

TAB 9

Precedents

Collaborative Family Law Practice



The Law Society of
Upper Canada | Barreau
du Haut-Canada

CONTINUING LEGAL EDUCATION

[Name of client] and [Name of client]
First Settlement Meeting
[Month, day, year]

Agenda

The following is the agenda proposed for this meeting.

- Introduction of Participants
- Either [first name of lawyer] or [first name of other lawyer] will be appointed to act as a recorder for the meeting and to prepare and distribute minutes to the participants.
- [First name of lawyer] and [first name of other lawyer] will talk briefly about the collaborative process and how it differs from the other dispute resolution methods that are available.
- Copies of the participation agreement will be distributed and reviewed. (The preferred method of review is to read the agreement out loud with each of the participants taking turns.) Questions arising out of the agreement will be answered. Any necessary amendments to the agreement will be made on the spot.
- Copies of the communication guidelines will be distributed and reviewed. Any communication problems the clients see in their relationship that are not covered by the guidelines will be discussed and the guidelines amended to deal with them.
- Each of the participants will sign the agreement in the original form or as amended.
- Each of the clients will be asked to state, if he or she cares to, his or her goals and expectations of the collaborative process.
- Each of the clients will be asked to identify the issues arising out of the marriage and separation that are most important to him or her.
- The issues will be reframed as agenda items and organized in the order of priority the clients set for them.

- Any "burning" issues that need immediate attention will be resolved, probably on a provisional basis to be reviewed when further information is available or other related issues are decided.
- The clients with the assistance of the lawyers will decide what issues are to be placed on the agenda for the next meeting.
- The participants will decide what homework is to be assigned and completed before the next meeting.
- The date and time of the next meeting, or the next two meetings will be scheduled.

Prepared by James C. MacDonald

This is a **COLLABORATIVE FAMILY LAW PARTICIPATION AGREEMENT**
made on [month, day, year] by the following clients and their lawyers.

The clients,

[Client Name] and [Client Name],

and their lawyers,

[Lawyer Name] and [Lawyer Name],

have chosen to use collaborative law principles and the collaborative law process to settle the issues arising from the clients' separation.

Each client and each lawyer is a party to this agreement. Collectively, they are referred to as the "participants".

I. Purpose of the Process

The purpose of the collaborative law process is to settle the outstanding issues in a non-adversarial manner by employing cooperative principles in order to minimize, if not eliminate, the negative economic, social, and emotional consequences that would result from litigation or adversarial negotiations.

To this end, the participants will attempt to resolve the issues arising out of the relationship of the clients and their separation by focusing on the merits of the issues and the clients' common interests.

II. Children's Issues

In resolving issues about sharing the enjoyment of and responsibility for their children, the participants will make every effort to reach amicable solutions that promote the children's best interests.

The participants will act quickly to resolve the clients' differences related to the children in order to promote a caring, loving and involved relationship between the children and both clients.

During the collaborative law process neither client will make changes to the residence of the children nor remove them from Ontario without the prior consent of the other client.

The clients acknowledge that inappropriate communications regarding their separation can be harmful to their children. They will refrain from criticizing or belittling the other parent, or his or her spouse or family in the children's presence.

The clients will not use the children for the purpose of communicating with each other.

The clients will not discuss settlement issues in the presence of their children. Communication with the children regarding these issues will occur only if it is appropriate and on consent of both clients, or on the advice of a child specialist retained by both clients.

III. Principles Governing Participation in the Collaborative Law Process

All differences between the clients are to be settled without going to court or without either client commencing legal proceedings.

Instead, differences are to be settled, mainly, through informal discussions and conferences. These discussions and conferences will be focused on the concerns, needs and interests of the clients and on generating options to satisfy them.

Neither the clients nor their lawyers will use the threat to withdraw from the process or to commence legal proceedings as a means of achieving a desired outcome or forcing a settlement.

Written and verbal communication among all participants will be respectful and constructive.

The clients will be encouraged to speak freely and each client is to express his or her concerns, needs, interests, and options without criticism or judgment by the other.

The participants are to take a moderate approach to all of the differences between the clients. Where interests differ, each of the participants will use his or her best efforts to create options that are acceptable to the clients. If necessary, the clients are to compromise to reach a reasonable settlement of all issues.

None of the participants will take advantage of inconsistencies or miscalculations discovered in information furnished by any other participant, but will inform the other participants about them and seek to have them corrected.

The lawyers' representation is limited to providing services within the collaborative law process. Both lawyers, and other lawyers in their firms, will be disqualified from representing their respective clients in a contested legal proceeding against the other client.

Each lawyer will advise his or her client of the client's rights and obligations on all issues relevant to the relationship and the separation. The nature and particulars of the advice given will be communicated to the other participants to the extent necessary to further the negotiations toward settlement.

