Family Law Newsletter
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SCHILLER DUCANTO & FLECK LLP

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Passage of the Collaborative Process Act: Codifying a Valuable Option in Divorce

On August 18, 2017, Illinois became the 17th state to enact the Uniform Collaborative Law Act (the "UCLA") which promotes the private resolution of divorce matters outside of the courtroom. When Senate Bill 67 - now Public Act 100-205 – goes into effect January 1, 2018, Illinois will join 16 other states and more than 25 countries in recognizing a much-needed shift in how to best resolve divorce and related disputes.

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The UCLA codifies the collaborative divorce process and, among other things, specifically defines the requirements of what is known as the "Participation Agreement." The Participation Agreement is a contract that is signed by the parties, lawyers and other collaborative team members which officially starts the collaborative process. The Participation Agreement is the cornerstone of the collaborative model, in that it changes the negotiations from one of positional bargaining (*i.e.* traditional litigation) to a series of transactions based solely on the goals and interests of the parties and their children. To that end, the Participation Agreement contains a disqualification provision disallowing collaborative counsel from obtaining court-ordered relief. It is this provision that forces the trained collaborative team and the parties to create win-win solutions rather than running to the court for the judge to order one. This provision also allows both parties to better control their lives and the outcomes of their separation.

> **"The Participation Agreement is a contract that is signed by the parties, lawyers and other collaborative team members which officially starts the collaborative process."**

Historically, consumers have been somewhat confused when it comes to determining what type of dispute resolution services they need or are seeking. Now, they will have a detailed description of exactly what to expect from the collaborative law process as legislated by the UCLA. This will meaningfully help consumers to better understand the process and distinguish it from other methods, some of which can be less effective for them or their families.

The UCLA not only directs the role of the collaboratively trained attorney in the collaborative law process, but it also identifies what to expect from other collaboratively-trained professionals who may (and likely should) be included in the process.

Every collaborative team should include a divorce coach or coaches. These are trained professionals that, among other roles, address communication issues between the parties. A coach also focuses on the "emotional divorce." It is all too often that the "emotional divorce" is an obstacle to completing the "transactional divorce." A good coach efficiently and effectively helps the parties navigate the "emotional divorce" to get them to a place where they can healthily negotiate the "transactional divorce," which is typically the primary goal.

A financial neutral is another possible, and often extremely necessary, team member.

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SDF Congratulates Carlton R. Marcyan

Schiller DuCanto & Fleck congratulates Carlton R. Marcyan, on being named 2018 Chicago Lawyer of the Year in Collaborative Law by Best Lawyers in America. Schiller DuCanto & Fleck additionally had 29 lawyers named to Best Lawyers in America 2018.

Collaborative Law: A Distinct Alternative Dispute Resolution Practice Model

The Alternative Dispute Resolution ("ADR") process has seen a surge in popularity - particularly in family law cases - due to its confidentiality, cost-effectiveness and efficiency. When deciding what ADR model to employ in a divorce case, one of the most common questions asked is "How is collaborative law different from mediation?" While there are several differences between the collaborative process and the mediation model, both processes focus on problem-solving under a needs- and interests-based approach rather than positional bargaining. The significant differences are in the actual processes themselves.

Collaborative Team Approach

While mediation employs a neutral professional (usually an attorney, but not always) to facilitate communication and negotiation between the parties directly, the collaborative model utilizes a team approach consisting of two attorneys (one for each party) as well as other neutral professionals as the parties deem appropriate. These may include divorce coaches, a child specialist or a financial neutral.

The team model is the hallmark of the collaborative process, with each team member having distinct roles as follows:

- The attorneys act as their respective client's advocates, advisors and negotiators. They will ultimately put pen to paper to draft the final agreement that is reached.
- The divorce coaches are the mental health experts that keep the case moving forward and help to shepherd the parties and the attorneys through the process and work through various issues that arise during the process.
- A child specialist may be employed to facilitate agreements regarding complex parenting disputes such as issues surrounding special needs children, split parenting time arrangements, challenging decision-making issues, and arrangements for children with ongoing health concerns.
- A financial neutral is important if there are financial issues such as a business valuation, non-marital property or complex streams of income from employment or other sources. A financial neutral also works with the attorneys to put together options for resolving property distribution and support payments.

The collaborative team as a whole works to assist the parties in reaching a global agreement on all issues. By utilizing a methodology focused on the parties' needs and interests, rather than positional bargaining, the parties are able to focus on what is important to them in a global context in order to reach a customized agreement.

By contrast, a mediator does not offer legal advice during mediation and does not need to be "convinced" of either party's position. The mediator's role is not to make any decisions, but rather to facilitate communications between the parties, which will hopefully lead to an agreement. The mediation can either be between the parties only, or counsel can also be present with their clients under an attorney-assisted mediation model. If attorney-assisted mediation is utilized, the attorneys' role is to advise his or her client as to the law with respect to the negotiations.

