



General Statutes Commission

300 N. Salisbury Street, Suite 401
Raleigh, NC 27603-5925
Tel. 919-733-6660 Fax 919-715-5459

Floyd M. Lewis
Revisor of Statutes

P. Bly Hall
Assistant Revisor of Statutes

MEMORANDUM

To: House Judiciary
From: General Statutes Commission
Re: HB 32 (Collaborative Law)
Date: February 19, 2019

General Comments

Collaborative law is a voluntary alternative dispute resolution process in which parties make a good faith effort to resolve their dispute without the intervention of a court or other tribunal. A person is not required to participate in a collaborative law process, and any party can terminate the process at any time with or without cause. A distinctive feature of collaborative law is that the parties sign a collaborative law participation agreement, are represented by their lawyers (termed “collaborative lawyers”) during the process, and agree at the beginning of the process that if they fail to negotiate a resolution of their dispute, they will each be required to retain new lawyers for any subsequent litigation relating to the collaborative matter. Collaborative law adds an additional arrow to the quiver of alternative dispute resolution procedures recognized in this State.

This bill is a modified version of the Uniform Collaborative Law Act as approved in 2009, and amended in 2010, by the Uniform Law Commission. To date, seventeen states and the District of Columbia have adopted the Act, by statute or court rule.

Collaborative law is not new to this State. In 2003, the General Assembly authorized collaborative law procedures for the resolution of divorce and family law disputes as set forth in Article 4 of Chapter 50 of the General Statutes, G.S. 50-70 through 50-79. This bill leaves in place the collaborative law procedures for family law disputes but extends the availability of collaborative law to other areas of the law, beyond family law matters.

The bill establishes a statutory framework for the collaborative law process, with the following key features:

- Requires a lawyer to provide specified information to a client to assure that the client makes an informed decision as to whether to enter into the collaborative law process.
- Establishes minimum requirements for a collaborative law participation agreement.
- Defines when a collaborative law process begins and ends.
- Provides that the filing of a notice of a collaborative law process operates as a stay of any pending proceeding and precludes a court or other tribunal from dismissing the proceeding without giving the collaborative lawyers an opportunity to be heard.
- Allows a court or other tribunal, during a collaborative law process, to issue emergency orders to protect the health, safety, welfare, or interest of a party or otherwise preserve the status quo.
- Disqualifies a collaborative lawyer and a lawyer in an associated law firm from appearing before a court or other tribunal in a proceeding related to the collaborative matter, subject to certain exceptions.

- Encourages candor by the parties by providing for the confidentiality of collaborative law communications and privileges against their disclosure in later legal proceedings.

The Collaborative Law Committee of the Dispute Resolution Section of the North Carolina Bar Association participated in the drafting of this bill. A draft of the bill was widely circulated to individuals and groups believed to be interested in the topic, including other sections of the North Carolina Bar Association, and was subsequently introduced in the 2018 short session (HB 1022). HB 1022 passed the House but was not taken up in the Senate Committee on Rules and Operations of the Senate, apparently due to time constraints. The General Statutes Commission is not aware of any opposition to the bill.

Specific Comments

Section 1 adds a modified version of the Uniform Collaborative Law Act as new Article 53 of Chapter 1 of the General Statutes, consisting of §§ 1-641 through 1-663:

§ **1-641** provides that the Article may be cited as the Uniform Collaborative Law Act.

§ **1-642** defines key terms used in the Article, including “collaborative law process,” “collaborative matter,” and “collaborative law participation agreement.”

§ **1-643** provides that the Article, with certain exceptions, applies to a collaborative law participation agreement that meets the requirements of § 1-644 and is signed on or after the Article’s effective date. The Article does not apply to any claim or proceeding arising under Chapters 35A (Incompetency and Guardianship), 35B (Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act), or 50 (Divorce and Alimony) of the General Statutes. Family law matters will continue to be governed by the collaborative law procedures under Article 4 of Chapter 50 of the General Statutes. Individuals who cannot give informed consent are prohibited from being parties to a collaborative law process.

§ **1-644** establishes minimum requirements for a collaborative law participation agreement and allows the parties to agree to include in the agreement additional terms that are not inconsistent with the Article.

§ **1-645** specifies that participation in a collaborative law process is voluntary, specifies when and how the process begins and how it is concluded or terminated, and provides for the tolling of applicable statutes of limitations and other time limitations during the process. In general, a collaborative law process begins with the signing of a collaborative law participation agreement and concludes upon resolution of the collaborative matter or upon termination of the process.

§ **1-646** allows persons in a proceeding pending before a court or other tribunal to enter into a collaborative law process to attempt to resolve a collaborative matter related to the proceeding. The filing of a notice of the collaborative law process with the tribunal operates as a stay of the pending proceeding. The stay is qualified by § 1-647, which authorizes a tribunal to issue emergency orders notwithstanding the stay, and by § 1-648, which authorizes a tribunal to approve an agreement resulting from a collaborative law process.

