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Collaboratively Negotiating Agreements with Same-Sex Partners: What Do Professionals Need to Know?

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Committed interpersonal relationships, whether gay or straight, are fundamentally the same – particularly when the addition of children creates an expanded nuclear family. Dignity, honesty and respect for the new or dissolving relationship are core values of Collaborative Practice that apply to all cases. However, there are important differences between gay couples and straight couples that need to be respected – indeed, in many ways celebrated – when working within gay and lesbian communities. Collaborative practitioners should be aware of the psychological and practical nuances attached to the beginning and ending of same-sex relationships in order to handle competently the issues presented and to provide a quality experience for their clients.

This article will explore the ways in which the core values of Collaborative Practice meet the needs of same-sex couples in creating the structure for beginning and terminating committed relationships. It will highlight similarities to and differences from working with “straight” partners, and give Collaborative practitioners some food for thought when working with same-sex couples.

Definitions

DPA: Pre-marital and Domestic Partnership Agreement

DPSA: Marital Settlement/Domestic Partnership Settlement Agreement

Divorce: The termination of a committed relationship, whether a marriage, registration or cohabitation

LGBT: (Lesbian, Gay, Bisexual and Transsexual) The acronym for the many facets of the same-sex community

The term **Collaborative Practice** assumes a participation agreement signed by the clients and all professionals involved. It should be noted that many of the tenets of Collaborative Practice are also core principles of mediation. Mediation is extremely well-suited for these negotiations too, and should never be overlooked as a tool for clients. Further, mediation can work in tandem with and be a part of the Collaborative Process. The focus of this article, however, is the application of the Collaborative Practice model to issues facing same-sex couples.

Applying Collaborative Principles Generally

No Court

The cornerstone of Collaborative Practice is the commitment to avoid litigation. The written Collaborative Practice participation agreement requires all professionals involved in a negotiation to withdraw if either party seeks court assistance, and it applies to professionals in a divorce proceeding and to the drafters of a DPA. Neither attorney can represent a client in court against the other, either in divorce proceedings or, in the case of a DPA, in a subsequent divorce action. The appeal to all couples, straight or same-sex, is obvious.

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Interest-based Negotiation

The flip side of avoiding court and adversarial posturing is for the parties to give their lawyers permission to be problem-solvers rather than gladiators. In this role, the professionals are instructed to engage in interest-based negotiations rather than marketplace haggling over positions. In cases involving straight couples, the trickiest part of interest-based negotiations is knowing how to include a discussion of “the law” – what might happen if the parties were in court – with clients. For same-sex couples, the role of “the law” can be far less important than it might be with traditional couples, so partnerships are created or terminated based on the couple’s history and their own sense of fairness rather than entitlements based on legal theory.

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But why is this so? Frederick Hertz, a San Francisco Bay Area attorney, mediator and prominent lecturer in the LGBT legal community, observes that the marriage model is foreign to many same-sex couples. Same-sex couples may be more accustomed to leading separate financial lives. They are typically more accepting of short-term relationships and open relationships; and they are less likely to have expectations of long-term caretaking. This, together with the absence of clear law as it applies to same-sex couples, leaves them less reliant on legal entitlements. Adhering to Collaborative principles allows couples to do what feels fair and right to them by engaging in interest-based negotiation rather than simply trying to “win” a vague or unreliable legal argument.

Hertz also notes, however, that the possibility that marital rights might be extended to same-sex couples is triggering new thoughts, expectations and confusion, particularly for long-term couples who have been together under the old rules. Suddenly alimony does not seem so far-fetched, and

building an estate together or recognizing the financially less-advantaged partner’s right to part of the estate that has been accumulated by the other partner during a relationship seems more attractive and legitimate. Here is a golden opportunity for Collaborative professionals to get at the needs and interests of both parties, and to fashion an agreement for going forward or an agreement for allocating property and financial responsibility that might not have been expected or even accepted in the past.

