HOUSE BILL REPORT
SHB 1116

As Amended by the Senate

Title: An act relating to collaborative law.

Brief Description: Adopting the uniform collaborative law act.

Sponsors: House Committee on Judiciary (originally sponsored by Representatives Pedersen, Hansen, Rodne and Nealey; by request of Uniform Laws Commission).

Brief History:
Committee Activity:
Judiciary: 1/22/13, 1/29/13 [DPS].
Floor Activity:
Passed House: 3/4/13, 97-0.
Senate Amended.
Passed Senate: 4/15/13, 48-0.

Brief Summary of Substitute Bill

- Adopts the Uniform Collaborative Law Act.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 12 members: Representatives Pedersen, Chair; Hansen, Vice Chair; Rodne, Ranking Minority Member; O'Ban, Assistant Ranking Minority Member; Goodman, Hope, Jinkins, Kirby, Klippert, Nealey, Orwall and Shea.

Staff: Cece Clynch (786-7195).

Background:

Collaborative law is a voluntary, contractually based alternative dispute resolution process that allows parties to resolve all or part of a dispute outside of court. It is currently most commonly used in family law cases, but may be used to reach settlement in a variety of disputes. In collaborative law, the parties voluntarily participate and sign a collaborative participation agreement describing the scope of the matter to be resolved. One significant

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difference between collaborative law and other forms of alternative dispute resolution such as mediation, is that parties in collaborative law must be represented by attorneys throughout the process.

There are no statewide court rules regulating collaborative law. Some local court rules require the parties in a family law action to notify the court if they enter into a collaborative law participation agreement. In addition, there are rules adopted by the Washington Supreme Court regulating the conduct of lawyers and specifying a lawyer's professional responsibilities to a client.

The Uniform Collaborative Law Act of 2010 was drafted by the Uniform Law Commission. To date, five states and the District of Columbia have adopted the act: Nevada, Utah, Texas, Ohio, and Hawaii.

Summary of Substitute Bill:

The Uniform Collaborative Law Act (UCLA) is adopted and applies to collaborative law participation agreements signed on or after the effective date of the legislation. The use of collaborative law only applies to matters that would be resolved in civil court and may not be used to resolve matters in criminal cases.

Collaborative Participation Agreement.
A collaborative participation agreement (agreement) must, among other things, describe the nature and scope of the matter intended to be resolved, identify the collaborative lawyers representing the parties, and contain a statement by each lawyer confirming the lawyer's representation of a party in the process. The agreement may contain additional provisions that are not inconsistent with the UCLA, including provisions on how the collaborative law process can be concluded.

Authority of Tribunal During Collaborative Law Process.
Parties in a pending proceeding, such as a court action, arbitration, or administrative action, may enter an agreement to attempt to resolve a matter related to the proceeding. The notice to the tribunal of the agreement acts as an application for a stay of the proceeding. The stay is lifted when the parties file notice that the collaborative law process has concluded. The tribunal may require the parties to provide a status report on whether the collaborative law process is ongoing or concluded. During a collaborative law process, a tribunal may issue emergency orders to protect the health, safety, welfare, or interest of a party or a family or household member.

Concluding a Collaborative Law Process.
A collaborative law process is concluded by either a resolution of all or part of the collaborative matter or by termination of the process.

A collaborative law process is terminated when: (1) a party notifies other parties that the process is ended; (2) a party begins a proceeding related to a collaborative matter without agreement of all parties or, if there is a pending proceeding, the party initiates an action in the tribunal that would require notice to be sent to the parties; or (3) a party discharges his or her collaborative lawyer or the lawyer withdraws. In the event of the latter occurrence, the

process may continue if the unrepresented party engages a new collaborative lawyer and all parties agree to continue.

Responsibilities of Collaborative Lawyers.
Before a party signs an agreement, the lawyer must: (1) assess with the party factors the lawyer reasonably believes relate to whether the process is appropriate for the matter; (2) provide information the lawyer reasonably believes is sufficient for the party to make an informed decision; and (3) advise the party that the process is voluntary, can be terminated if the party initiates proceedings in a tribunal, and requires disqualification of the lawyer once the process is concluded.

Before a party signs an agreement, and throughout the collaborative law process, the lawyer must make a reasonable inquiry and assessment of whether the party has a history of a coercive or violent relationship with another prospective party. If the lawyer believes the party he or she represents has a history of a coercive or violent relationship with another party, the lawyer may not begin or continue a collaborative laws process unless the party requests the process and the lawyer reasonably believes that the party's safety can be adequately protected during the process.

Disqualification of Collaborative Lawyers.
A collaborative lawyer may not represent a party before a tribunal in a proceeding related to the collaborative matter, except to ask the tribunal to approve an agreement resulting from the collaborative law process or to seek or defend an emergency order. In the case of an emergency order, the collaborative lawyer may represent a party or family or household member only until the person is represented by a successor lawyer or reasonable measures are taken to protect the health, safety, welfare, or interest of the person.

This disqualification applies to lawyers in the collaborative lawyer's law firm, except for firms representing governmental entities. In the case of a party that is a governmental entity, another lawyer in the firm may represent the party, but the collaborative lawyer must be isolated from any participation in the matter.

Confidentiality and Privileges of Collaborative Law Communications.
Provisions for confidentiality and privilege are created for parties and nonparties in the collaborative law process. A collaborative law communication is confidential to the extent agreed to by the parties or required by other state law.

With certain exceptions, a collaborative law communication is privileged, is not subject to discovery, and is not admissible in evidence. Generally, a party may refuse to disclose and may prevent others from disclosing a collaborative law communication. However, information that is otherwise admissible or discoverable does not become inadmissible or protected from discovery solely because of its use in a collaborative law process.

