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Divorce without Courts

By Jane Gross

WHITE PLAINS

MICHELLE GESKY'S first divorce took three years, tens of thousands of dollars and incalculable heartache. A settlement was reached before trial, but not without appearances before the judge and the assignment of a social worker to defuse a thorny custody issue.

Now Ms. Gesky, 41, is divorcing again, determined "to get past the emotion and not make what is already terrible worse." She also wants all three of her children, two from her first marriage and one from her second, to be spared the acrimony.

Her husband, Tom, 36, does not bear the same scars. But he, too, hopes for a divorce where the couple "can care for each other afterward, like the friends we once were" and congenially raise their infant daughter.

With those goals in mind, the Geskys decided to try a process called collaborative divorce. Invented more than a decade ago by Stuart G. Webb, a burned-out Minneapolis matrimonial lawyer, it is gaining in popularity around the nation and has recently made its way to New York State .

On a recent evening, at a four-way negotiating session in White Plains with their lawyers, the couple sat shoulder to shoulder on adjoining chairs. It was a peaceful tableau. They didn't recoil from each other's touch. Nor did they bicker or fall silent at moments of disagreement.

Already they had made progress toward decisions about selling their house, dividing their pensions and designing a joint child custody arrangement.

They were considering their daughter's changing needs: nursery school soon, later ballet or bassoon lessons, boyfriends, college. The lawyers chimed in with what-ifs. A stranger in the room could not have told which lawyer represented which client.

"I've lived through the process of a contentious, adversarial, drawn-out, money-hungry divorce, and it's devastating," Ms. Gesky said. "This time I don't want that pain. I want clarity and release."

Collaborative divorce is now available in 35 states and much of Canada . According to Mr. Webb, who simultaneously gave up litigation and became a Buddhist, 4,500 lawyers nationwide have been trained in the protocol, which halves the legal costs of divorce. New York, where state laws make dissolving a marriage costlier and arguably nastier than anywhere in the nation, is a relative newcomer, with collaborative lawyers first taking cases about two years ago.

In some ways, the method resembles mediation in its problem-solving approach. But rather than a neutral mediator, each party brings a lawyer to the sessions, as advocate and adviser. But the very format changes how lawyers behave.

"We are by nature competitive," said Barry Berkman, who organized the first group of collaborative divorce lawyers in New York City and Westchester County after learning about the process at a California symposium. "Otherwise we'd be botanists."

Most matrimonial lawyers measure success by who won, and for how much. "This is different," he said. "Success is a resolution that works for both parties."

The cornerstone of the process - and its most controversial element - is that the two lawyers sign a pledge to withdraw from the case if either of their clients decides to go to court. This gives the lawyers an economic incentive to leave adversarial habits behind. It also encourages clients to stay at the bargaining table, since bolting means starting over with new counsel.

Collaborative divorce also requires a full disclosure of assets and respectful behavior at all negotiating sessions. Yelling, table-pounding, threatening and stalling are against the rules.

The settlement is shaped by figuring out what works for the couple. One husband split an inheritance with his wife to break a logjam, although he was not required to by law. One wife gave ground on weightier items because her husband agreed to continue changing the screens and storm windows every year.

Because this is not how most lawyers think, Mr. Berkman said, those practicing collaborative divorce generally meet in the equivalent of support groups. The 40 lawyers in New York City and its northern suburbs gather monthly to discuss their shared cases.

At one recent meeting in White Plains, Amy Carron Day and Marc Fleisher figured out how to lower the decibel level by beginning sessions with safe topics and coaching the husband to show more support for his quick-to-anger wife. At another meeting, Robin Carton explained to Neil Kozek that her client felt he was "saber rattling" when he made reference to what might happen if they went to court, a tactic collaborative lawyers are supposed to leave behind.

There is no nationwide tally of how many cases have been settled this way, and leaders of the movement are only now talking of the need to collect systematic data. But they point to the dramatic experience when collaborative divorce was introduced in Medicine Hat, in the Canadian province of Alberta.

