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COLLABORATIVE LAW: RECOGNIZING THE NEED FOR A NEW DEFAULT METHOD OF FAMILY LAW RESOLUTION

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I. INTRODUCTION

Litigation has traditionally been, and in many cases remains, the default method of resolution of family law disputes, especially divorce. It has, however, come to be seen by many in the family law area as a necessary evil—a way to reach a resolution that is legally effective, but excessively expensive in terms of time, actual cost, and, even more importantly, emotional outlay.[1] This is especially true when children are involved. Today's parents are far more cognizant of the perils of litigious divorce, especially those cases that linger over long periods of time.[2] Studies have demonstrated the immediate and long-term ramifications of litigated divorce, especially in so-called "high conflict" cases.[3]

This unhappiness with the litigation process has led to attempts at methodologies designed to lead to the same legal conclusions but with a better personal effect on the parties through non-litigious methods including mediation.[4] Mediation can be a more cost and time effective method of resolving family disputes, by involving a neutral third-party mediator to help the parties identify and resolve their issues.[5] It has its own shortcomings, however, including the fact that *pro se* clients do not have anyone to rely on for advice about their legal rights.[6] Clients without legal representation may also find themselves on an unbalanced playing field, if one party has a strong personality and the mediator is not sufficiently aware or able to keep the proceedings on an even keel.[7]

* Professor of Law and Coordinator, Child and Family Law Concentration, Barry University, Dwayne O. Andreas School of Law. I would like to credit some of the insight for this article to two former students in my "Collaborative Family Law" seminar, Dzovina Mashurova and Robert Vosburg, who presented excellent papers on the financial and cultural aspects of collaborative divorce. I would also like to thank my former research assistant, Jessica Thomas, for her invaluable efforts in researching the issues.

1. *See* Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 322–25 (2004) (critiquing the monetary and emotionally damaging effects of family law litigation).

2. *See* Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of the Children and the Adversarial System*, 52 U. MIAMI L. REV. 79, 83–84 (1997).

3. *See generally* Judith S. Wallerstein & Julia Lewis, *The Long-Term Impact of Divorce on Children: A First Report from a 25-Year Study*, 36 FAM. & CONCILIATION CTS. REV. 368 (1998) (reporting the results of a study dealing with the effect of parental separation or divorce on children and adolescents).

4. *See generally* Marsha B. Freeman, *Divorce Mediation: Sweeping Problems Under the Rug, Time to Clean House*, 78 U. DET. MERCY L. REV. 67, 74–75 (2000) [hereinafter Freeman (MERCY)].

5. *See id.* at 69–70.

6. *See id.* (observing that mediators, including those who are lawyers, are not allowed to give legal advice, and many parties enter mediation without legal representation due to cost).

7. *See id.* at 72.

Similarly, arbitration allows parties to bypass court litigation, with a binding decision handed down by an arbitrator, rather than a judge.[8] This method, while not set in a traditional courtroom, nevertheless relies on a third party to make the decision based on evidence presented by the parties, and may not do much to encourage a more conciliatory tone between the parties.

Piggy-backing on these attempts at non-litigious resolution, collaborative law was, only a short time ago, still a mere concept—the idea that parties could arrive at mutually agreeable (or at least more agreeable) resolutions to their legal squabbles.[9] It is a direct contradiction to the idea of litigation, where parties are expected to fight for the right to be right—to have a third party, be it judge or jury, determine the validity of their claims and declare them, therefore, the "winner."

Unfortunately, we have learned over the years that there are few actual winners in litigated court battles, only those who prevail over another. The costs in terms of time, energy, and, of course, money, take its toll on all involved.[10] In family law issues, this is compounded by the basic fact that this is a personal, emotional dispute, not an arms-length business agreement gone wrong.[11] Parties locked in litigation are also locked into interest-based arguments founded upon what they can theoretically win in court rather than arguments based on their actual needs or even wants, mechanically adopting the long-held belief that there should be winners and losers in the dispute.[12]

Attorneys are not immune to the difficulties inherent in litigating family disputes. Lawyers are traditionally trained to protect the rights of their clients, and conventional litigation allows them to do that in a familiar setting.[13] While it may be a familiar setting, it is not necessarily a comfortable one. There are few family lawyers who likely find the idea of fighting for their client's property rights an enjoyable activity, let alone battling over whether and how often their client may see his/her children.[14] Family law attorneys have always had notoriously high "burnout" rates, arising from both the types of litigation they engage in,[15] as well as the often unrealistic expectations of their clients, similarly caught up in the litigious

8. *See* Marsha B. Freeman, *Love Means Always Having to Say You're Sorry: Applying the Realities of Therapeutic Jurisprudence to Family Law*, 17 UCLA WOMEN'S L.J. 215, 218 (2008) [hereinafter Freeman (UCLA)].

9. Gregory R. Solum, *Collaborative Law: Not Just for Family Lawyers*, 67 BENCH & B. OF MINN., Feb. 2010, at 29 (stating that in 1990, Stuart Webb began formulating and formalizing the concept of collaborative law into an actual negotiation method for use in family law disputes, particularly dissolution of marriage).

10. *See* Tesler, *supra* note 1, at 319 n.7 (explaining the emotional and financial costs of conducting divorce litigation).

11. *See* Freeman (UCLA), *supra* note 8, at 216–17.

12. *See id.* at 219–20, 231–32.

13. *See id.* at 216 (citing Susan L. Brooks, *A Family Systems Paradigm for Legal Decision Making Affecting Child Custody*, 6 CORNELL J. L. & PUB. POL'Y 1, 3 (1996)).

14. *See* Freeman (UCLA), *supra* note 8, at 236–37; Dennis P. Stolle, David B. Wexler, Bruce J. Winick & Edward A. Dauer, *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 16 (1997).

