

SENATE BILL REPORT

SHB 1116

As of March 28, 2013

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: Passed House: 3/04/13, 97-0.

Committee Activity: Law & Justice: 3/27/13.

SENATE COMMITTEE ON LAW & JUSTICE

Staff: Sharon Swanson (786-7447)

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 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 (UCLA) 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 Bill: UCLA is adopted and applies to collaborative law participation agreements signed on or after the effective date of the legislation. The use of collaborative

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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 (Agreement). An 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 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 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, 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 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 its 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 concludes.

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 the lawyer represents has a history of a coercive or violent relationship with another party, the lawyer may not begin or continue a collaborative law 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, 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, not subject to discovery, and 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 as such: (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 cyberstalking 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. 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.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: 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. Having it all in statute makes sense since not all of the professionals involved and governed are attorneys. Other states have adopted UCLA in its entirety. Collaborative law is distinguishable from mediation in that each party in a collaborative process has a lawyer that is 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 their attorney, studies show that 90 percent of collaborative matters do resolve. 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. Having been through a collaborative divorce process, I can attest that my relationship with the father of my child would not be as cooperative or as smooth absent the opportunity to work together to resolve our issues. Collaborative law allows families to work together to determine what their future will look like. All parties have a voice. If you went through a divorce you know how hurtful and emotional the process is. With a collaborative law approach, experts are available to assist and advise you to make good choices for the future of your relationships.

Persons Testifying: PRO: Representative Pedersen, prime sponsor; Jamie Lewellyn, Walla Walla attorney; Mike Fancher, Seattle Divorce Services; Steve Fisher, Angela Lee, Kristin Little, John Burke, Mary Sakaguchi, Mark Weiss, citizens; Dennis Cooper, Uniform Law Commission; Jessica McKeegan Jensen, Jessica Jensen Law; Grace Huang, WA State Coalition Against Domestic Violence.