Each lawyer will assist his or her client in the negotiations. However, the lawyers respect the intelligence of the clients and the clients' own ability to voice their concerns and express their interests. To the extent practicable, and to the degree desired by the clients, the clients will conduct the negotiations with the lawyers present as negotiation consultants and coaches.

IV. Good Faith Dealings and Exchange of all Important Information and Documents

Each of the participants acknowledges that the utmost integrity and dealing in good faith is required of the clients and the lawyers throughout the process. Good faith includes taking all reasonable steps to ensure that the negotiations are "unimpeachable" so that, among other things, any agreement resulting from them is signed by the clients "voluntarily" and not under pressure.

All rights to examinations under oath, formal court hearings, restraining orders and other procedures provided by law and by the rules of the court are suspended for the duration of the collaborative law process.

The clients assisted by their lawyers will voluntarily furnish all information and produce all documents that are important in relation to the issues to be resolved in coming to an agreement. In determining what is important in relation to the issues, the participants will not be restricted by what may be legally relevant, and acknowledge that in undertaking to furnish all important information and to produce all important documents they are including information and documents that may be legally irrelevant or legally privileged from disclosure.

All decisions made, and any settlement agreement reached, will be based on the understanding that each side has furnished all important information and produced all important documents that ought to have been furnished and produced for a proper resolution of the issues.

V. Use of Other Professionals

When appropriate and needed, the participants will use the services of other professionals such as financial planners, valuers, tax planners, child specialists and divorce coaches. They will be retained jointly by the clients as neutrals and will be directed to work in a manner consistent with collaborative principles.

Prior to retaining another professional, the clients will determine whether the professional's fees will be paid by one or both of them, and if by both the proportion each is to contribute. They will determine also whether any opinion or report by the professional will be covered by the confidentiality clause in this agreement. If, for any reason, the clients fail to address the question of confidentiality, any opinion or report given by the professional will be subject to the confidentiality clause of this agreement.

VI. Cautions and Limitations

The clients acknowledge that electing the collaborative law process does not guarantee their claims will be successfully resolved. They understand that the process cannot eliminate concerns about disharmony, distrust or irreconcilable differences.

The clients acknowledge that it is the primary responsibility of each of them to assert his or her concerns, needs and interests, or make them known to his or her lawyer for assistance in this respect.

The clients further acknowledge that while the collaborative lawyers share a commitment to the process described in this agreement, each of them has a professional duty to represent his or her own client diligently, and is not the lawyer for the other client.

VII. Consent to Extension of Time to Protect Legal Rights

Each client hereby consents to the suspension for the duration of the collaborative law process of any limitation period limiting the time within which a cause of action or a step in a legal proceeding may be commenced or taken by either of them against the other. If, but for this suspension, such limitation period or time allowed for the taking of any step would expire during the collaborative law process, each client hereby consents to a reasonable extension of time to permit the commencement of the action or the taking of the step.

VIII. Withdrawal of Client or Lawyer from Collaborative Law Process

If a client wishes to withdraw from the collaborative law process with their current lawyer, but retain a new lawyer to continue with the process, the client shall give written notice to the other client through his or her lawyer, of their intention to obtain a new lawyer. The new lawyer shall execute a new collaborative law participation agreement within 30 days of the client giving notice. If a new agreement is not executed within 30 days, the other client shall be entitled to proceed as if the collaborative law process was terminated as of the date written notice was given.

If either lawyer withdraws from the process for any reason except those set out in the Mandatory Termination clause of this agreement (see below), the withdrawing lawyer shall give written notice to his or her client and to the other client through his or her lawyer. If the client whose lawyer has withdrawn elects to continue with the process, he or she shall give written notice of this intention to the other client through his or her lawyer. The new lawyer shall execute a new collaborative law participation agreement within 30 days. If a new agreement is not executed within 30 days, the other client will be entitled to proceed as if the collaborative law process was terminated as of the date the first written notice was given.

If a client or his or her lawyer decides to terminate the collaborative law process, written notice shall be given to the other client through his or her lawyer.

On termination of the collaborative law process by a client or a lawyer, there will be a thirty (30) day waiting period (unless there is an emergency) before any court hearing to permit the clients to retain new lawyers and make an orderly transition. All temporary agreements will remain in full force and effect during this period. The intent of this provision is to avoid surprise and prejudice to the rights of the other client. Either client may bring this provision to the attention of the court to request a postponement of a hearing.

IX. Mandatory Termination of the Collaborative Law Process

A lawyer must withdraw from the collaborative law process if he or she learns that his or her client has withheld or misrepresented information and continues to withhold and misrepresent such information, or otherwise acted or used the collaborative law process in a manner to undermine or take unfair advantage of the other client. The lawyer withdrawing will advise the other lawyer in writing, without giving reasons, that he or she is withdrawing and that the collaborative law process must end.