15. *See* Andrew P. Levin, *Secondary Trauma and Burnout in Attorneys: Effects of Work with Clients Who are Victims of Domestic Violence and Abuse*, CRIM. L. & OTHER PROBLEMS, PLI Litig. & Admin. Practice, Course Handbook Series No. 14158 at 103 (2008).

framework, to "win" at all costs.[16] Judges are likewise mindful of the difficulties of presiding over family law litigation, where they often make decisions far more reasonably made by the parties themselves, but for the litigation postures they have assumed.[17]

Collaborative law takes on a few forms, from the very formal to the almost all-inclusive.[18] In its most formal iteration, the parties and attorneys all enter into an agreement to negotiate a settlement through a series of meetings.[19] There is generally a stipulated "panel" of professionals assisting the parties in determining their actual wants and needs in the action, rather than having them adopt positions based on which interests they can notionally protect.[20] In addition to the parties' attorneys, members of the stipulated panel generally include mental health experts, who helps the parties sort out their needs and deal with their underlying concerns, and a financial specialist, who help them work out arrangements suitable for the needs of both parties based on their available assets.[21] The main point of the agreement is that if either party decides to stop the collaborative process and litigate instead, both lawyers must withdraw from the case.[22] The purpose is to provide an incentive for the parties and the lawyers to arrive at a negotiated settlement.[23]

This type of formal agreement generally works well for those parties who are more comfortable with or who need a stricter format to be able to proceed. However, many parties who eschew the traditional litigation route similarly may not want to be tied to an agreement which connects them to specific panel members and which does not allow them to withdraw without having to start over with a new attorney.[24] In these cases, many hope to reach a decision based on collaborative

16. *See* Freeman (UCLA), *supra* note 8, at 216–17 (discussing the difficulties of litigious divorce on the parties and attorneys and advocating for a more therapeutic method of dissolution).

17. *See id.* at 231–32. One of the most egregious, but not unusual examples, I recall is representing a burly construction worker, who, after basically all the issues in the divorce had been settled, insisted he had to have the delicate china teacups that had been sitting in the china cabinet, though he likely had not even known they were there before.

18. This author refers to two types of collaborative law, the formal agreement capital "C", and the more informal, lower case "c", which allows for different approaches for different needs. Both incorporate the goals of non-litigious family law resolution, and both are appropriate in different settings depending on the parties and situations.

19. James K. L. Lawrence, *Collaborative Lawyering: A New Development in Conflict Resolution,* 17 OHIO ST. J. ON DISP. RESOL. 431, 432 (2002); *see also* Tesler, *supra* note 1, at 319–20 (considered the definitive guide for practitioners seeking to practice collaborative family law).

20. *See* Tesler, *supra* note 1, at 331.

21. *Id.*

22. *Id.*

23. *See* Lawrence, *supra* note 19, at 433–34; *but see* Colorado Bar Association Ethics Committee, Formal Op. 115 (2007) (concluding that in the context of Collaborative Law, the Collaborative Agreement violates the Colorado Rules of Professional Conduct and is coercive to clients because: a) the possibility that conflict will materialize is significant; b) the agreement interferes with the lawyer's independent professional judgment by foreclosing a course of action that "reasonably should be pursued on behalf of the client"); *contra* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447 (2007) (concluding that the Collaborative Agreement is a "permissible limited scope representation" under the Model Rules of Professional Conduct as long as the parties are fully informed, and that the benefits of the collaborative process in family law outweigh the potential concerns).

24. *See* Marsha B. Freeman & James D. Hauser, *Making Divorce Work: Teaching a Mental Health/Legal Paradigm to a Multidisciplinary Student Body,* 6 BARRY L. REV. 1, 4 (2006) [hereinafter Freeman & Hauser].

efforts but prefer to use whatever methods work, often relying on more informal negotiations among the parties and attorneys, which may include the help of the court where necessary to move things along.[25] This method is referred to as cooperative family law, where the court becomes a facilitator to the process rather than the decision maker per se.[26]

This movement, from a primarily adversarial setting to one incorporating different modes of non-litigious resolution, which may include concepts of therapeutic jurisprudence,[27] has been advanced as a "comprehensive" law movement, and is designed to allow parties to use the law to achieve both legal and emotionally empowering endings.[28]

It is becoming increasingly clear that the family law litigants of yesterday prefer to be the negotiators of today, whether due purely to matters of cost and time or more likely due to concerns regarding the welfare of their children. Other nations have achieved greater results in promoting collaborative legal processes, and have recognized the perils of litigation and the benefits of collaboration far earlier.[29] The United States has made strides in attempting to catch up on the collaborative front, but until the legal profession recognizes and addresses the obstacles standing in the way of its advancement, it cannot become the default method of family law resolution.

The Symposium which generated the majority of the articles within this issue was designed to provide legal, mental health, and financial professionals with the information and knowledge needed to enter into the field of collaborative law or, at the very least, to help those professionals understand the concepts and philosophies behind it in advising clients. The Symposium was fortunate to have practitioners, judges, mental health and financial professionals, and law professors as participants, who are well versed in the subject area and supportive of its precepts, including the Reporter to the Uniform Collaborative Law Act (UCLA), Professor Andrew Schepard.

Part II of this article will focus on the hurdles involved in spreading the collaborative movement among different cultures, where the parties have discrete views of marriage and divorce, which may not appear at first glance to be amenable to collaborative law. Part III will address the costs involved in the collaborative process, especially in dissolution of marriage, which often works as an obstacle to lower and middle class families taking advantage of its benefits. Part IV will discuss the passage of the Uniform Collaborative Law Act and its circulation among the states, focusing on how its adoption will help move the collaborative movement toward a more uniform use. The Conclusion will

25. *See* Freeman (UCLA), *supra* note 8, at 219.