The court or other tribunal may require the parties and their lawyers to provide a status report on the collaborative law process while the stay is in effect. The tribunal must provide the

parties notice and an opportunity to be heard before dismissing the proceeding based on delay or failure to prosecute.

§ 1-647 allows a court or other tribunal to issue emergency orders to protect the health, safety, welfare, or interests of a party or otherwise preserve the status quo during the collaborative law process.

§ 1-648 allows a court or other tribunal to approve an agreement resulting from a collaborative law process.

§ 1-649 disqualifies a collaborative lawyer and a lawyer in the same law firm from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter, subject to certain exceptions in this section and in §§ 1-647, 1-650, and 1-651. The disqualification does not apply if the lawyer represents a party (i) to seek the tribunal's approval of an agreement resulting from the collaborative law process or (ii) to seek or defend an emergency order to protect the health, safety, welfare, or interest of a party or otherwise preserve the status quo.

§ 1-650 limits the lawyer disqualification requirement to the individual collaborative lawyer so that another lawyer in the same law firm may represent a low-income party in the collaborative matter or a matter related to the collaborative matter after the conclusion of the collaborative law process if (i) the party qualifies for free legal representation under criteria established by the law firm, (ii) the collaborative law participation agreement so provides, and (iii) the collaborative lawyer is isolated from further participation in the matter.

§ 1-651 additionally limits the lawyer disqualification requirement by allowing another lawyer in the same law firm to represent a governmental entity in the collaborative matter or a related matter after the conclusion of the collaborative law process if (i) the collaborative law participation agreement so provides and (ii) the collaborative lawyer is isolated from further participation in the matter.

§ 1-652 requires parties to disclose relevant information during the collaborative law process without formal discovery requests and to update information previously disclosed that has materially changed. The parties may define the scope and terms of the disclosure during the collaborative law process.

§ 1-653 provides that the Article does not affect the professional responsibility obligations and standards applicable to a lawyer or other licensed professional.

§ 1-654 requires a prospective collaborative lawyer to obtain the informed consent of a prospective party to participate in a collaborative law process by requiring the lawyer to:

- Assess with the prospective party whether a collaborative law process is appropriate for the prospective party's matter.
- Provide the prospective party with information that the lawyer reasonably believes is sufficient for the party to make an informed decision about the material benefits and risks of a collaborative law process as compared to other forms of dispute resolution.
- Inform the prospective party about (i) the voluntary nature of the collaborative law process and the right of any party to terminate it with or without cause, (ii) what terminates a collaborative law process, and (iii) the lawyer disqualification requirements.

§ 1-655 provides that a person incurs no liability for the person's decision to participate or not to participate in a collaborative law process.

§ 1-656 provides that collaborative law communications generally may not be disclosed to anyone other than a party, a party's collaborative lawyer, or a nonparty participant (such as an expert), except to the extent agreed by the parties in a signed record or as otherwise required by law.

§ 1-657 provides that collaborative law communications of a party or a nonparty participant are privileged, are not subject to discovery, and are not admissible in evidence, subject to the waiver and preclusion of privilege under § 1-658 and the limits of privilege under § 1-659. However, evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely because of its disclosure or use in a collaborative law process.

§ 1-658 (i) provides for the express waiver of the privilege under § 1-657 and (ii) prevents assertion of that privilege by a person that reveals a collaborative law communication which prejudices another person in a proceeding, but only to the extent necessary for the person prejudiced to respond to the disclosure.

§ 1-659 provides specific exceptions to the privilege for collaborative law communications under § 1-657 based on important countervailing public policies such as the prevention of bodily injury or a crime.

§ 1-660 allows a court or other tribunal to enforce an agreement resulting from a collaborative law process despite the failure of a lawyer to draft a valid collaborative law participation agreement or to obtain the client's informed consent to participate in the collaborative law process. The tribunal must find that the parties signed a document or other record indicating an intention to enter into a collaborative law participation agreement and reasonably believed they were participating in a collaborative law process. If the tribunal makes these findings and the interests of justice require, the tribunal may enforce the agreement that resulted from the process and may apply the lawyer disqualification requirement and the privilege against disclosure of collaborative law communications.

§ 1-661 allows parties to a collaborative law process to agree to use other nonadversarial forms of alternative dispute resolution to settle a collaborative matter and allows the parties' collaborative lawyers to serve as counsel for those forms of alternative dispute resolution.

§ 1-662 and § 1-663 are standard uniform act provisions relating to uniformity of application and construction and to the federal Electronic Signatures in Global and National Commerce (ESIGN) Act, respectively.

Section 2 is a severability provision, and **Section 3** authorizes the printing of official and drafters' comments.

Section 4 provides that the act becomes effective October 1, 2019.