

BREAKING UP AFTER 40 YEARS OF MARRIAGE IS HARD TO DO: SUCCESSFULLY NAVIGATING THE GRAY DIVORCE

The longer a couple has been together, the more ingrained are the patterns of behavior between them. Just a look or a tone of voice can set off conflict. For couples who are divorcing after spending decades together and raising children to adulthood, investigation into the process options for the divorce should not be ignored or shortcut.

The collaborative process (CP) is an out of court process which offers a less combative and more transparent forum for untying the marital knot and is particularly well suited for couples having a so-called “Gray Divorce.” For these older families contemplating how best to get through the divorce process, collaborative divorce offers a clear and proven path to untie the knot gently and purposefully, rather than cutting it apart with a sharp knife and leaving the ends to fray and dangle unattached.

Let’s face it, change in life is mostly hard and painful. Typically we don’t invite change, but it comes upon us. Whether it’s illness or death, separation or divorce, or simply a habit that needs changing, all successful change requires deliberate behavior and dedicated focus. The CP brings together a carefully selected team of supportive professionals, who, through a series of meetings, help the couple to unravel the marriage knot as they work through and resolve all their issues.

To get the CP started, each party retains a collaboratively trained attorney, a coach, and a financial neutral. The coach

monitors the inevitable emotional gyrations and helps with communication challenges during the meetings. The financial neutral will receive, review, and chart the assets and debts of the couple. The financial neutral may also appraise business interests, determine income tax aspects of retirement assets, and recommend options of how best to divide and distribute complex assets. Unlike in a courtroom setting, the financial neutral is working for the process and remains neutral throughout the engagement.

In a longer marriage, the couple has typically established a system for handling the “business” of the family. At the first collaborative meeting, the couple discusses and critiques the system currently in place, and then tweaks it as necessary to agree on a status quo to assure bills are paid, earnings are deposited, and beneficiary destinations continue naming each spouse. The handling of the family business per the agreed upon status quo will continue until the parties have otherwise agreed in the CP.

Following the establishment of the status quo, each party will describe her/his post-divorce goals and concerns in financial, family, personal, and professional areas. Addressing those concerns and attaining those goals are the team’s work during the CP. Hearing each other’s concerns and validating each other’s goals for the future acts to ease the tension and complexity of the parties’ marital knot.

Concerns unique to the Gray Divorce include how inheritances and financial gifts already received from parents and relatives will be treated. If one party used all her inheritance to pay the children’s college tuition, how will her expectation of repayment be treated? Because her inheritance, rather than family funds, paid college tuition,

the other spouse was able to make larger contributions into his retirement plan. If she can receive a larger portion of the retirement funds, will she feel adequately compensated for the loss of her inheritance? These are real concerns. The opportunity to address such concerns with the support and in the safety of the CP more frequently than not will lead to a mutually satisfactory resolution. Conversely, in a courtroom setting, many issues surrounding the payment of college tuition for adult children are outside of the Court's jurisdiction.

Another concern unique to the Gray Divorce is the short future earning horizon available to recoup funds lost in the divorce process. The timing and length of the CP rests entirely with the couple. The parties determine just how quickly and in what order the financial and other issues are addressed. The disclosure of assets and debts proceeds without formal discovery, because in the Participation Agreement, which is the contract by which the parties agree to use the CP, each party is obligated to provide all documentation and information that anyone requests. What may take months and thousands of dollars to achieve in the courtroom can take mere days and nominal funds to achieve in the CP. The good will and trust built by each party voluntarily providing requested financial information also helps to untwist the marital knot created during the long marriage.

Typically in the Gray Divorce, couples have more equity in their residence, which may be one of the largest assets to be addressed, valued, and distributed in the marital estate. Working collaboratively, the parties can accurately determine the cost of one of them keeping the house and how sharing the equity with the departing party can best be achieved. Conversely, if the house is to be sold, a review of the IRC exclusions (IRC § 121) for sale of primary residence can lead to certainty about any income tax consequences of a sale.

Concern for providing an inheritance to the children often weighs heavily in the Gray Divorce. These couples often have signed Powers of Attorney, Health Care Powers, Wills, and estate plans that include each other and provide for the children's inheritance. Protecting the inheritance potential of children is not typically addressed in the courtroom, but

can be addressed in the CP. Design and coordination of new estate plans can be discussed, agreed to, and achieved. With cooperation and respect, the family's estate plan can be rewritten to recognize the divorce and still secure an inheritance for the parties' children. Acknowledging that the marriage has ended but that the family continues through a coordinated estate plan will help to untie the marriage knot for both the couple and the family with a minimum of rancor and anxiety.

In conclusion, the CP is particularly well adapted to the so-called Gray Divorce, having advantages both for the couple and the couples' family.

About the Author:

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Lea leads the firm's Family Law practice, which includes the Collaborative process, and is also a member the Estate Planning and Administration and Business Law Groups.

Since 2007, Lea has concentrated her family law practice in the methods of out-of-court alternative dispute resolution, which include mediation

and collaborative law. Each process reaches resolution by settlement customized to address the needs of each separate case. Collaborative law focuses the parties on maintaining healthy relationships with children and extended family during and after the divorce. With over 80 hours of focused mediation training, Lea will help mediating parties find the solution right for them.

While Lea is dedicated to the collaborative process, she also recognizes that sometimes court is inevitable. She is an experienced litigator in traditional divorce matters, including equitable distribution, support and alimony issues, custody matters, property negotiation and settlement of marital claims (including real estate matters). Drafting and enforcing pre-marital agreements is also an important component of her family law practice.