X. Confidentiality

All communications and information exchanged within the collaborative law process will be confidential and without prejudice. If subsequent litigation occurs,

- (a) neither client will introduce as evidence in court information disclosed during the collaborative law process, except documents otherwise compellable by law including any sworn statements as to financial circumstances made by the clients;
- (b) neither client will introduce as evidence in court information disclosed during the collaborative law process with respect to either clients conduct or legal position with respect to settlement;
- (c) neither client will request or compel either lawyer to attend court to testify in any court proceedings, or request or compel either lawyer to attend for an examination under oath, with regard to matters disclosed during the collaborative law process;
- (d) neither client will require the production at any court proceedings of any notes, records or documents in the lawyer's possession.

These guidelines with respect to confidentiality apply to any subsequent litigation, arbitration or other process for dispute resolution.

XI. Rights and Obligations Pending Settlement

During the collaborative law process,

- (a) each client will respect the other's privacy;
- (b) neither client will incur any debt or liability on behalf of the other for household and living expenses without the other's prior written consent, except for those expenses ordinarily incurred by the family in the normal course of day-to-day living;
- (c) neither client will dispose of any personal asset (including assets such as real property, vehicles, savings, investments, pensions, and retirement plans) without the written consent of the other, nor, except as may be required in the ordinary course of business, of any business asset without the consent of the other;
- (d) neither client, without the consent of the other, will change the coverage or beneficiary of any existing
 - i. insurance policy,
 - ii. health plan,
 - iii. dental plan,
 - iv. or other policy or plan that benefits any member of the family.

XII. Enforceability of Agreements

If the clients require a temporary agreement during the collaborative law process, the agreement shall be in writing and signed by the clients. If either client withdraws from the collaborative law process, the temporary agreement is enforceable and may be presented to the court as a basis for an order.

Any final agreement signed by the clients may be incorporated in a court order or filed with the court for enforcement.

XIII. Acknowledgement

Both clients and their lawyers acknowledge that they have read this agreement, understand its terms and conditions and agree to abide by them.

[Month, day, year].

[Client Name]

[Lawyer Name]

[Client Name]

[Lawyer Name]

Prepared by James C. MacDonald

COMMUNICATION GUIDELINES FOR THE COLLABORATIVE FAMILY LAW PROCESS

1. Attack the problem and concerns at hand. Do not attack each other.
2. Avoid positions. Instead, express yourself in terms of needs or interests and the outcomes you would like to realize.
3. Work for what you believe is the most constructive and acceptable agreement for both you and your family.
4. During 4-way meetings (both lawyers and both clients will be present) remember the following:
 - a) Be respectful of others.
 - b) Use each other's first name and avoid "he" or "she".
 - c) Do not interrupt when the other client or his or her lawyer is speaking. You, also, will have a full and equal opportunity to speak on every issue presented for discussion.
 - d) Do not use language that blames or finds fault with the other client. Use non-inflammatory or neutral words.
 - e) Avoid using the terms "fair" and "unfair." Instead, use words like "acceptable," "workable," "agreeable," and their converses, "unacceptable," "unworkable," "not agreeable."
 - f) Speak for yourself. Make "I" statements, not "you" statements.
 - State what you observe. (For example, "I noticed that twice this month times that were scheduled for the children to be with you simply did not happen.")
 - State how you feel about what you observe. (For example, "I feel worried and unhappy about this.")
 - State what you think about what you observe. (For example, "I think it is bad for the children to have scheduled time with you that does not happen.")
 - State what you would like to do about what you observe. (For example, "I want you to propose a schedule that could be put into place for visits that would not result in the children being disappointed in that way.")

- g) Practice active listening.
 - Listen fully while the other person speaks; avoid planning your reply until the speaker has finished.
 - Try to understand what the other is saying without being judgmental about the person or the message.
 - Ask for more information on any points that aren't completely clear to you.
 - Check out how accurately you understand what the speaker said by restating your understanding in different words.
 - Keep doing these steps until the speaker agrees that you have fully understood what was said.
 - Remember, you can say "I understand" without meaning "I agree."
 - h) If you have a complaint, raise it as your concern and follow it up with a constructive suggestion as to how it might be resolved.
 - i) If something is not working for you, tell your lawyer so it can be addressed.
 - j) Talk with your lawyer about anything you do not understand. Your lawyer can clarify issues for you.
5. Be willing to commit the time required to meet regularly. Be prepared for each meeting.
6. Be patient - delays in the process can happen notwithstanding that everyone is acting in good faith.

Adapted by James C. MacDonald from Collaborative law, A Training for Family Law Attorneys, Stuart G. Webb, and from Collaborative Law, Achieving Effective Resolution in Divorce without Litigation, Pauline H. Tesler.

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