

## Describing the Collaborative Process for Divorcing in Illinois by James H. Feldman of Jenner & Block LLP

**Summary:** Widely adopted in the United States, Canada, and many other countries, the Collaborative Process used in Illinois is a values-driven, private, out-of-court alternative to the traditional litigation model for divorce, often resulting in greater client satisfaction and more durable results. Facilitated by trained professionals, the process helps couples achieve just resolution while avoiding many of the harmful aspects of litigation, including the loss of control and the financial and emotional costs. Key elements of the Collaborative Process are explained.

### **Helpful references:**

Illinois: [www.collaborativedivorceillinois.org](http://www.collaborativedivorceillinois.org)

International: [www.collaborativepractice.com](http://www.collaborativepractice.com)

Anyone considering divorce in Illinois is likely, in the first instance, to seek guidance from a lawyer, mental health provider, faith leader, wealth manager, accountant or other professional. These first-contact professionals are often familiar with litigation and mediation, the two process models long established and widely used for divorcing in Illinois but are less familiar with the Collaborative Process (**CP**), the newest divorcing process used in Illinois. This overview is intended to assist these professionals in describing the basics of CP to divorcing couples. It can be provided to the couple as well, to aid their understanding of CP.

CP is not simply a “friendly” divorce. It is a highly developed, voluntary process with specific laws, rules, and protocols. It is a client-driven and controlled, private process in which virtually nothing happens without the consent of the parties.

CP is not brand new. Introduced in 1990 in Minnesota, over time CP became popularized and is now used in most US states, Canada, and many other countries. In 2009-2010 the Uniform Law Commission approved and recommended to the states versions of the Uniform Collaborative Law (and Rules) Act (taking the form of statute, court rule, or both). Then, in 2018, Illinois enacted the Collaborative Process Act (750 ILCS 90), supplemented that year by companion rule of the Illinois Supreme Court (SCR 294), both modeled on the Uniform Act. Today, nearly one-half of the states in the United States have adopted a version of the Uniform Act. In Cook County, litigated cases can now be suspended and placed on a special calendar for CP cases (Cir. Ct. Rule 13.2). The core elements of CP in Illinois are these:

- Participation Agreement. The couple, along with their collaborative attorneys and other members of the professional team, sign a Participation Agreement in which the parties pledge to proceed out of court without litigation, to make full disclosure, and to negotiate in good faith, with transparency and civility.

- Interdisciplinary team. The couple selects a professional team. The professional team is comprised of professionals from different disciplines, each of whom has been trained in CP and licensed in their respective fields. The composition of the interdisciplinary team can be tailored to fit the case, but typically consists of **collaborative attorneys** for each party (always required), a **financial neutral**, and one or two mental health professionals (**coaches**) to support the parties, diffuse negative emotions, and help offset imbalances that may exist between the couple. A neutral **child specialist** is often added to the professional team where minor children are involved, and a neutral **mediator** can be added as well. The couple's pre-existing professionals, such as therapists, accountants, and wealth managers, are not part of the professional team but are sometimes asked for their input during the process. Outside experts and consultants usually are jointly retained by the parties. Financial neutrals usually come from the financial planning and accounting worlds. The financial neutrals gather financial information, create balance sheets and budgets, identify special expertise needed, assist with financial literacy, and help formulate solutions and settlement options that might work for both parties.
- Meetings and negotiations. Meetings of the parties and the professional team involve a series of agenda-led, face-to-face sessions where the couple participates directly alongside the professional team. The couple's individual and shared goals, needs and interests are the focus. Positional bargaining tactics are discouraged. The parties are heard and supported by the professional team. Settlements reached in the process ultimately require court approval to be enforceable.
- Confidentiality. Communications among the participants during the process are privileged and cannot be used in court. The couple can agree on the extent to which they otherwise want to maintain confidentiality and assure privacy. The professional team is required to maintain confidentiality.
- Disqualification of professionals. If settlement fails, members of the professional team, including the couple's collaborative attorneys, are barred from participating in litigation between the couple. This key provision is often referred to as the "defining element" of CP. Disqualification encourages the couple and the professionals to stay in the process and fully explore options for settlement, with flexibility and creativity. This potential for disqualification produces a heightened degree of professionalism among the professional team.
- Termination of process. Either party may terminate CP at any time, with or without cause, and CP is terminated if either party initiates litigation except to seek court approval of a settlement.

