The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: CS/SB 1190

INTRODUCER: Children, Families, and Elder Affairs Committee and Senator Lee

SUBJECT: Family Law

DATE: April 7, 2014 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Crosier	Hendon	CF	**Fav/CS**
2.	Brown	Cibula	JU	**Favorable**

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1190 creates the Collaborative Law Act (Act). The Act codifies the collaborative process, which is used to facilitate the settlement of matters relating to the dissolution of marriage, such as the distribution of property, alimony, child custody, visitation, and support. A form of alternative dispute resolution, the collaborative process brings together the parties, collaborative attorneys, and specialists, which may include mental health professionals and financial specialists. The hallmark of the collaborative process is the disqualification of the parties' attorneys from further representation if the process terminates without an agreement.

The bill defines terms used in the collaborative law process. The bill also specifies circumstances in which the collaborative process continues, concludes, or terminates, and generally prohibits the disclosure, discovery, or admissibility of communications made during a collaborative law process.

The bill will take effect 30 days after the Supreme Court adopts rules consistent with the bill.

II. Present Situation:

Florida does not currently have a collaborative law process in statute. However, Florida law recognizes forms of alternative dispute resolution and is considered a leader among states in that

regard.[1] Florida public policy favors arbitration[2] and "mediation and settlement of family law disputes is highly favored in Florida law."[3] Arbitration and mediation provisions are provided in ch. 44, F.S. (Mediation Alternatives to Judicial Action).

The collaborative law movement began in 1990. The movement started to significantly gain in popularity after 2000.[4] Known as an interdisciplinary dispute resolution process, the model envisions a collaborative team of professionals assembled to assist the divorcing couple in negotiating resolution of their issues. In addition to the collaborative attorneys, the collaborative team may consist of mental health professionals, or divorce coaches, a child specialist, and a financial specialist.[5] The entire team does not attend all of the meetings.

Today, collaborative law is practiced in every state, in every English-speaking country, and in other countries.[6] Established in 2000, the International Academy of Collaborative Professionals has more than 4,000 professionals as members from 24 countries.[7] In the United States, at least 22,000 attorneys have been trained in the collaborative process.[8]

In the United States, the Uniform Law Commission established the Uniform Collaborative Law Act of 2009 (amended in 2010) which regulates the best use of collaborative law, a form of alternative dispute resolution. According to the ULC:

> Collaborative Law is a voluntary dispute-resolution process in which clients agree that, with respect to a particular matter in dispute, their named counsel will represent them solely for purposes of negotiation, and, if the matter is not settled out of court that new counsel will be retained for purposes of litigation. The parties and their lawyers work together to find an equitable resolution of a dispute, retaining experts as necessary. The process is intended to promote full and open disclosure and, as is the case in mediation, information disclosed … is privileged against use in any subsequent litigation. … Collaborative Law is governed by a patchwork of state laws, state Supreme Court rules, local rules, and ethics opinions. The Uniform Collaborative Law Rules/Act (UCLR/A) is intended to create a uniform national framework for the use of Collaborative Law; one which includes important consumer protections and enforceable privilege provisions.[9]

Seven states, Alabama, District of Columbia, Hawaii, Nevada, Texas, Utah, and Washington have enacted the Uniform Collaborative Law Act, and bills are pending in six states other than

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[1] Fran L. Tetunic, *Demystifying Florida Mediator Ethics: the Good, the Bad, and the Unseemly*, 32 NOVA L. REV. 205, 243 (Fall 2007).
[2] *Shotts v. OP Winter Haven, Inc.*, 86 So. 3d 456, 472 (Fla. 2011).
[3] *Griffith v. Griffith*, 860 So. 2d 1069, 1073 (Fla. 1st DCA 2003).
[4] John Lande and Forrest S. Mosten, *Family Lawyering: Past, Present, and Future*, 51 FAM. CT. REV. 20, 23 (January 2013).
[5] Glen L. Rabenn, Marc R. Bertone, and Paul J. Toohey, *Collaborative Divorce – A Follow Up*, 55-APR Orange County Law 32, 32 (April 2013).
[6] *Id*.
[7] *Id.*
[8] Andrew J. Meyer, *The Uniform Collaborative Law Act: Statutory Framework and the Struggle for Approval by the American Bar Association*, 4 Y.F. ON ARB. & MEDIATION 212, 213 (2012).
[9] Uniform Law Commission, Uniform Collaborative Law Rules/Act Short Summary. http://www.uniformlaws.org/Shared/Docs/Collaborative_Law/UCLA%20Short%20Summary.pdf