Exemptions to privilege include communications that would be public under the Public Records Act or that pertain to certain criminal activity. In addition, the privilege does not apply when the communication is sought or offered: (1) in a claim of professional misconduct or malpractice arising from the process; (2) to prove or disprove abuse, neglect,

abandonment, or exploitation of a child or adult, unless the protective services agency is a party to the process; or, (3) to prove or disprove stalking or cyber stalking of a party or child.

There is also no privilege if the tribunal finds that the evidence is not otherwise available, the need for the evidence substantially outweighs the interest in protecting confidentiality, and the communication is sought in a criminal proceeding or a proceeding related to avoiding liability on, rescinding, or reforming a contract arising out of the collaborative law process.

Standards of Professional Responsibility.
The UCLA does not affect the professional responsibility obligations and standards that apply to a lawyer or other licensed professional or to the obligation of a person to report abuse or neglect, abandonment, or exploitation of a child or adult.

EFFECT OF SENATE AMENDMENT(S):

The Senate Amendment removes "a legislative body conducting a hearing or similar process" from the definition of "tribunal".

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) This request legislation from the Uniform Law Commission passed out of committee, and the House of Representatives, in a prior year. The main issue that generates any controversy concerns whether the legislation should go into effect via statute, or whether some or all of it is more properly the subject of court rule. Persons who have used the collaborative process in their own dissolution action report that, with this process, anger is reduced and parties can work together to achieve workable solutions. Litigation can be destructive. Bullying does not occur in the collaborative law process. This process is taking an approach that transactional law has always taken and applying it outside of business transactions. Lawyers in King County are looking at employing collaborative law outside of the family law context where it is mainly used today. Collaborative law is rapidly being adopted in the state, country, and world. It is good for families, good for kids, and saves the state money. Enacting this law will provide a context that is lacking today. It will provide uniformity and a clear definition of collaborative law, and will protect the public. Parties will know what to expect and will know their rights and their obligations. At this time, only Pierce and Thurston Counties have local rules in place relative to collaborative law. Any request by the Washington State Bar Association (WSBA) to adopt only part of this bill and allow the rest to be put in rule should be rejected. It is uncertain whether any court rules will ever be adopted. Last year, the WSBA made the same pitch but the rules are not in place today and the WSBA cannot make rule changes on its own. It would make no sense to have only part of this bill in statute and nothing whatsoever in rule. Having it all in statute makes sense since not all of the professionals involved and governed are attorneys. No other state

has done what the WSBA suggests, putting part in statute and part in rule. Although Utah has both statute and rule, that state already had a rule in place on the subject at the time the statute was adopted. Other states have adopted the UCLA in its entirety. The other amendments proposed by the WSBA and the amendment regarding contested actions are acceptable. Collaborative law is distinguishable from mediation in that each party in a collaborative process has a lawyer that has been trained in mediation, but there is no mediator involved. As for concerns that there is less motivation to conclude a collaborative matter or that the poor are most impacted if and when the collaborative process concludes without resolution and the party loses his or her attorney, studies have shown that 90 percent of collaborative matters do resolve. Also, under RCW 26.09.140, a party who is without means can request attorneys' fees. Stalling plagues every dissolution action, whether the collaborative process is employed or not. The disqualification provision acts as an incentive, not a deterrent, in helping people reach agreement. Also, typically, even if complete resolution is not reached, some pieces generally get resolved in the process so disqualification does not mean starting completely over again. Attorneys that practice collaborative law use informed consents that inform clients about the disqualification provision. Uniformity among the states is important and beneficial. Parties may travel or move to another state and want recognition of what was done in the prior state. This national framework will replace a patchwork, promote consistency, and create black letter privilege much like what exists in the mediation statute. It would be very convenient to see this all laid out in statute as a chapter in Title 7, alongside other chapters relative to mediation and arbitration. While there is some controversy about whether all of this should be in statute, or whether separation of powers means some should be in rule, there is agreement that the portions related to privilege must be in statute. Consumer protection is key. The collaborative process will not be used by all victims of domestic violence, but if and when used it is very important that the process be spelled out clearly. Section 14 relative to coercive or violent relationships is very important. The addition relative to cyber stalking is appreciated. If the court rules are passed, it may be that there will be amendments to the UCLA requested to reflect this. Conflict affects the children involved in family law matters, and collaborative law can reduce conflict. It is important to have privilege addressed, otherwise both clients and their lawyers are without protection.

(In support with concerns) The WSBA structure is such that it is governed by a 17-member board, and only the board can take a position for the organization as a whole. At the same time, there are 27 sections, and each can take a position for that section. Most concerns have been addressed. However, one concern remains, and that is the inclusion of sections 6 through 10 and 19. These belong in court rule not statute. Not all states that have adopted the UCLA have done so wholesale. Texas made changes and California has both statute and court rule. The WSBA has been working to get collaborative law provisions put in rule. The WSBA rules committee has them now, preparing them for presentation to the Supreme Court. It is hoped that the Supreme Court receives them prior to the end of the legislative process.

(Opposed) None.

Persons Testifying: (In support) Representative Pedersen, prime sponsor; Al Aldrich, Mary Sakaguchi and Mark Weiss, King County Collaborative Law; Mike Fancher, Collaborative Professionals of Washington; Dennis Cooper, Uniform Law Commission; Grace Huang,

Washington State Coalition Against Domestic Violence; and Paul McVicker, Alternative Dispute Resolution Section of the Washington State Bar Association.

(In support with concerns) Kathryn Leathers, Washington State Bar Association.

Persons Signed In To Testify But Not Testifying: None.