

COLLABORATIVE DIVORCE – EMBRACING DUE PROCESS

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An interesting conversation arose recently among some of my colleagues in the FACP Leadership Institute. A facilitator described a conversation she once had with a non-Collaborative lawyer. The lawyer had expressed a concern for “due process,” in Collaborative Law, which I interpreted to mean that the attorney thought due process was lost in Collaborative. I recognized how an attorney untrained in Collaborative could have that concern.

Procedural due process refers to the steps required to place a party on notice of legal proceedings so that they may participate. When anyone, the government or a private person, seeks to take legal action against you, you have the right to “notice and the opportunity to be heard.”¹ For decades, American jurisprudence has continued to uphold access to courts as a constitutional right. Collaborative Law asks clients to waive that right.

Florida has explicitly addressed this concern, by requiring attorneys to provide a prospective Collaborative client with “sufficient information” to allow “informed consent” to engage in the process.² The client is informed that (s)he is, at least temporarily, waiving the right to adversarial hearings and other procedures, such as formal discovery of evidence, in the adversarial system. The information that must be provided by a Florida Collaborative lawyer includes, “the material benefits and risks of using the collaborative law process,” and “alternatives to the collaborative law process.”

I began practicing law in New York twenty years ago. That state does not have a Collaborative Law statute, so these disclosures were not required by law or rule. Yet, I have described the client’s process options during nearly every divorce interview I’ve ever had. Even before my first Collaborative training in 2005, back when mediation was the primary alternative to litigation, these conversations arose out of my firm conviction to the right of clients to self-determination, including the means by which the decisions about how their marriage will end and their family will continue. To me, these conversations are the natural outgrowth of reasonable disclosure necessary for informed consent, required by court rules or not. I had never thought about this issue in terms of due process before.

Procedural Due Process has to do with Notice. The Government cannot take away your life, liberty or property without telling you why and giving you access to the adversarial system, where facts will be discovered and tested, and the law faithfully applied. “Substantive Due Process,” is that area of the law that guarantees our fundamental rights.

Americans have the constitutionally protected right to make and maintain the family we choose. “It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”³ Personal marital, familial, and sexual privacy are protected by the Bill of Rights. Among the family-centered rights that are so fundamental to our conception of

¹ *Goldberg v. Kelly*, 397 U.S. 245 (1970)

² F.S.A. Bar Rule 4-1.19

³ *Planned Parenthood of Southeastern PA v. Casey*, 505 U.S. 833 (1992)

freedom that they have been held to be “constitutional” in nature are the right to marry,⁴ the right to marry someone of a different race,⁵ the right to marry someone of the same gender,⁶ the right to choose whether or not to have children,⁷ and the right to the care and custody of those children.⁸ In all of these cases, the value we place on individual freedoms has moved the law, over time, to push government out of our decisions about family life unless there is a “compelling” government interest in the subject matter. The government reaches into the family only when given a very important reason to, like protecting a child from abuse.

Absent one of these reasons, families have the right to make their most intimate decisions autonomously. Plenty of American families raise their children, provide for their support, engage together in the civic, religious and social activities they decide will benefit them, and otherwise function in society without ever facing the interference of the government. Perhaps the place for the law in Collaborative cases lies in these fundamental rights. Not in a decision, often resulting in one client’s rights being superior to another, but in a resolution borne of respect for each clients’ fundamental rights under the law.

These fundamental family rights are grounded in the right to privacy.⁹ I am aware that judges, professional athletes, high level corporate executives, and other high-profile individuals have chosen the Collaborative process to ensure that privacy right. Privacy naturally results from the very fact that Collaborative cases are held outside the public scrutiny of the Courts. Although Florida’s Sunshine Laws, allowing public access to nearly all court documents, is antithetical to the privacy of a divorcing couple, Florida does not require that the details of these decisions be available for public consumption. In a case resolved between the parties, including a Collaborative matter, a Memorandum of Understanding may be filed instead of the detailed Marital Settlement Agreement, keeping the details private.

As clients exercise the right to autonomously decide what is best for their family going forward, their Collaborative team fosters their dignity and wellbeing. Access to the Court system remains guaranteed - the Collaborative process can end, for example, if a client fails to negotiate in good faith or provide full financial disclosure. Collaborative Law provides a knowing waiver of the formalities of substantive due process, all while preserving fundamental rights. Due process is not lost in the Collaborative process. To the contrary, due process is embraced by it.

⁴ Griswold v. Connecticut, 381 U.S. 479 (1965)

⁵ Loving v. Virginia, 388 U.S. 1 (1967)

⁶ U.S. v. Windsor, 570 U.S. 744 (2013) striking down a portion of the “Defense of Marriage Act,” holding that the federal government cannot define the terms “marriage” and “spouse” in a way that excludes married same-sex couples from the benefits and protections that married opposite-sex couples receive; and Obergefell v. Hodges, 576 U.S. 644 (2015) holding that marriage is central to “personal identity, dignity and autonomy,” for all, including same-sex couples, making it a fundamental right protected by the Fourteenth Amendment to the US Constitution.

⁷ Planned Parenthood of Southeastern PA v. Casey, 505 U.S. 833 (1992)

⁸ Santosky v. Kramer, 455 U.S. 745, 758-59 (1982)

⁹ Roe v. Wade, 410 U.S. 113 (1973)