Florida.[10] Six states, including Florida, address the collaborative process through local court rules.[11]

The purported benefits of collaborative divorce are that the process hastens resolution of disputed issues in a dissolution of marriage case and that total expenses of the parties are less than the parties would incur in traditional litigation. Although a comparison of costs is not available, the International Academy of Collaborative Professionals (IACP) studied 933 cases in which the parties agreed to the collaborative process.

The IACP found that:

- Eighty percent of all collaborative cases resolved within a year;
- Eighty six percent of the cases studied were resolved with a formal agreement and no court appearances; and
- The average fees for all professionals totaled $24,185.[12]

Case profiles considered inappropriate for the collaborative law approach include cases that involve domestic violence, substance abuse, or severe mental illness.[13]

Critical to the collaborative law approach is the "disqualification clause," which requires that if the parties fail to reach an agreement and intend to engage in contested litigation, both collaborative lawyers are disqualified from further representation, and the parties must start again with new counsel. "The disqualification provision thus creates incentives for parties and Collaborative lawyers to settle."[14] Still, the American Bar Association (ABA) has cited the disqualification provision as the primary basis for the ABA to not approve the Uniform Collaborative Law Act. The ABA claims that the disqualification provision, unfairly enables one party to disqualify the other party's attorney simply by terminating the collaborative process or initiating litigation.[15]

III. Effect of Proposed Changes:

CS/SB 1190 creates the Collaborative Law Act. The bill defines the collaborative law process as a process intended to resolve a collaborative matter in the family law context without intervention by a tribunal in which the parties sign a collaborative law participation agreement and are represented by collaborative attorneys.

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[10] Illinois, Massachusetts, Michigan, New Jersey, Oklahoma, and South Carolina. http://www.uniformlaws.org/Act.aspx?title=Collaborative%20Law%20Act (last visited April 4, 2014).

[11] California, Florida, Indiana, Kansas, Louisiana, and Wisconsin. Email correspondence with Meghan McCann, National Conference of State Legislatures (March 12, 2014). At least four judicial circuits in Florida have adopted local court rules on collaborative law. These are the 9th, 11th, 13th, and 18th judicial circuits. Other circuits may however recognize the collaborative process in the absence of issuing a formal administrative order.

[12] Rabenn, *supra* note 5, at 36.

[13] *Id*.

[14] John Lande, *The Revolution in Family Law Dispute Resolution*, 24 J. AM. ACAD. MATRIM. LAW. 411, 429 (2012).

[15] Meyer, *supra* note 8, at 216.

Uses of the Collaborative Process in Settling Issues in Dispute

The collaborative process may be useful in facilitating early settlement of legal issues. Matters addressed in the collaborative process generally relate to the dissolution of marriage, including the distribution of marital property, alimony, and child support and custody.

The bill specifically defines collaborative matters as matters arising under ch. 61, F.S., (Dissolution of Marriage; Support; Time-sharing) or ch. 742, F.S., (Determination of Parentage) such as:

- Marriage, divorce, dissolution, annulment, and marital property distribution;
- Child custody, visitation, parenting plans, and parenting time;
- Alimony, maintenance, and child support;
- Parental relocation with a child;
- Determination of parentage; and
- Premarital, marital, and postmarital agreements.

A collaborative participation agreement is an agreement between parties to participate in the collaborative law process.

The bill defines a proceeding as a judicial, administrative, arbitral, or other adjudicative process before a tribunal, including prehearing and posthearing motions, conferences, and discovery.

The bill further defines a tribunal as a court, arbitrator, administrative agency, or other body acting in an adjudicative capacity.

The collaborative process is voluntary and parties have the option of beginning the process before filing a petition in court or after a party files a petition for dissolution of marriage.

Circumstances in Which the Collaborative Process Continues, Concludes, or Terminates

In addition to methods specified by the parties in the agreement, the process is concluded by:

- Resolution as evidenced by a signed agreement;
- Partial resolution in which the parties agree that some of the matters will be resolved outside of the process; or
- Termination of the process.