#### **Questions often raised:**

- Cost. The cost of CP is almost always less than litigating in court. Unlike CP, litigation typically involves competing experts, costly discovery, and positional bargaining. It is

a truism that conflict is a primary driver of professional fees. Members of the professional team, having been trained in CP, work to reduce conflict.

- Comparison to Mediation. Mediation for divorce is similar to CP. It too is a private, out-of-court process that uses established protocols and interest-based negotiations, and it is almost always less costly than litigation. All communications are privileged and cannot be used in court. Unlike CP, mediation can be compelled by court order, does not require each party to have an attorney, and does not typically have the support of a professional team. Most importantly, unless mediation is conducted under the umbrella of CP, mediation does not disqualify the couple's attorneys from participating in ensuing litigation if mediation fails to achieve settlement.
- Concealment and Discovery. Fraudulent concealment is rare because exchange of financial information is voluntarily produced to the satisfaction of the couple, guided by the financial neutral. The requirement of transparency in CP is, in a sense, self-enforced by provisions granting each party the unilateral right to terminate the process, thereby disqualifying the collaborative attorneys (and other members of the professional team) from participating in litigation. These provisions, collectively, serve to incentivize the couple to disclose all material information. The occurrence of fraudulent concealment, although rare, could invalidate a settlement agreement.
- Consequences of Failure. Even if full settlement is not achieved using CP, and the parties must engage different attorneys and other professionals for litigation, they will have benefited from any partial agreements reached in CP as well as the exchange of financial information which can be used in the litigation. They are not starting over.
- Cases Not Appropriate for CP. Most couples are good candidates for CP, even where high conflict is present. However, CP is not for everyone. For example, it is not for those who are unwilling to be transparent about their finances, for those who only want their "day in court", or for those who simply cannot afford it.

### **Conclusion:**

CP is an important new process option for couples divorcing in Illinois. CP offers privacy, structured meetings with established protocols, support of a trained team of professionals, and full control over the couple's divorce. Each party's right to terminate the process, and thereby disqualify the professionals from litigation, creates a powerful incentive that promotes settlement and encourages transparency. Hopefully this overview will assist first-contact professionals in describing CP to couples considering divorce.

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Jenner & Block Of Counsel James H. Feldman is chair of the firm's Family Law Practice. He is Fellow of Collaborative Divorce Illinois (formerly known as Collaborative Law Institute of Illinois) and a member of the International Academy of Collaborative Professionals. Over many years as a practitioner in the field, Mr. Feldman has developed a reputation as one of the premier counselors to high-net worth and wealthy individuals with family law needs.

He was named a "Trailblazer" in 2016 by the *National Law Journal* in its inaugural issue for Divorce, Trusts and Estates lawyers. *Leading Lawyers Network Magazine-Consumer Edition* has consistently identified Mr. Feldman among the "Top 10 Leading Family Lawyers in Illinois" and, in 2019, ranked him #2 for Collaborative Divorce and #4 for Family Law in Illinois. Mr. Feldman has been listed in every edition of the *Best Lawyers in America* since its first publication in 1983. He is AV Peer Review Rated, Martindale-Hubbell's highest peer recognition for ethical standards and legal ability.

Mr. Feldman has been a faculty member of the Illinois Institute for Continuing Legal Education and has lectured and written many publications on subjects relating to his practice area. Mr. Feldman has also chaired committees in the Litigation and Family Law Sections of the American Bar Association. He was Chair of the Board of Directors for The Family Institute at Northwestern University from 2009-2015 and was a Board member for 20 years.

Mr. Feldman was a Fellow of the American Academy of Matrimonial Lawyers for 38 years. The Illinois Chapter of AAML named him the 2023 recipient of the Samuel S. Berger Award presented annually to an Illinois attorney or judge who "exemplifies the highest standards of integrity, courtesy and knowledge of Family Law, and demonstrates an extraordinary ability to solve human problems."

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