm once every two years. Big cities also have senior people with 20 years experience as advocates, and highly polished skills. They are naturally reluctant to start all over learning a new approach."

In small communities, especially in the West, the collaborative approach has begun to be a significant if not dominant force in family law. In Medicine Hat, Alta., 18 of the city's 19 lawyers practising family law are now collaborative qualified. In Calgary, Victor Tousignant, chairman of the Calgary collaborative group, says one-third of the Canadian Bar Association's family law section are qualified in the collaborative approach.

The popularity of the approach in the West stems from the fact that collaborative law was first practised in Minnesota in 1990, then spread quickly to California and by the late 1990s had worked its way up the West Coast to British Columbia, Ms. Cohen says.

"Frankly, many of us were dazzled by the model when we first heard of it," she says. "Many family law specialists have grown increasingly dissatisfied with the adversarial approach. The emotional cost to families is just so high, not to mention the financial costs."

Adopting collaboration as a standard does require new expertise, she admits. While each regional collaborative family law association has its own requirements for practitioners, the general rule is that they must have at least five years experience, attend regular meetings, complete training courses -- usually two- or three-day sessions -- and commit to continuing education to refine their skills as mediators.

In Toronto, for example, the standard to become a member of the collaborative panel is five years as a family law specialist, completion of a five-day training course and three successful cases. The panel has only two members at the moment. The stumbling block is completing those three cases.