26. *See* Freeman & Hauser, *supra* note 24, at 5.

27. *See generally* David B. Wexler & Bruce J. Winick, *Putting Therapeutic Jurisprudence to Work*, A.B.A. J., at 54–56 (May 2003) (explaining the concept of legal results also incorporating therapeutic outcomes).

28. *See generally* Susan Daicoff, *Law as a Healing Profession: The "Comprehensive Law Movement,"* 6 PEPP. DISP. RESOL. L.J. 1 (2006) (detailing and analyzing the convergence of the "Comprehensive Law Movement" and advocating a more flexible social, psychological, and emotional approach to lawyering as embodied in the comprehensive law movement).

29. *Id.*; *see also* Freeman (UCLA), *supra* note 8, at 223–24.

summarize how all of these issues must be addressed to move from a litigious, damaging family law resolution forum to one that is user-friendly and can actually provide for a healing effect on the families.

II. DIFFERENT STROKES FOR DIFFERENT FOLKS: NOT JUST A CATCHY PHRASE

Collaborative law has increased in popularity since it was introduced as a formal movement in the 1990's. As will be discussed later, both the Uniform Commissioners and a number of the States have moved to make collaborative family law a norm, if not the default method of resolution. The recognition of the benefits of non-litigious dissolution, in particular, has grown throughout the states. But for this kinder, gentler system of family law resolution to make a wider and more meaningful impact as the default method for family law issues, especially for dissolution of marriage litigation, the legal system must recognize the differences in cultures within our nation and how parties within those cultures might have difficulty in understanding or adopting its precepts. Comprehension of these differences can lead to adjustments in methodology, enabling many more individuals to take advantage of the positive effects of non-litigious dissolution.

Even within one broad national culture, differences abound, and many are based on the beliefs and traits ingrained in individual customs. Until the mid-twentieth century, divorce was still a relative rarity in comparison to today's statistics,[30] and over time, our national perceptions and acceptance of divorce have evolved as these figures have changed. But, within certain cultures, those perceptions remain rooted in different expectations of life and marriage.

Lawyers learn the rudiments of practice in law school. Doctrinally, law students are given the bases to understand the legal issues at stake and the knowledge to address them in practice. They are often given true practical experience in the form of clinics and externships, allowing them to put their knowledge to actual use by helping real clients, rather than merely studying past cases and hypothesizing about positions.

Many clinical programs offer models for student use, giving students not just theoretical information, but helpful tools to determine how to put their knowledge to work.[31] Models can be very explicit in their guidelines, taking the law student (and future lawyer) through stages of meeting and evaluating a client's needs: starting with identifying the issues involved, eliciting a chronology of events from the client, sorting out those facts relevant to the issues, and ending with a basis for beginning the representation.[32] All of these steps are designed to allow the lawyer to develop both the case and a relationship with the client.[33]

30. *See* U.S. CENSUS BUREAU, THE 2012 STATISTICAL ABSTRACT, Table 133, *available at* http://www.census.gov/compendia/statab/2012/tables/12s0133.pdf.

31. *See* Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 374 (2002).

32. *See id.* at 375.

33. *See id.*

These are tried-and-true methods, used by generations of lawyers to accomplish these goals. However, lawyers need to be cognizant of matters, which may not readily be apparent in such interactions with the client, such as how a client (and perhaps the other party to the dispute) sees the facts in light of their own cultural influences.[34] While the attorney is hearing and evaluating each step in terms of his or her overall understanding of the law and the facts, the client may be *telling* a story based on an entirely different perception.

The fact that different people view the same sets of circumstances and events in different ways comes as no surprise to most of us, but this phenomenon has been far better studied by those in other disciplines, including professionals in the social work and mental health fields.[35] Those professions that have considered these differences among people understand that they can lead to misunderstandings between the professional and the client.[36] However, these professions also understand that misunderstandings can be avoided or mitigated by the professional's (and the professions') willingness to accept and work with, instead of around, the client's different views of the circumstances.[37] Understanding and even utilizing cultural differences requires a comprehension of the basis for those differences: that culture is a phenomenon "learned from one's intimate environment," where there are shared values and customs, as well as specific societal rules of behavior.[38] A culture may well exist separate and distinct from the larger culture around it, such as the subsets of different émigrés existing within the larger American population.[39]

The larger, more dominant U.S. culture, as most of us perceive it, is generally understood as "White, American, and Eurocentric," in contrast to the "minority" cultures based on ethnicity, race, religion, economics, and sexual orientation.[40] A good lawyer will accept that these cultural differences—whether of the client or the lawyer—will necessarily influence both the lawyer's efforts on behalf of the client and, just as importantly, how the client will view those efforts.[41] Failing to recognize these differences will have lasting consequences, and perhaps make it impossible for the lawyer and client to reach a mutual understanding of what is legally and socially preferable in their case.[42]

Legal skills models traditionally focus on the doctrinal knowledge necessary to understand the law and the skills required to represent clients within the legal

34. *See id.* at 376.
35. *Id.*
36. *Id.* at 377.
37. *Id.*
38. *Id.* at 379–80.
39. It is worth noting that even those Americans whose roots extend far back to this soil frequently retain elements of their own ancestors, though perhaps not as broadly or blatantly as either newer immigrants or more tightly held cultures.
40. *See* Tremblay, *supra* note 31, at 380.
41. *Id.*
42. *Id.* at 381. Lawyers, of course, will have their own cultural perceptions and biases. These preconceptions must be recognized and compensated for when dealing with clients. This concept is not explored in more depth in this article, however, which focuses on a particular method of lawyering and how to adapt that method to the cultural differences of clients.

forum. By necessity, most of these models focus on the dominant culture: the White, Western, Eurocentric perceptions of both areas.[43] But these models of doctrine and skill sets, by their own limitations, foreclose understanding and legal avenues that a client from another culture might benefit from,[44] especially in personal areas, such as family law.