Disqualification of Counsel

Engaging in a collaborative divorce restricts both the attorneys and the other team professionals from participating in the case in a litigation context if the collaborative process breaks down. For example, if a couple decides to participate in a collaborative divorce, they, along with the entire team of professionals, sign a Collaborative Participation Agreement ("CPA"), which sets forth all of the ground rules which they agree to abide by during the process. One of the key provisions of the CPA is that if the collaborative process breaks down and no agreement is reached, all of the professionals ***must*** be discharged. The parties are required to retain new counsel and new experts when they proceed in litigation. The work product generated in the collaborative process is also prohibited from being utilized in litigation.

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Timing of Mediation

Another difference between the collaborative model and mediation is that mediation can occur in several different contexts throughout the life of a divorce case. The parties can choose to engage a neutral at the beginning of the case and the entire case can be resolved solely through the mediation process prior to a case ever being filed. Or, a case that is pending in court can also be referred to mediation during the pendency of the case. In either situation, if no agreement is reached in mediation and the parties remain at an impasse, the case will then proceed in front of a judge in a more "traditional" litigation format.

It is important when deciding whether ADR may be beneficial for a certain case to evaluate whether the parties are strong candidates for the collaborative process. The process requires ***both*** parties to be committed to resolving their issues through a mutual problem-solving model rather than positional bargaining and being uniformly committed to not engaging in litigation.

Passage of the Collaborative Process Act: Codifying a Valuable Option in Divorce *(Continued from cover)*

Rather than each person hiring their own expert or having their own attorney collect and analyze discovery, a joint, collaboratively trained expert is utilized by the parties. This person may be responsible for collecting and analyzing data, creating a balance sheet, running cash flow projections and support scenarios, and, at times, even valuing business interests. The attorneys will still do their due diligence, but a financial neutral can significantly streamline the process and will eliminate a great deal of redundant time.

While the collaborative process can be transformative and can allow parties to amicably resolve their divorce and protect their assets and children, it is not for everyone. The collaborative process is voluntary and requires informed consent. The UCLA now makes this abundantly clear to the practitioner and the consumer. While the benefits are substantial, such as complete privacy, sustainable solutions and often reduced costs compared to litigation, the UCLA obligates lawyers to advise clients of both the risks and benefits of utilizing the collaborative law process. The Collaborative Law Institute of Illinois (www.collablawil.org) is a great resource for those considering the collaborative process and determining if it is the right fit for you and your family.

Collaborative law requires specialized skills and training to be successful. For more information about the new Collaborative Law Act, join Jason Sposeep of Schiller DuCanto & Fleck and other panelists as they present the **Collaborative Process Act: A New Beginning** on October 24, 2017 from 1:30 to 4:30 at Jenner & Block, 353 N. Clark Street. This presentation is open to all practitioners/professionals looking to create or hone a better understanding of collaborative law in the context of the UCLA.

What to Do (and What You Should Have Done Before) When You Need to Attempt to Vacate Your Mediated or Collaboratively Reached Divorce Judgment

Sometimes things just go wrong. Although using an alternative approach to a litigated divorce, such as mediation or collaborative method, should be speedier and sometimes result in a better outcome, there may be isolated instances when the final product, *i.e.* the Judgment of Dissolution of Marriage, might need to be vacated and the parties need to go back to the proverbial "drawing board."

The relevant sections in the Illinois Compiled Statutes that allow such action are 2-1301(e) and 2-1401 of the Code of Civil Procedure. The former is used within 30 days of entry of the final judgment and the latter is used after 30 days have elapsed since the entry of the final judgment. Courts may vacate an order or judgment within 30 days "upon any terms and conditions that shall be reasonable." The task of the court is to determine "whether substantial justice is being done between the parties and whether it is reasonable under the circumstances to proceed to trial on the merits." 735 ILCS 5/2-1301(e).

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If, however, the 30-day period has expired, Section 2-1401 of the Code of Civil Procedure provides the mechanism to present the court with a legal or factual basis to vacate the underlying judgment. Generally, the argument is that if the court had known at the time of the judgment a fact or legal basis that would have precluded its entry, it would have not entered the judgment. To prevail, the petitioner has the burden to show by a preponderance of the evidence the following: (1) the existence of a meritorious defense; (2) due diligence in presenting this defense in the underlying litigation; and (3) due diligence in the filing of the section 2-1401 petition for relief, which cannot be filed more than 2 years after the entry of the judgment. An affidavit and other materials should be presented with the petition to vacate that provide the court with the relevant and additional information.

