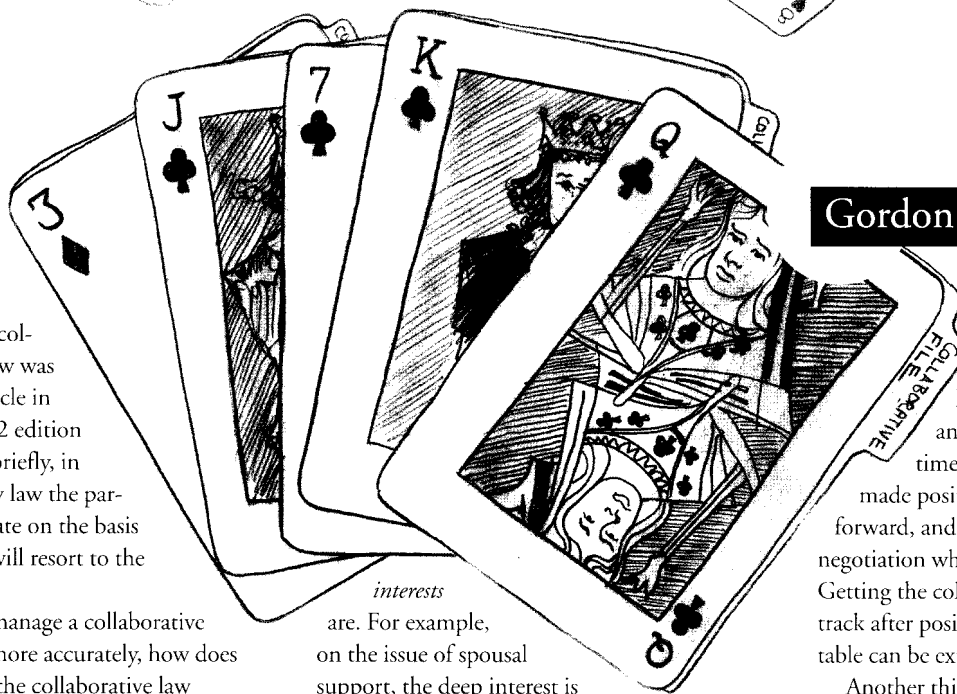


Putting Family Cards on the Table

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The concept of collaborative family law was explained in an article in the April/May 2002 edition of *LawNow*. Very briefly, in collaborative family law the parties agree to negotiate on the basis that neither party will resort to the litigation process.

How does one manage a collaborative family law file, or more accurately, how does one keep it within the collaborative law process?

Collaborative family law is process oriented, and participants must take it on faith that following the process will lead to resolution. The resolution or outcome, all things considered, will be superior to the outcome that would have been achieved through litigation. The difficulty I find as a Registered Collaborative Family Lawyer is keeping the participants, myself included, within the process to be followed for collaborative family law.

Everyone has a tendency to revert to positional negotiation. For those unacquainted with the term, positional negotiation occurs when each party sets out his or her position, which is usually quite an entrenched position. Any settlement would be somewhere on the continuum between the two positions. Extreme positions are usually taken as part of the bargaining strategy we have all learned.

In contrast, collaborative family law rejects positional negotiation, and instead attempts to use interest based negotiation and mediation principles. Interest based negotiation is an exercise in first ascertaining what each party's *deep*

interests are. For example, on the issue of spousal support, the deep interest is never really just some dollar figure. It is almost always financial stability or, alternatively, the need for a clean break and certainty. Once those deep interests are identified through a long process of probing, the parties would then move on to identifying every possible option that may satisfy the deep interests.

Through the process of probing to identify deep interests and generating options, parties often begin to understand where their spouse is coming from. One of the almost mantra-like phrases used in Collaborative Family Law training is "seek first to understand, then to be understood".

Going through the process of probing for deep interests and generating options is often

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time consuming. Participants have often made their mind up beforehand about what they want and tire of participating in the time consuming *process*. Ready-made positional solutions are brought forward, and everyone lapses into positional negotiation where we all seem most familiar. Getting the collaborative process back on track after positions have been put on the table can be extremely difficult.

Another thing that often goes off track in a collaborative family law file is the principle of transparency. That is, that there be as little conversation between lawyer and client behind closed doors as possible. A prominent collaborative family law practitioner and trainer has stated that she finds it most helpful to give legal advice in the presence of the other party and his or her lawyer. In that way, legal advice can be tempered or expanded upon by the other lawyer. Not knowing what information the other party has is like negotiating in a vacuum, and will eventually lead back to positional negotiation.

As you will have gathered, collaborative family law involves a process which does not come naturally to participants. Managing to keep clients, and yourself, from exercising the natural inclination to use positional negotiation, and keep certain information confidential, is a difficult task.

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