Privacy, Confidentiality

Collaborative Practice is a confidential process that provides privacy and safety for the participants. This feature should be particularly attractive in the LGBT community, which can in any locality be small, protective, tightly knit, intricately entwined and/or extroverted and extremely social within the safe harbor of other same-sex couples. Privacy can be critical for same-sex couples for family-related, job-related, and a number of other reasons.

Control

Mistrust of the legal system is still very real in the LGBT community, so the control of the outcome and the process that Collaborative Practice offers is a valuable tool. Collaborative Practice is a shared process intended to provide safety, efficiency and success that empowers each participant and puts control of decisions and outcomes in his or her own hands rather than in the hands of attorneys or third-party decision-makers and a bureaucratic system.

Specific Issues for Same-Sex Partnerships

Tax Considerations

When creating a DPA or considering a property division in a divorce, it is easy to forget that many of the tax benefits for straight married and divorcing couples are just not available to the LGBT community. Jean Johnston, a San Francisco tax attorney and leading expert in LGBT tax and estate issues, cautions: “In considering the tax consequences of any proposed settlement it is important to keep in mind that we are in somewhat uncharted territory.”

The twin obstacles facing same-sex couples are uncertainty and inequality. Partners in same-sex registered domestic partnerships, civil unions, or even state law-sanctioned same-sex marriages often have no guaranteed “rules” or predictable outcomes in a given dispute. The only certainty is that they are going to be treated differently from partners in straight marriages, if not locally, at least by the Federal Government. For federal tax purposes, registered domestic partners and same-sex spouses are treated as strangers engaged in arms-length transactions, regardless of the provisions of the states in which they reside.

Here are some of the issues, also per Jean Johnston:

Transfer of property. For federal tax purposes, the transfer of property from one same-sex “spouse” to another is a taxable event, which could trigger federal income tax or gift tax to the transferor *and* federal income tax to the transferee on the *same* transaction (with different treatment at the state level). Therefore, when crafting a potential or actual property division, be sure to work with a tax expert to maximize whatever breaks can be extracted and to avoid unintended taxes.

Spousal support. This issue is rife with complications. If between unregistered partners, support could either be deemed a gift or income to the supported partner. If between registered partners or same-sex spouses in a state that confers the obligation of support, the “gift” analysis would not seem to apply unless the amount paid far exceeds support standards. However, the support could still be deemed income to the recipient, even though the payor cannot deduct it. The IRS has not ruled on either the gift tax issue or the income tax issue, so we simply don’t know what will happen when this is tested, except that we do know that the payment will not be deductible for federal tax purposes. For state tax purposes, however, it might be (and is, in California).

Child support. Although it might seem far-fetched, the IRS could take the position that this, too, is a gift or income to a same-sex recipient parent.

Reporting income. In crafting a DPA, remember that there are no “marriage benefits” for same-sex couples according to the IRS: all income must be reported by the earning party, whether a same-sex “spouse” or registered domestic partner. This is contrary to all community-property concepts and complicates the agreement and the couple’s tax returns.

Retirement. The ability to use deferred compensation as a planning tool in a traditional marriage (or as an option-expander in dissolution suits) disappears for same-sex couples. While married non-participants can avoid the ten percent penalty for early distribution of retirement plans at the time of divorce, same-sex partners cannot. While married non-participants can roll over IRAs and 401(k)s to the other spouse’s IRA or 401(k) without incident, same-sex partners cannot.

Gender Notions

Typecasting gender roles is prevalent throughout society and the legal system. Many of these are dying a very slow death. The idea that the man is the provider and the woman is the caretaker can factor into how an estate is divided, for example. And the “tender years doctrine,” in which mothers rather than fathers are seen to be the most appropriate primary caretakers of infants and small children, can affect the outcome of contests between parents.

All assumptions about biological gender are inapplicable in the LGBT community, and all such biases and suppositions must be jettisoned in order to provide quality service to same-sex couples. It is important for Collaborative professionals to get to know the clients as individuals, to avoid typecasting and gender stereotypes, and to avoid trying to squeeze same-sex couples into what Fred Hertz calls “heteronormative coupledness.”