However, despite that there are methods to attempt to vacate a judgment, the court does not always allow it. In divorce matters, one of frequent reasons to vacate a judgment is because one side claims the other side failed to properly disclose assets, income or both. The First District Illinois Appellate Court in the case of *In re Marriage of Goldsmith* said "no" to vacating a judgment because the petitioner failed to demonstrate due diligence in presenting the claim to the circuit court in the original action. "To set aside a judgment based on newly discovered evidence, the petitioner must show the new evidence was not known to her at the time of the proceeding and could not have been discovered by the petitioner with the exercise of reasonable diligence." 2011 IL App (1st) 093448, ¶ 15. The court further stated that where, as in that case, a party elects to waive formal discovery, "[t]he party does so at his or her own peril." *Id.*, ¶ 47. The appellate court therefore affirmed the trial court's denial of the petition to vacate because the petitioner failed to make attempts to determine through formal discovery the husband's financial situation. *Id.*, ¶¶ 49-50. Of concern is that in mediated and collaboratively handled cases, both parties generally forego formal discovery. It is important in marital settlement agreements arising from these methods that there is provision for an automatic remedy, such as sharing of discovered assets and income, if assets or income are not disclosed.

The same result occurred in *In re Marriage of Lyman*, 2015 IL App (1st) 132832. In that matter, the Appellate Court, First District, again emphasized that to set aside a judgment based on newly discovered evidence, a petitioner must show the new evidence was not known to her at the time of the proceeding and also could not have been discovered by the petitioner with the exercise of reasonable diligence. The court concluded that the wife:

"... did not act with due diligence regarding her claims of allegedly undisclosed assets at the trial court level. While we empathize with Deborah's argument that Robert lulled her into foregoing further discovery, we cannot overlook the obvious. Specifically, Deborah may have made a bad decision, but we cannot extricate her from the natural consequences of her own decision making. To allow Deborah to proceed with her section 2-1401 petition would give her a second opportunity to do that which should have been done before executing the MSA." *Id.*, ¶ 84.

The moral to the story is that, in cases that are mediated or using the collaborative method - and when there is no formal discovery - special language must be added to the parties' marital settlement agreement and judgment to allow for the handling of undisclosed assets or income. Without that you are at risk if your spouse was less than candid during the alternative dispute resolution process, as the court may determine that your failure to carry out full discovery was your choice and you are stuck with it.

Schiller DuCanto & Fleck Welcomes Elaine Knowles

Schiller DuCanto & Fleck welcomes Elaine Knowles as an Associate in our Chicago office. Ms. Knowles is a veteran practitioner and brings with her nearly a decade of negotiating and litigating complex family law matters involving business valuations, high conflict custody issues and domestic violence.

IN THE NEWS

Andrea K. Muchin spoke at The Young Lawyers Group of the Jewish United Fund's Networking Reception on August 15th, 2017. Andrea's article "Two courts reject creative way to shelter husband's marital assets" was also published in the Chicago Daily Law Bulletin.

Anne Prenner Schmidt was recognized by the Metropolitan Family Services Legal Aid Society for her work with their Pro Bono Program.

Schiller DuCanto & Fleck had 29 lawyers selected to Best Lawyers in America.

Amy N. Schiller's article "The color barrier is broken, but bias claims remain in sports" was published in the Chicago Daily Law Bulletin.

Erika N. Wyatt's blog "Pet Custody Comes to Illinois" was published on our Family Law Topics blog.

Anita M. Ventrelli was part of a roundtable discussion titled "Business Valuations: Determining A Company's Worth During Divorce" in Crain's Chicago Business. Anita is also presenting "How To Cross-Examine a Business Valuation Expert" at the Iowa State Bar Association on October 27, 2017.

Joshua M. Jackson presented "Arbitration - A Bargain for Finality" at the Lake County Bar Association Seminar on September 13, 2017.

Gregory C. Maksimuk's blog "I Am Divorced...Now What? The Top 10 Steps to Take to Safeguard Your Financial Future" was published on our Family Law Topics blog.

Eric L. Schulman spoke at the American Academy of Matrimonial Lawyers - Illinois' Columbus Day Seminar 2017 on the treatment of bonus, commission and other variable income types under the new child support income shares statute.

Kimberly A. Cook's article "Private lives, right to know a balancing act" was published in the Modern Family column of the Chicago Daily Law Bulletin.

Michelle A. Lawless has been named one of the 10 Best Attorneys in Illinois for Outstanding Client Service by The American Institute of Family Law Attorneys.

Jason N. Sposeep spoke at "Sensible Separation: Connecting the Pieces of the Divorce Puzzle" on September 28, 2017.

Congratulations to future Associate Mackenzie Ditch on passing the bar exam!

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