

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 Children, Families, and Elder Affairs

BILL: CS/SB 1190

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

SUBJECT: Family Law

DATE: April 1, 2014

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Crosier	Hendon	CF	Fav/CS
2.			JU	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1190 creates a uniform process in ch. 61, F.S., entitled the “Collaborative Process Act.” The bill provides definitions, states when a collaborative agreement is in effect and its impact on legal time periods. The bill addresses the confidentiality and applicable exceptions of all collaborative communications, written agreements entered into as a result of the process, and the waiver of the privilege by a party. The bill provides for the disqualification of an attorney from further representation of a party if the process terminates without an agreement. The bill provides that certain sections created in the legislation do not take effect until the Florida Supreme Court adopts certain rules.

The bill has an effective date of July 1, 2014, and the fiscal impact is indeterminate.

II. Present Situation:

The Uniform Law Commission (ULC) provides model statutes that are designed to be consistent from state to state. Florida’s commissioners to the ULC are appointed to four year terms by the Governor and confirmed by the Senate.¹ The ULC develops model statutes in many different areas of law to create uniformity in the law between jurisdictions. One such model statute is 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:

¹ Section 11.249, F.S.

At its core, 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 in a collaborative process is privileged against use in any subsequent litigation. Collaborative Law is currently being practiced in all American jurisdictions as well as in a number of foreign countries. In the U.S., 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. Collaborative Law under the UCLR/A is strictly voluntary. Attorneys are not required to offer collaborative services, and parties cannot be compelled to participate.²

Seven states, Washington, Nevada, Utah, Texas, Hawaii, Alabama, Ohio, and Washington, D.C., have enacted the Uniform Collaborative Law Act, while bills are pending in six other states.³ Florida currently recognizes forms of alternative dispute resolution and is considered a leader among states in that regard.⁴ Florida public policy favors arbitration⁵ and “mediation and settlement of family law disputes is highly favored in Florida law.”⁶

Collaborative law is a non-adversarial alternative dispute resolution concept that, similar to mediation, promotes problem-solving and solutions in lieu of litigation. Collaborative law is entirely voluntary, and counsel retained for the purpose of collaborative law is only to be used in the collaborative law process. Should litigation ensue because the collaborative law process partially or completely failed to resolve the issues, the parties are required to retain different attorneys for litigation. The concept requires extensive confidentiality and privileges to be created by statute, while the courts must develop rules of practice and procedure to conform.

The bill creates the Florida Uniform Collaborative Law Act. The bill does not actually create a collaborative law process in Florida. The bill primarily serves to provide the necessary statutory privileges and confidentiality of communications required for the collaborative law process.

² Uniform Law Commission, Uniform Collaborative Law Rules/Act Short Summary. *available at* http://www.uniformlaws.org/Shared/Docs/Collaborative_Law/UCLA%20Short%20Summary.pdf (last visited March 27, 2014).

³ Illinois, Massachusetts, Michigan, New Jersey, Oklahoma, and South Carolina.

⁴ Fran L. Tetunic, *Demystifying Florida Mediator Ethics: the Good, the Bad, and the Unseemly*, 32 *Nova L. Rev.* 205, 244 (Fall 2007).

⁵ *Shotts v. OP Winter Haven, Inc.*, 86 So.3d 456 (Fla. 2011).

⁶ *Griffith v. Griffith*, 860 So.2d 1069, 1073 (Fla. 1st DCA 2003).

III. Effect of Proposed Changes:

Section 1 provides the legislative intent for the creation of a collaborative law process for proceedings under ch. 61, F.S., and ch. 742, F.S.

Section 2 creates Part III of ch. 61, F.S., and is entitled the “Collaborative Process Act.”

Section 3 creates s. 61.55, F.S. This section states the purpose and the state policy for creating a uniform system of practice of the collaborative process which is to encourage the peaceful resolution of disputes and early settlement of pending litigation through voluntary settlement procedures.

Section 4 creates s. 61.56, F.S. This section provides definitions of terms pertinent to the collaborative process such as collaborative attorney, collaborative communication, collaborative participant, and collaborative participation agreement. The section also provides that matters arising under ch. 61, F.S., or ch. 742, F.S., are included in the collaborative law process.

Section 5 creates s. 61.57, F.S. This section provides that the collaborative process is commenced when the parties enter into a collaborative process agreement regardless of whether a proceeding is pending. This section provides when the collaborative process is terminated.

Section 6 creates s. 61.58, F.S., to provide that a collaborative law communication is confidential to the extent agreed upon by the parties in writing. This section also provides a privilege against disclosure for collaborative law communications, within limits provided in the bill. A collaborative law communication is not subject to discovery or admissibility into evidence in a proceeding before a tribunal. Each party has a privilege to refuse to disclose a collaborative law communication, and to prevent any other person from disclosing a communication. If a party makes a representation about a privileged collaborative communication, the privilege is waived but only to the extent necessary for the other party to respond to the disclosure or representation. The privilege does not attach to a signed written agreement reached during the collaborative process unless the parties otherwise agree in writing.

The bill provides that a privilege does not apply to a collaborative law communication that:

- Is available to the public under ch. 119, F.S.;
- Is a threat or statement of a plan to inflict bodily injury or commit a crime of violence;
- Intentionally used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence; and
- Is offered for the limited purpose of establishing or refuting enforceability of an agreement reached during the collaborative process.

Section 7 provides that ss. 61.55-61.58, F.S., created by this bill shall not take effect until 30 days after approval and publication by the Florida Supreme Court of:

- Rules of Professional Conduct governing mandatory disqualification of a collaborative law attorney and includes limited exceptions to mandatory disqualification in certain situations.
- Family Law Rules of Procedure governing required elements of a collaborative law participation agreement defining the commencement, procedures, and termination of the

collaborative law process and that upon referral to a collaborative law process ongoing procedures are legally suspended during the time the collaborative process remains in effect.

Section 8 creates s. 61.57, F.S., to provide for the disqualification of collaborative attorneys from further representation of the collaborative participants in a dissolution of marriage proceeding if the collaborative process terminates without an agreement.

Section 9 provides an effective date of 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 fiscal impact of this bill on expenditures of the State Courts System is indeterminate at this time.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates the following sections of the Florida Statutes: Part III of Chapter 61, 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.