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“Roles are allocated for same-sex couples by personality and personal needs, not by gender,” Hertz says, “but that doesn’t mean they are not problematic – especially for parenting, and particularly when there is a biological connection to one parent and not to the other one. For example, gay men in ‘wife’ roles have all sorts of issues that are different from those facing heterosexual wives.”

If defined by the stereotyped roles played, a same-sex couple, regardless of gender, might be comprised of two “moms,” two “dads,” a “mom” and a “dad,” two “providers,” no “providers,” one of each, etc. Further, the role one person *appears* to play in the partnership could very well be the opposite of the role he or she actually plays. Collaborative practitioners must pay careful attention to how they perceive a specific couple and whether a team member might be attempting to fit the same-sex clients into a pre-conceived “couple” mold. It may be helpful to identify partners who have previously been in a straight marriage – this can often inform attitudes about the process. Also be careful to give gay clients who want to be treated as a “normal” married couple the room to be so.

It can also be important to distinguish between lesbian couples and gay (male) couples. A committed relationship may have dimensions that seem “typical” for gay men but which might not be the norm for lesbian couples. The couple’s unique history will inform their deeply-held interests, needs and goals in the process.

Applying CP Principles to Pre-Marital/ Domestic Partnership Agreements

In her article entitled “Enter the Prenuptial – a Prelude to Marriage or Remarriage” (*Family Law News* Vol. 14 No. 4, California State Bar 1992, p. 3), Florence Kaslow states, “One strong criticism of the legal prenuptial is that philosophically it goes counter to the ideal of marriage built on total trust and sharing – there appears to be an implicit assumption ... that one party is marrying the other for economic reasons ... [and that the other is a] greedy newcomer who might not be considerate and fair in a future divorce action.”

Kaslow points out that too often a PDPA is drafted by the attorney for the fiancé with the resources and it turns into a no-win situation, because if Poor One simply signs, Poor One is resentful and if Poor One balks, Big Bucks is resentful.

Bringing the couple together collaboratively to create their own agreement educates, trains and builds on the couple’s commitment to each other. Sandra Rosenbloom and Judith Nesburn in their article entitled “Isn’t it Unromantic? Collaboratively Negotiating Pre- and Post-Nuptial Agreements” (*Collaborative Review* Spring 2008 Volume 10 Issue 1, IACP pp 18-19) underscore that “the Collaborative process, with its emphasis on meeting the needs of both participants and insistence on transparency, is the perfect vehicle to dispel the doubts and distrust that often are silent partners in negotiating pre- and post-nuptial agreements.”

Jean Johnston believes that the Collaborative Process is ideal in this respect. “I counsel my LGBT clients contemplating marriage not to fall lock-step into the community property system without fully understanding what it is and what it would mean to them, *i.e.*, how does it reflect their financial reality, particularly for long-term couples, and is their financial/economic reality one that they have chosen by default or truly considered? Finances and monetary expectations are the undoing of many couples, regardless of whether they are gay or straight. The value in examining a financial relationship is not only in the outcome but in engaging in a process, which hopefully will help strengthen the relationship by facilitating communication and clarity.”

Kaslow states that in the process of creating a premarital agreement together “couples have the opportunity to learn how to listen and understand each other and how to compromise. Developing these skills enables them to better cope with conflicts when they inevitably arise during the course of their marriage.” Therefore, the Collaborative process can be both a mechanism for planning and a mechanism for building communications skills and trust for any couple planning to marry or register.

For the LGBT community, the premarital agreement can also be an important tax planning tool given the inconsistencies between state and federal law. It may be critical to have such an agreement in order to avoid unfavorable tax treatment of any act of generosity or the simple process of providing for one’s family. Johnston cautions, however, that care should be taken to make sure that the “Big Bucks” client isn’t hiding behind the tax fears to justify separate property treatment rather than disclosing or discussing other motivations.

Many same-sex couples are quite open to premarital agreements, which do not feel the least bit coercive or threatening for either of the partners, regardless of the disparity of their assets or incomes.