All 29 of the lawyers who regularly practice matrimonial law in Medicine Hat, population 51,000, have now been trained in the collaborative process, according to Janis Pritchard, the first president of the collaborative lawyers' association there, who describes herself as a former "barracuda litigator."

Within six months of the training of half the lawyers in 2000, the filing of motions fell by 50 percent. By 2001, after the next group was trained, filings had fallen an additional 25 percent. Collaborative techniques are now being tried in Medicine Hat by corporate, real estate and trust lawyers.

Most in the New York group continue to do litigation, mediation and collaborative divorce. But many do less and less litigation, and some have abandoned it entirely.

"I can't bring myself to go that route anymore," said Katherine Eisold Miller, Mr. Gesky's collaborative lawyer, who was a big-firm litigator for 15 years. Ms. Miller's career change has been eased by her background; both her parents are therapists. "This feels very natural to me," she said.

As a dispute resolution process, collaborative divorce shares the so-called interest-based bargaining techniques of mediation. But many lawyers who practice mediation say that it is not suitable for marriages with a "power imbalance," since the parties are generally in the room without advocates and hire lawyers only when it is time to draft and submit an agreement.

Mr. Berkman offered several examples of power imbalance: A wife of 25 years who had always said "yes, dear" about money matters. A guilt-ridden adulterer willing to "give away the store." A jilted spouse "so depressed she can't think straight." Ms. Miller cited her own divorce, where mediation failed, she said, because her ex-husband couldn't stand that she "knew the lingo" and he didn't.

Even the matrimonial lawyers who have reservations about collaborative divorce prefer it to mediation. The cynical explanation might be that mediation, which is also done by mental health professionals, takes business from lawyers.

But Ann Diamond, a litigator at Sheresky Aronson & Mayefsky in Manhattan, said that she was "dead set against" mediation because anguished husbands or wives need "someone to stand behind, someone to be the heavy." (Mediators permit each party to have a lawyer with them, but most couples forgo the extra expense.)

Ms. Diamond, and others, worry that the collaborative lawyers' pledge not to take a case to court could in some cases actually run up a client's bill. Let's say the husband decides to go to court. The wife, Ms. Diamond said, is then also forced to start from scratch.

While more than 90 percent of divorce cases are uncontested, those that wind up in litigation generally cost two to three times as much as a comparable case handled collaboratively, according to lawyers familiar with fees for both methods.

Richard A. Abrams, a New York City litigator who has also joined the local collaborative law group, cited this example: A collaborative divorce that required half a dozen two-hour negotiating sessions, no outside forensic experts and a draft agreement would cost a couple about \$15,000 in Manhattan. In litigation, with a

routine number of status conferences in court but no complicated motions, discovery or trial, the same divorce would cost at least \$30,000.

Lisa Headley, with a 20-year marriage and a 10-year-old daughter, was "so mad and hurt" when her husband, Brian McCormick, asked for a divorce that her first instinct was revenge. One visit to a lawyer whom Ms. Headley, 45, described as "a barracuda" slowed her rush to court.

Then she consulted a mediator but decided "you have to be very strong and know exactly what you want, and I was a basket case and didn't think I could do that." Instead, she hired Mr. Fleisher for a collaborative divorce. "I needed someone on my side," she said, but not someone who was going to say, 'You're going to pay, buddy.' In the end, I had to live with myself."

Custody was never an issue, and the couple had no significant property to fight over. After a half-dozen sessions there was an agreement ready to be signed. Ms. Headley wanted her daughter to attend the same church each Sunday, but was persuaded that it was regular worship that mattered, not where. She kept the living room rug, but parted with the bedroom set.

"It seems so silly now," Ms. Headley said. "But they told us it happens to everyone, so I didn't feel like such a fool. And they kept pointing out the progress we were making."

"I'm not saying it wasn't awful," she said, "but I'd recommend it to anyone."