Cultural differences and perceptions have been better acknowledged and accepted in other areas of the law. Contract law, for instance, not only allows for the parties to agree upon what jurisprudence is to be applied within the States, but also allows the parties to agree upon the international standards to be applied. Such choices are usually enforced by the courts as requested. The business arena, as well, allows for cultural differences to be acknowledged and utilized when necessary. But in the far more intimate dealings of family law, we are likely foreclosing many clients from utilizing beneficial aspects of the legal system simply by ignoring the differences in client understanding of the law.

One commentator notes that it is a balancing act to recognize and appreciate the cultural differences of the client while not presuming stereotypes that may very well not apply.[45] A lawyer who does not comprehend true cultural differences in how the client sees his or her circumstances, will have a far more difficult time both establishing the requisite relationship needed with the client, and more importantly, in succeeding based on the *client's* perceptions, in representing them in their goals.[46] It is equally important for the lawyer to recognize his or her own societal perceptions, preconceptions, and possibly misconceptions about other cultures, lest the lawyer inadvertently infuse all clients with the same thought processes which, in reality, is a very unlikely prospect.[47]

Understanding the concept of what is termed a "cross-cultural practice," one which both recognizes cultural differences, so as not to assume they do not matter in the legal process, and also helps the lawyer avoid the often unconscious urge to stereotype clients according to their cultural backgrounds, is essential to learning how a client will view and process the legal proceedings.[48] In both general and specific ways, appreciating the cultural differences among us will help the legal profession plan for and execute methodologies to further client satisfaction, including the concepts of collaborative law.

A. Religious Influences on Dissolution of Marriage

In countries where cultures are deeply rooted in the orthodoxy of religious beliefs, divorce has on the one hand been severely restricted for women and, on the other hand, often a legitimate exit from marriage even when unavailable under

43. *Id.* at 380.

44. *C.f. id.* at 400–01 (surveying literature on cross-cultural interactions and noting members of dissimilar cultures have differing world views which can "cause enormous misunderstanding in a professional relationship").

45. Tremblay, *supra* note 31, at 377–78 (citing to one writer's definition of needing to be "cross-eyed" with respect to both recognizing but not imposing cultural differences on clients).

46. *See id.* at 379.

47. *See id.* at 384.

48. *See id.* at 385.

secular law.[49] Some cultures center on patriarchal, male-dominant societies, where the role of women in the home may be far different from that outside it.[50]

Citizens from such cultures, who have emigrated to the United States, or even who have grown up here but within the insular confines of their unique heritages, may have very different views on divorce than the majority population. Some such cultural mores are more easily adapted into the general societal views than others, for example: Jewish law views marriage as a contract, even though sanctified by a religious ceremony, therefore, there is general freedom to dissolve the marriage;[51] Roman Catholic precepts view marriage as a sacrament, even though codified by the state, capable of being dissolved only by the Church, not merely by the wishes of the parties.[52] While in both of these religions the parties can attain a secular divorce, the far fewer number of Orthodox Jews in the United States, as compared to the general population of practicing Roman Catholics, make concerns about obtaining a religious divorce a more widespread concern for Catholics in general.[53] Many Catholics belong to cultures which are male-dominated in other aspects of life as well,[54] which may also affect how they perceive their ability to use the legal profession.

B. Cultural Influences on Dissolution of Marriage

1. Hispanic Cultural Influences

Most people feel as if they inhabit different places in different worlds at the same time. We work, have families, friends, and interests, all or none of which may intersect. In the Latin world, this may be far more pronounced. This idea of multidimensionalism winds its way throughout the Hispanic population and may have profound implications in the way the client as well as the legal profession intersect. Members of the Hispanic population often converse in multiple languages; acclimate themselves to vastly different environments at school, home, and work; and interact with others in numerous diverse ways.[55] It is this very

49. *See* Adelaide Madera, *Civil and Religious Law Concerning Divorce: The Condition of Women and Their Empowerment*, 12 J.L. & FAM. STUD. 365, 365–66 (2010).

50. *See id.* at 367.

51. *See id.* at 368. In the Jewish Orthodoxy, a husband may refuse to grant a *ghet*, or Jewish divorce, to the wife, and a rabbinical panel may step in to determine the outcome. This would affect the parties only within the religion, and not as to the ability to acquire a secular divorce.

52. *See id.*

53. *See* Lisa Fishbayn, *Gender, Multiculturalism and Dialogue: The Case of Jewish Divorce*, 21 CAN. J.L. & JURISPRUDENCE 71, 72 (2008). These concerns regarding the requirement of Jewish religious divorce for Orthodox Jews are far more prevalent in areas with high demographics of religious Jews. It led to the States looking for ways to accommodate both the secular and religious requirements. In 1983, New York passed a statute requiring parties to a secular divorce to agree not to impede the other party from seeking or acquiring a religious dissolution. *See* N.Y. DOM. REL. LAW § 253 (McKinney 1983). This was in response to the state's perceived concerns regarding Orthodox Jewish men using the withholding of a ghet as a tactical bargaining matter in secular divorce negotiations.

54. *See* PEW RESEARCH CENTER, CHANGING FAITHS: LATINOS AND THE TRANSFORMATION OF AMERICAN RELIGION (2007), *available at* http://www.pewhispanic.org/files/reports/75.pdf.