As perhaps its most significant benefit, the Collaborative process can help the couple make their intentions clear with regard to having children, raising children of the partnership and other partnerships, and conferring all the benefits of parenthood on partners who are non-biological or otherwise non-traditional parents.

So what is different? Much of the introduction concerning Premarital Agreements simply doesn’t apply to many same-sex couples. Many same-sex couples are quite open to premarital agreements, which do not feel the least bit coercive or threatening for either of the partners, regardless of the disparity of their assets or incomes. The marital “rules” were not designed for them, and rather than being threatened by the prospect, they see the process of creating their own rules for their customized relationship as a constructive and positive one.

When straight couples negotiate Premarital Agreements, the couple must find a structure that balances one partner’s separate-property rights with the need to build an estate together and care for one another, even in the event of a divorce. In most cases, the “totally separate” Premarital Agreement is a recipe for disaster for these couples, probably due in part to what society expects from them as a married couple. This may not always be so for same-sex couples, simply because the right to marry and/or the right

to register as a civil union or Domestic Partnership and take on the rights and responsibilities of “marriage” is relatively new. Many same-sex couples have been together for a very long time under the old rules. Further, for gay males, this acceptance of separate financial lives could be indicative of the perception of greater economic equality between men as opposed to between men and women. Other same-sex partners may have simply lived financially and otherwise separate lives because it is expected or convenient. Accordingly, a large population of same-sex partners want to continue with their separate financial lives when contemplating marriage or registration. They are terrified of adverse tax consequences and find the concept of “alimony” completely foreign. In these situations, a more “separate” DPA is what they want and expect. Nonetheless, it is good practice to make sure the partners know the consequences of their agreement, and to test their own needs and goals as a couple against the concept of “separate-ness.”

Applying Collaborative Practice Principles to Same-Sex Divorce

Avoid Court and Adversarial Representation

The tacit understanding of those familiar with Collaborative Practice is that the adjudicatory model is inadequate to meet the needs of divorcing parties, and they are better off crafting their own solutions. But for same-sex couples in most jurisdictions, the adjudicatory model is not only *inadequate* to meet the needs of same-sex parties, it can be *hostile*. The legal complications facing same-sex couples are many and varied. In some jurisdictions, there may be no structure at all for domestic partners, while others acknowledge that civil unions or registered domestic partnerships confer the same rights and responsibilities as marriages. Currently only two states – Massachusetts and Connecticut – permit same-sex marriage, but many permit the formal registration of legal Domestic Partnerships between partners of the same sex. But regardless of the way a local jurisdiction treats same-sex relationships, these unions simply do not exist in the eyes of the Federal Government, giving rise to the above-described complications and contradictions. Further, bringing the proceedings into court might bring about the public “outing” of one or both of the partners, which could be unwelcome, unwanted and inappropriate for any given couple. Therefore, avoiding court for same-sex couples takes on a significance that simply does not exist for straight couples, and crafting their own agreements outside the system becomes even more critical.

Unfortunately, although an out-of-court resolution is clearly more advisable than going to court, same-sex couples also want to avoid *lawyers*. Hertz points out that because many

same-sex partners see lawyers as part of the “system,” lawyers are also viewed as part of the problem. This issue must be confronted and a relationship of trust must be established if the Collaborative process is going to work. Once that challenge is met, the Collaborative commitments can help same-sex couples avail themselves of the extensive resources of the Collaborative team, which can give them enhanced communication and negotiation skills; a clear sense of their joint, their own, and the other person’s finances; a stronger relationship going forward; and a better agreement than they could have come up with by themselves.