The process can terminate through a variety of actions by a party, including when a party:

- Gives notice that the process is concluded;
- Begins a proceeding related to the process without agreement of all parties;
- Initiates contact with the court or other tribunal, through a pleading, motion, order to show cause, or request for a conference; or
- Discharges a collaborative attorney.

A party may terminate the process with or without cause.

If a collaborative attorney is discharged or withdraws, the unrepresented party has 30 days to hire another collaborative attorney. Parties must consent to continue the process by reaffirming the collaborative law participation agreement in a signed record. The parties must also amend the agreement to identify the successor attorney and the successor attorney must confirm that he or she represents one of the parties.

The parties may request that the tribunal approve a resolution of the collaborative matter.

Confidentiality and Privilege

Communications made during the collaborative law process are privileged, not subject to discovery and inadmissible in evidence. If a communication is privileged, a party may refuse to disclose or may prevent another person's disclosure of the communication. However, evidence or information otherwise admissible or subject to discovery is not privileged solely because of its disclosure or use in the collaborative law process. The parties may agree to a partial or complete waiver of privilege of the collaborative law process, as evidenced in a signed record.

A privilege to a collaborative communication may be waived if it is waived by all parties, and if it is the privilege of a nonparty participant, the nonparty participant expressly waives the privilege.

A person may not assert a privilege to a collaborative communication if he or she discloses a collaborative communication that causes prejudice to another person in a proceeding. However, the privilege is waived only to the extent necessary for the prejudiced person to respond to the disclosure.

A privilege does not apply to any collaborative communication that is:

- Available under ch. 119, F.S., as a public record, or made during an open session of a collaborative law process, or during which a session is required by law to be open to the public;
- A threat or statement of a plan to inflict bodily injury or commit a violent crime;
- Intentionally used to plan, commit, or attempt to commit a crime, or conceal criminal activity; or
- In a collaborative law participation agreement, signed by the parties.

A privilege also does not apply to the extent that a collaborative communications is:

- Sought or offered to prove or disprove a claim of professional misconduct or malpractice related to the collaborative law process;
- Sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation of a child or adult unless the Department of Children and Families participates in the process;
- Sought by a party and found by a tribunal to not otherwise be available as evidence, the need for the evidence substantially outweighs the interest in protecting confidentiality, and the communication is sought or offered in:
    - A court proceeding involving a felony; or
    - A proceeding seeking rescission or reformation of a contract arising from the collaborative law process, or in which a party asserts a defense to avoid liability in the contract.

Effective Date of the Collaborative Process Act (Act)

The Act does not take effect until 30 days after the Florida Supreme Court approves and publishes:

- The Rules of Professional Conduct requiring collaborative attorneys and attorneys in the same law firm to disqualify themselves from representing a participant to the process in court except in limited circumstances relating to the seeking of an emergency order to protect the health, safety, and welfare, or interest of a party until a successor attorney is available and for continued representation of government entities; and
- The Family Law Rules of Procedure governing the collaborative law process which must address the collaborative law participation agreement and requiring a stay of ongoing proceedings if a party has already filed a petition on the same matter.

The bill takes effect July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The use of a collaborative process may reduce litigation costs for litigants by reducing attorney fees, case related costs, and court fees.

C. Government Sector Impact:

The Office of State Courts Administrator (OSCA) indicates that this bill may decrease judicial workload due to fewer filings, hearings, and contested issues in each case in which the process is used. A reduced workload will only happen in instances in which the collaborative process ends in an agreement. Although fiscal impact is expected to be positive, exact impact is unknown at this time.[16]

[16] Office of the State Courts Administrator, *2014 Judicial Impact Statement, CS/SB 1190* (April 4, 2014).

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates the following sections of the Florida Statutes: 61.55, 61.56, 61.57 and 61.58.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Children, Families, and Elder Affairs on April 1, 2014:
The Committee Substitute:

- Provides legislative purpose to create a system of practice of a collaborative law process.
- Adds definitions of terms used in the collaborative law process.
- Provides that certain sections created in the proposed legislation not take effect until 30 days after the approval and publication by the Florida Supreme Court of Rules of Professional Conduct and Family Law Rules of Procedure.

B. Amendments:

None.