55. *See* Berta Esperanza Hernandez-Truyol, *Essay: Borders (En)Gendered: Normativities, Latinas, and a Latcrit Paradigm*, 72 N.Y.U. L. REV. 882, 883–85 (1997).

diversity that makes it difficult for the legal profession, with its generally one-dimensional, White, Eurocentric view of society and clients,[56] to understand how Hispanics view legal proceedings, and similarly makes it difficult for Hispanics to trust in that system.[57] As one commentator explains, traveling among the different multicultural worlds of most American Hispanics is at once automatic and thought-provoking.[58] One leaves the familiarity of one world—be it the English workplace or the Latin home—and finds herself adapting robotically to the changes, while at the same time feeling a sense of alienation from herself.[59] Yet, in the ordinary day, this is the "norm" for many in the Hispanic population. One learns to traverse the distinct worlds one inhabits regularly and generally does so flawlessly.

Yet, when even someone who is accustomed to such constant and multiple transitions is then thrust into yet another world, one that is "foreign" to even the most singular cultural inhabitants, such as the law, it is easy to see how one's perception of this new land can be far more difficult to traverse.

The United States has a large Hispanic minority population.[60] This population is rooted in both the Roman Catholic religion,[61] with its Church-dominated view of marriage and divorce,[62] and notions of male dominance,[63] making it much more difficult for either party, but perhaps more so for the woman, to seek a divorce.[64] Male Hispanics may view divorce as a repudiation of not just the marriage but of themselves as the dominant figure in the marriage.[65]

Historically, women's rights, both within the marriage and in seeking to leave it, have been influenced both by the religious aspect as well as the male-centricity of the Hispanic culture.[66] Women are still expected to conform to both the religious and cultural expectations concerning the marriage, including dissolution.[67] Many of these cultural aspects are perceived as springing from the woman's traditional role as the bearer and primary caregiver of the children.[68] Cultures that focus great respect on tradition and family unity tend to discourage divorce, even where

56. *See generally* Tremblay, *supra* note 31 (discussing the one-dimensional, White, Eurocentric dominant model of the legal system and how cultural differences affect both clients and attorney perceptions and place in the legal system).

57. *See* Hernandez-Truyol, *supra* note 55, at 883–84.

58. *See id.*

59. *See id.* at 883, 890.

60. In 2009, the United States had a Resident Hispanic Population of approximately 48,419,000. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012 10 (2011). This is a 37.1% increase in the Hispanic Population since the 2000 Census when the Resident Hispanic Population totaled 35,306,000. *Id.* According to the 2009 figures, the resident Hispanic Population comprises approximately 16% of the total U.S. population. *Id.* (based upon this author's own calculation of the total Resident Hispanic Population of 48,419,000 divided by the total Resident Population of 307,007,000).

61. *See* Hernandez-Truyol, *supra* note 55, at 915.

62. *See* Madera, *supra* note 49, at 368.

63. *See* Hernandez-Truyol, *supra* note 55, at 916.

64. *See generally* Hernandez-Truyol, *supra* note 55.

65. *Id.*

66. *C.f.* Hernandez-Truyol, *supra* note 55, at 915–16 (explaining that in the Latin Culture concepts of *Marianismo*, the idea that Hispanic women are to exemplify the Virgin Mary and assume a role that is submissive to their husbands, and *Machismo*, the idea that men are to be intellectual, rational, authoritarian, and independent, as well as predominantly Catholic mandates; together introduce gender subordination into the "cultura Latina").

67. *See id.*

68. *See id.*

remaining in the marriage is against one's personal desires or perhaps even safety.[69]

Many cultures have traditionally made it difficult, if not impossible, for abused women to leave their partners, whether for internal (psychological) or external (societal) reasons.[70] Though much of the literature has revolved around the native countries,[71] it is not hard to understand that generations of thought processes and cultural influences may continue to play a part in the way people from these cultures view their place in the world, even when physically worlds apart from them. Even when a party makes the decision to break from the relationship, it does not translate into an automatic ability to fight for one's legal rights. While collaborative family law might be a better place for such parties, it may also be difficult for the weaker party to become a full-fledged member of the negotiating team without understanding and help from her attorney. Similarly, the dominant partner (often the male) may see collaborative law as a form of capitulation where, from his cultural view, he should instead be asserting himself in a litigation setting.

2. African American Cultural Influences

Cultural differences may not arise solely from outside influences, like ethnicity. Other populations, likewise, do not fit the pervasive White, Eurocentric view of society. African-Americans, similarly, may have different cultural views and values concerning family structure and life[72] that defy generational assimilation in other areas.[73]

Mediation, like collaborative family law, is a method of non-litigious resolution designed to achieve results with lower costs, less time, and hopefully a more amicable solution, since the parties are seeking to avoid a litigated battle.[74] For many parties, how well this is accomplished may depend on whether the mediation was voluntary or mandated by either court or legislature.[75] In the case of

69. *See* Katalin Toth & Markus Kemmelmeier, *Divorce Attitudes around the World: Distinguishing the Impact of Culture on Evaluations and Attitude Structure,* 43 CROSS-CULTURAL RESEARCH 280, 281 (May 2009), *available at* http://ccr.sagepub.com/content/43/3/280.

70. *See* Muntaha Gharaibeh & Arwa Oweis, *Why Do Jordanian Women Stay in an Abusive Relationship: Implications for Health and Social Well-Being,* 41 J. NURSING SCHOLARSHIP 376 (2009) (discussing the reluctance and difficulty of Jordanian women to leave abusive relationships).

71. *See id.* at 377–78.

72. Economic differences are also an indicator of how one looks at their own intimate relations, as well as society's expectations overall. Generally, no matter the ethnicity or race, the higher the economic status the more likely one is to have adapted to the Eurocentric perceptions. This article does not attempt to fit the economic dynamics into the paradigms addressed herein, but focuses on the generalizations re the larger portions of any demographic population re legal resolution methods in family law in particular.