Honor and Recognize the Relationship that is Ending

A same-sex couple faces societal and familial obstacles that straight couples normally do not. Your partner is your ally in a world which largely questions your right to be together – a world in which three of the “United” States of America have recently voted to deny your fundamental right to marry. Family members may shun you; you might be reluctant to book a hotel on a vacation trip. Sound familiar? It may be because this journey is similar to the journey of mixed-race couples. Those couples are farther down the path to acceptance than same-sex couples, as evidenced by the recent election of a mixed-race president in a country with a 12% black population. In any case, this dependence on your partner in an “us against the world” mentality adds a layer of betrayal and loss to the termination of a same-sex relationship that is far more powerful than in a straight divorce. Given this, it makes even more sense to approach the termination of the relationship collaboratively, which can help alleviate feelings of betrayal, strengthen trust, and preserve that important alliance.

Preserve Ongoing Relationships

One of the strengths of the Collaborative process is the acknowledgment of the larger family the relationship has created – whether it is children, extended family, or a tight social circle such as in the LGBT community. Partners in a same-sex relationship may have been members of a close-knit group of friends for years before the relationship and will continue to travel in this circle following the termination of the relationship. The Collaborative process offers them a way to negotiate this reality, particularly with the help of the mental health professionals.

A partner in a same-sex relationship may have become very close to his partner’s family members, his own family being unable to accept him. The Collaborative process can create a structure for continuing these important relationships with the ex-partner’s blessing even after the relationship has changed forms.

Create a New Relationship Based on Respect and Open Communication

The goal of the Collaborative process, particularly for parents, is that the end of a committed relationship is the beginning of a new and different one. The post-partnership relationship can, with the help of a Collaborative team, include better communication and more respect, which sometimes even leads to reconciliation.

Same-sex partners with children have an even greater need for the resources of Collaborative Practice than straight couples with children. This is so because the rules for same-sex couples are often unclear. A non-biological partner can be left in the dust, even though his children have been calling him Daddy since they could speak. There are often other important relationships for children of same-sex couples, such as the biological Dad who has made it possible for two Moms to have their family. Sometimes there are also children from other relationships who are very close to both partners but whose legal ties to one of the partners may be tenuous or even non-existent. The complications can be daunting and endless. Collaborating provides a structure for the couple to continue to enjoy meaningful ongoing interaction with their children, regardless of the lack of clarity the law provides. In order for this to happen, a new and respectful relationship between the couple must be established, and for this, the Collaborative team was ready-made.

Holistic Process

Given the unanswered questions, complications and nuances – practical and psychological – of committed same-sex relationships, Collaborative Practice can be an ideal process for terminating the relationship with dignity. The resources (mental health professionals, financial specialists, child specialists, and others) that the Collaborative team can bring to couples terminating a same-sex committed relationship can help the couple honor those nuances, cut through the complications and provide a great benefit and service to the LGBT community.

Challenges

Using the Collaborative model can be challenging, however, particularly where the issues facing same-sex couples fall outside of the family law realm. The negotiations are typically contract-based and often handled by civil litigators who place more emphasis on the parties' perceptions and testimony than their needs and interests. The wildly unpredictable outcomes in these contract-based disputes make it more difficult for lawyers to agree on likely results. This can make the use of Collaborative Practice more difficult, or it can be the perfect opportunity for a team of well-trained Collaborative professionals to negotiate an outcome best suited for a particular couple.

The legalization of same-sex relationships through domestic partnership and marriage provisions, while eagerly sought, can also be problematic. The formality of divorce is foreign to many same-sex couples who have been accustomed to operating outside of a system that often will not even recognize the needs and rights of the parties. Further, the professionalized framework of Collaborative Practice may be off-putting to couples who can't understand why they need *any* lawyers, much less two lawyers – and who are these other professionals?

Conclusion

Same-sex couples are perfect for Collaborative Practice because this population has historically been ignored and underserved by the legal system. As a group they are unsure of their legal status and rights. Collaborative Practice allows same-sex partners to create their own rules and formulate custom solutions that might not be available to them elsewhere. In spite of the challenges, working as a team with same-sex couples to create good working relationships or to terminate an existing relationship with dignity can be extraordinarily rewarding for both the couple and the professionals involved. With careful thought and preparation on the part of the professionals, same-sex couples' needs can be met as well or better than those of their straight counterparts.

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