

More couples choose 'friendly' divorce

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Alex Crookes knew he was in for a divorce with a difference the minute he walked into a lawyer's office with his ex-wife, Lynne Maclennan.

The couple instinctively sat at opposite sides of the table, until one of their lawyers, trained in the relatively new concept of collaborative family law, set a more comfortable tone for the talks.

"The first thing the lawyer said was, 'Sit next to each other,'" says Crookes, 37.

So the Toronto couple, who've been together almost 15 years, share a three-storey house and two young children, plotted out their new future – and separate lives – over the course of two "very difficult" meetings.

"It was very nonconfrontational," says Crookes, who is in the midst of moving into a new home this week, a couple of blocks from his 8-year-old son and 5-year-old daughter.

"The lawyers were there to make sure that nobody was screaming or throwing coffee cups at each other, but that seemed to be their primary role," he says. "It was up to us to talk about what we were scared of, what we were worried about, what we wanted to achieve."

Maclennan and Crookes once questioned whether the cost, about \$6,000 each, was worth it.

"We were laughing because we went to both meetings together, we drove in the same car, we had lunch together afterward. We said, 'Do you think we really needed the lawyers?'" says Maclennan, 40.

"But really we did because (the collaborative process) forced us to move things along rather than languishing. There were some things that gave me a different perspective."

Collaborative law was first introduced in Minneapolis in 1990s and made its way to Canada a decade later as a much-needed alternative to ugly court battles that could cost a fortune and leave the couple, and their kids, scarred for life.

Since then Toronto has become a "hotbed" for collaborative settlements, divorce experts say, and it's growing in popularity right across Canada. In 2000, just 75 Canadian lawyers were trained in collaborative practice. Today they number more than 2,800.

Collaborative practice puts the separated couple in the driver's seat, or, more appropriately, seats. While their lawyers are always in the room to offer advice or give guidance, the couple sort out for themselves how they want their life to look post-divorce, where the kids will live and how much of the time, what the primary breadwinner will pay in support.

Nearby are also financial and family counselling experts who can help clear away unexpected hurdles and get the two sides back on track if things start going off the rails, without the "bottomless pit" of \$300 to \$600 per hour lawyer fees needed to mount a court challenge.

Thanks to the growth in collaborative practice, as well as mediation and then arbitration as last resorts if an agreement can't be reached, just 2 to 3 per cent of all divorces now end up in court, divorce experts say.

"I think as divorce rates increased and lawyers became better educated in family law, they learned about the pain and the suffering, and that slogging it out in a courtroom is a very hard way to make a living," says Philip Epstein, who is trained as a collaborative lawyer but prefers mediation. "To be in a profession where it's all about winning and losing is just too painful for all concerned."

Family law lawyer Sheila Kirsh, one of the founding members of Collaborative Practice Toronto, an umbrella group for some 81 lawyers, 17 family counsellors and 15 financial experts, did litigation for 20 years until one final court battle made her think differently.

"At the end of the day, I won, but I wasn't feeling very satisfied with what had happened. I thought there had to be a better way than going through three years of litigation, a way to have families remain intact – yes, they're going to have separate households – with both still willing to go to their children's weddings."

Divorce lawyers have had to become especially "creative" since last fall because of tanking stock prices, pension plans and house values that made it almost impossible for experts to come up with net worth calculations and determine support and the split of assets. The ongoing uncertainty has forced many lawyers to look at more open-ended agreements that can be revisited in a few months, or years, when the economy rebounds. Collaborative law lends itself especially well to that, says family law lawyer Judith Huddart.

Epstein spent decades battling it out in court, but now settles 98 per cent of his cases through mediation. Few go the next step, arbitration, in which an independent person looks at both sides of the case and makes a binding judgment.

Epstein is also trained in collaborative law, but believes it works best for couples who "are not overwrought or not overly emotional about their divorce and can treat each other as equals.

"I believe that the system works better if the lawyer has reasonable control over the process (mediation.) Collaborative law believes the client should be in control. One of the advantages of a lawyer is that I'm objective about the outcome."

Everyone agrees the key is staying out of court.

"What's ruinous for people is if they settle too late. Even if they settle in the middle of a trial, they've spent all the money," says Epstein.

Just last week, he helped settle "one of the most difficult (divorces) I've ever seen." Lawyers had already amassed "a room full" of documents, anticipating a court case.

He warned the couple repeatedly that litigation would take about 10 days and cost them at least \$100,000 each. And he stressed the outcome could be highly unpredictable, depending on how the judge applied divorce case law and "spousal support guidelines" that give ranges for how much support should be paid, depending on income and length of the marriage.

In mediation, he stressed, you get to choose your own "judge." In court, one is assigned to you.

At the end of that reality check, Epstein gave the couple a day to try reaching a settlement through mediation. They had a deal by 7 o'clock that night, at a cost of about \$7,500 each.

"It's a bottomless pit if you start preparing for a trial," says Epstein, which is why he recently wrote a paper for judges, urging them to talk money at every pre-trial conference – "they're shy about that" – so that couples are well aware how much they are paying their lawyer per hour, how long the case might take and the risk of having to pay court costs if they lose.

"The right time (to settle) is when the parties are emotionally ready to actually want to do business. The problem with matrimonial law is that it's sometimes about vengeance or hurt or the inability to let go. Those are poor candidates for early mediation (or collaboration.)"

Maclennan cautions that collaboration isn't a cakewalk – and since neither had had an affair or held on to some seething hatred, their separation was less complicated than many. But still, she and Crookes "had to put personal differences and desires aside to a large extent" and work hard toward their common goal of "putting the kids' well-being first."

"In order to do this we had to respect each other and learn to communicate better. It has been hard but, in the end, it's definitely worth it."