73. *See generally* Cynthia R. Mabry, *African Americans "Are Not Carbon Copies" of White Americans—The Role of African American Culture in Mediation of Family Disputes*, 13 OHIO ST. J. ON DISP. RESOL. 405 (1997–98) (discussing persistent cultural differences and values among African Americans).

74. *See id.* at 413–15.

75. *See id.* at 408. While many couples themselves seek non-litigious resolution, courts are also more amenable to ordering it in an attempt to resolve a case. A number of state legislatures have decreed mediation as a requirement for dissolution cases before the parties may litigate before the court in an attempt to preempt the need for litigation. Florida uses mediation extensively throughout its civil dockets and requires it for divorces headed to litigation. *See* FLA STAT. § 68.183 (2011).

those from different cultural backgrounds or perceptions, non-litigation processes, such as mediation or collaborative law, may be viewed far differently yet.

Proponents of cultural consideration in legal areas, including dispute resolution, affirm that culture cannot help but play a role, often a significant one, in how one or both of the parties perceive themselves and the system.[76] Courts have acknowledged the role of cultural differences in litigated proceedings, including a decision by the Iowa Supreme Court, holding that cultural perceptions can be considered in divorce and custody issues.[77] The Court was cognizant of the different ways in which culture can affect our family structures and perceptions, and, while not controlling, found it was only fair to acknowledge them rather than try to fit the family into the "generally acceptable" actions of most others.[78] Similarly, family therapists are advised to acknowledge differences among different cultures.[79] In the same way, mediators, as well as others working with clients in family related issues, need to be aware that cultural influences and perceptions can dramatically affect the course and outcome of the processes.[80]

African American culture is said to emanate from a variety of factors which are ever changing.[81] Among these factors are historical African connections, American Southern history, slavery, poverty and racism, and family life that may be different from the (generalized) Eurocentric population.[82] These historical experiences, expressed in a variety of ways, including religion, music, and the combination of the two, form what is termed the African American culture.[83] As such, race and culture are integrally related since culture is a major factor in how people perceive family law processes.[84] It follows then, that race itself similarly becomes an integral part of the process. As in most other legal models, however, mediation training generally focuses on the "normalized" family view, rather than the individualistic cultural characteristics found in many families. If we are to make legal procedures of any kind, especially non-litigious resolution, a viable alternative for cultural minorities, we must adjust our perspectives to fit the client, and not expect the reverse.[85] Many African Americans endure strains in the marriage dissimilar to the general population, based on racism and discrimination, which mediators must understand to be able to effectively lead the process.[86] In the same way, such common experiences, which many non-minorities cannot relate to

76. *See* Mabry, *supra* note 73, at 416.

77. *In re* Marriage of Kleist, 538 N.W.2d 273, 277 (Iowa 1995) (holding that the mother's Hispanic culture that valued motherhood above all was a valid consideration in awarding custody. Ironically, the Court did acknowledge that were the culture value a perceived negative, *at least in American culture*, it would likewise probably be seen as such in the decision); *see also* Mabry, *supra* note 73, at 416–19 (discussing *Kleist*).

78. *See Kleist*, 538 N.W.2d at 277.

79. Mabry, *supra* note 73, at 416.

80. *See id.* at 419.

81. *Id.* at 420 (citing SADYE M.L. LOGAN, EDITH M. FREEMAN & RUTH G. MCROY, SOCIAL WORK PRACTICE WITH BLACK FAMILIES: A CULTURALLY SPECIFIC PERSPECTIVE 24 (1990)).

82. *Id.*

83. *Id.*

84. *Id.*

85. *See id.* at 421.

86. *See id.* at 425–26.

on a visceral level, may lead to mistrust against the mediator, and must be recognized and acknowledged by the facilitator to ensure an appropriate process.[87]

At the same time, caution must be used to ensure we do not end up stereotyping the families we see rather than merely allowing for true cultural differences.[88] It is easy for a lawyer in any setting, including mediation, to assume preconceived ideas about clients from other cultures, and more care than usual may need to be taken to ensure a lack of bias from the professional.[89]

III. FINANCIAL DISPARITIES: LIMITING CHOICES

While many commentators discuss the emotional toll of litigated dissolution, the practical aspect is that litigated divorces are frequently expensive in terms of time and money.[90] Non-litigious forms of resolution have grown in popularity as a means of limiting both.[91] The actual cost of a collaborative divorce versus a litigated one seems to depend on where the practice takes place. Tesler estimates that a collaborative divorce costs 10 to 20 percent that of a litigated one.[92] Others estimate costs ranging from $3,500 to $20,000 or more.[93] Similarly, mediation can be fairly expensive, with the parties paying for set times (sometimes a full day) in advance, for the mediator and each of the attorneys, if represented. However, there is no guarantee that mediation will resolve the issue in the allotted time, requiring either additional mediation or litigation.

While both of these methods may theoretically be less than litigated divorce, they are often still expensive and out of the reach of many parties. While it is true those parties will have to pay for litigation costs if they choose that route, if it is prohibitive to hire attorneys they can and do appear *pro se*.[94] They do not have that option in a collaborative divorce.

Non-litigious divorce, especially collaborative dissolution, brings with it benefits for everyone, including society in general. Children of litigated divorce, especially high conflict cases, frequently suffer emotional problems that lead to higher rates for dropping out of school, teen pregnancies, and even delinquency.[95] Non-litigious divorce holds benefits for all, but if the hope is to expand the availability and use of it, especially collaborative law, lawyers and the other professionals comprising the collaborative panels will have to make it

87. *See id.* at 424–25.

88. *See id.* at 422; *see also* Tremblay, *supra* note 31, at 378.

89. *See* Mabry, *supra* note 73, at 422–23.

90. *See* Tesler, *supra* note 1, at 324.

91. *See generally* Daicoff, *supra* note 28, at 1.

92. *See* Tesler, *supra* note 1. When I invited a collaborative law panel to talk to my class, I was personally shocked at the costs for the collaboration. It was clear that the only consideration being advanced was the opportunity to resolve the conflict without time consuming and angry litigation, but the costs were geared basically the same as a litigated dissolution.

93. *See* Martha Neil, *Kinder, Gentler Collaborative Divorce Also Costs Less*, A.B.A. J. LAW NEWS NOW, Dec. 18, 2007, *available at* http://www.abajournal.com/news/article/kinder_gentler_collaborative_divorce_also_costs_less; *see also* Patrick Foran, *Adoption of The Uniform Collaborative Law Act in Oregon: The Right Time and the Right Reasons*, 13 LEWIS & CLARK L. REV. 787, 793 (2009).

94. *See* Freeman & Hauser, *supra* note 24, at 2, 24.

95. *See* Weinstein, *supra* note 2, at 126.

economically feasible. With current costs, its main consumers are those who could litigate but choose not to, likely for the emotional benefits as well as the lower cost. While this is a positive result, the costs still preclude huge numbers of potential litigants who could and would choose the system if it were economically accessible.

Lawyers have economic incentive to curb the costs of collaborative divorce. Poorer litigants are no less likely to worry about the emotional toll of litigated divorce on their children than anyone else. It is likely that many litigants who appear *pro se*, purely out of cost necessity, would appreciate the opportunity to be represented by counsel and resolve the issues in a non-adversarial manner. While panel members would receive less compensation from such parties, they would garner many clients who would not hire them otherwise, and they would make up those differences in the numbers of clients they would likely attract. Many of those clients today are representing themselves *pro se* instead of hiring lawyers.[96] Additionally, many parties may not need the services of the mental health professional or financial analyst. A willingness by attorneys to be flexible in terms of the makeup of the collaborative panels according to the actual needs of the parties would lower costs and bring in more consumers. If we are to truly pave the way for collaborative law as the default method of dissolution, we must acknowledge the cost issues and be willing to deal with them.

IV. THE UNIFORM COLLABORATIVE LAW ACT

The benefits of non-litigious resolution of family law issues have been noted over time.[97] A number of states and courts have moved to encourage or even require some form of non-litigious resolution, most often in the form of mediation, prior to parties being able to litigate. Today, the philosophies of collaborative family law, including the savings in costs, time, and, most of all, the emotional toll on families, have led to calls to make non-litigious divorce, especially the collaborative process, the norm or default method of resolution.

The Uniform Law Commission (ULC) provides the States with non-partisan legislation designed to bring clarity and uniformity to vital areas of law.[98] In 2009,[99] the National Conference of Commissioners on Uniform State Laws

96. *Id.*

97. *See* Freeman (UCLA), *supra* note 8, at 220–21, *passim*; *see generally* Daicoff, *supra* note 28 (noting the benefits of non-litigious family law resolutions); Weinstein, *supra* note 2 (detailing recommendations for non-litigious dispute resolution in the family law context as well as benefits inherent in such alternatives).

98. *See* UNIFORM LAW COMMISSION (also known as The National Conference of Commissioners on Uniform State Laws), About Us, *available at* http://www.nccusl.org/Narrative.aspx?title=About%20the%20ULC (last visited Mar. 11, 2012).

99. UNIFORM LAW COMMISSION, UNIFORM COLLABORATIVE LAW ACT, *available at* http://www.law.upenn.edu/bll/archives/ulc/ucla/2009_final.htm (last visited Mar. 11, 2012) [hereinafter UCLA]. The UCLA was amended in 2010 and 2011 and has thus far only been enacted in Nevada, Texas, Utah, and Washington, D.C. *See* http://www.nccusl.org/Act.aspx?title=Collaborative%20Law%20Act (last visited Mar. 11, 2012).

promulgated the Uniform Collaborative Law Act (UCLA), designed to provide statutory provisions regulating collaborative family law in the States adopting it.[100]

The UCLA, as promulgated, clearly defines collaborative law with a capital "C." Its requirements include a participation agreement between the parties and their attorney which must contain a disqualification clause, prohibiting the attorney form representing a party in any future proceedings on the same subject matter.[101] The UCLA provides, however, that participation is wholly voluntary, and limits the ability of Courts to mandate parties' participation in it.[102] Additionally, participants may also opt out at any time, with no reason required.[103]

The UCLA lays out the rationale for collaborative family law and its processes, noting the pitfalls of a "positional" or interest-based negotiation strategy, which assumes a win-lose approach to dissolution.[104] Instead, the Act promotes a "problem-solving" or "needs-based" approach which eliminates the idea of beginning from an extreme starting point which is difficult to retract from in negotiations.[105] The problem-solving approach focuses the parties on "finding creative solutions that maximize the outcome for both sides."[106]

The UCLA acknowledges that lawyers can encourage clients to focus on needs-based or problem-solving solutions (collaborative law with a small "c") even without a formal participation agreement.[107] The rationale for the formal agreement and disqualification clause is to provide incentives for litigants to follow through on such ideals.[108] When parties know they will have to start over without their attorneys, they will hopefully be more committed to seeing the process through.[109] The UCLA further encourages that the parties select necessary mental health and financial consultants jointly, rather than individually hiring competing consultants or witnesses in a continuing effort to focus the parties on resolving conflicts in ways beneficial to all, including the children, rather than aiming for a "winning" strategy.[110]

The Act distinguishes collaborative family resolution from the more widely known mediation process. Mediation is presently court or legislatively mandated in a number of states.[111] This requirement diminishes a key motivation of mediation, coming to a voluntary and beneficial outcome. Mediators, unlike collaborative lawyers, cannot give legal advice to parties, who, in the context of mediation, may

100. *See generally id.* UCLA, Prefatory Note.
101. *Id.* § 9(a).
102. *Id.* § 5(b).
103. *Id.* § 14(3)(b).
104. *Id.* at 10.
105. *Id.* at 2; *see also* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 759–60 (1984) (describing the problem solving-approach to litigation).
106. UCLA, *supra* note 99, at 11 (citing Peter Robinson, *Contending with Wolves in Sheep's Clothing: A Cautiously Cooperative Approach to Mediation Advocacy,* 50 BAYLOR L. REV. 963, 965 (1998)).
107. *See id.*; *see also* Freeman (UCLA), *supra* note 8, at 221–22.
108. *See* UCLA, *supra* note 99.
109. *See id.* § 9; *but see* Colorado Bar, *supra* note 23 (expressing concerns that the disqualification clause limits the client's right to choose his or her attorney).
110. *See* UCLA, *supra* note 99.
111. *See generally* Peter S. Chantilis, *Mediation U.S.A.*, 26 U. MEM. L. REV. 1031, 1033 (1996).

be unrepresented, or constrained in their ability to address the problem of the "uneven playing field" which may be present.[112] Unlike collaborative lawyers, mediators are not always licensed and regulated by the state.[113]

Collaborative law, while only a formal designation for less than two decades,[114] has organizational groups in virtually every state, with thousands of lawyers already trained in its processes.[115] A number of states have enacted statutes promoting and regulating collaborative agreements.[116] Early studies on the collaborative process indicate higher client satisfaction than with litigation.[117]

While it is more novel in the United States, collaborative law has found rapid growth in other nations, and is a staple of family law disputes in Canada and Australia, among others.[118] The benefits of the collaborative process to the parties, and to the children of the divorce, have lasting effects, especially when contrasted with the detriments of prolonged litigation.[119] Lawyers and judges are similarly intrigued by the prospect of a lower-stress divorce practice.[120] Adoption of the UCLA will go a long way towards helping families successfully traverse the end of the marriage relationship, while keeping the parental relationships intact.

CONCLUSION

Collaborative law takes us from an adversarial position-based proceeding to one of a needs-based, problem-solving method of resolution for family law issues, especially dissolution of marriage. Some advocate using it not only as a stand-alone proceeding, but combining the use of specially trained mediators for parts of collaborative process where needed (a clear example of collaborative with a small "c").[121] Many practitioners are already hoping for even greater strides in this area, such as incorporating the philosophies of therapeutic jurisprudence. This concept seeks to allow the parties to move into the future family dynamic in a more balanced and content manner, by controlling not just the behavior of the parties during the divorce, but also addressing the underlying hostilities present both

112. UCLA, *supra* note 99, at 12; *see also* Freeman (MERCY), *supra* note 4, at 85–89.

113. UCLA, *supra* note 99, at 12.

114. *Id.* (acknowledging Stu Webb's contribution to the formalization of the collaborative law process).

115. *See id.*

116. *See id.* at 13 (citing CAL. FAM. CODE § 2013 (West 2004 & Supp. 2009); N.C. GEN. STAT. §§ 50-70 to -79 (2007); TEX. FAM. CODE ANN. § 6.603 (Vernon 2006); TEX. FAM. CODE ANN. § 153.0072 (Vernon 2008)). Other state courts have similarly taken action through court rules.

117. *See id.* at 13; *see also* Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 191 (2004) (stating that collaborative law eliminates "much of the stress and pain of litigation for [lawyers] and their clients"); CAN. DEPT. OF JUSTICE, THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES 57 (2005), *available at* http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2005/2005_1/pdf/2005_1.pdf.

118. *See* UCLA, *supra* note 99, at 6; *see generally* Freeman (UCLA), *supra* note 8, at 13.

119. *See* Weinstein, *supra* note 2 (discussing the negative impact that the adversary nature of the courts can have on children); Wallerstein & Lewis, *supra* note 3 (studying the effects of divorce and separation on children and adolescent teenagers).

120. *See, e.g.*, CAN. DEPT. OF JUSTICE, *supra* note 117, at 57.

121. *See* P. Oswin Chrisman, Gay G. Cox & Petra Novotna, *Collaborative Practice Mediation: Are We Ready to Serve this Emerging Market?*, 6 PEPP. DISP. RESOL. L.J. 451, 451–52 (2006).

before and engendered by the divorce itself.[122] Such ideas were scoffed at only a few years ago, but the realization of what non-litigious divorce can accomplish, especially collaborative divorce, has made the legal and mental health professions take note of the tremendous opportunities to help the families, particularly the children, as they move forward.[123] In order to make non-litigious divorce the default method, we must recognize and address the issues that set up barriers to its success, including its relevance and perceptions to different cultures and the costs connected with it. To truly help families through these tumultuous times, the process must be cost effective. The goals should be to make the collaborative law process accessible to parties with little or no financial means, who have the greatest need for a cost effective dissolution process.[124] It must also acknowledge the cultural differences and misconceptions concerning the procedure, and find methods to make it more user friendly for all. At that point, we can hope the collaborative method, with or without a capital "C", will truly become the default model for dissolution of marriage in the nation.

122. *See* Freeman (UCLA), *supra* note 8, at 231.

123. *See id.*; *see also* Daicoff, *supra* note 28, at 1–4; MacFarlane, *supra* note 117, at 215.

124. *See* Lawrence P. McLellan, *Expanding the Use of Collaborative Law: Consideration of its Use in a Legal Aid Program for Resolving Family Disputes*, 2008 J. DISP. RESOL. 465 (advocating the use of collaborative methods in legal aid offices, which handle extensive numbers of family law cases).