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:	SB 972
INTRODUCER:	Senator Lee
SUBJECT:	Family Law
DATE:	January 11, 2016
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Cibula	JU	**Favorable**
2.			RC	

I. Summary:

SB 972 establishes the Collaborative Law Process Act as the framework for a collaborative law process to facilitate the out-of-court settlement of dissolution of marriage and paternity cases. The process is a type of alternative dispute resolution, which employs collaborative attorneys, mental health professionals, and financial specialists to help the parties reach a consensus. The terms of the process are contained in a collaborative law participation agreement between the parties.

Under the bill, issues that may be resolved through the collaborative process, include but are not limited to:

- Alimony and child support;
- Marital property distribution;
- Child custody and visitation;
- Parental relocation with a child;
- Premarital, marital, and postmarital agreements; and
- Paternity.

The bill also defines under what circumstances the collaborative law process begins and ends. The collaborative law process begins when the parties enter into a collaborative law participation agreement. Under the bill, parties may enter into a collaborative law participation agreement before filing a petition with the court or while an action is pending. The bill also allows for the partial resolution of issues collaboratively, with the remainder to be resolved through the traditional adversarial process.

Under the bill, collaborative law communications, which are communications made as part of the collaborative process, are generally confidential and privileged from disclosure, not subject to discovery in a subsequent court proceeding, and inadmissible as evidence. However, the bill provides exceptions to the privilege.

The effect of the bill is contingent upon the adoption of implementing rules by the Florida Supreme Court.

II. Present Situation:

Collaborative Law Process

The collaborative law process, a type of alternative dispute resolution, is designed to facilitate the out-of-court settlement of dissolution of marriage cases. The process employs collaborative attorneys, mental health professionals, and financial specialists to help the parties reach consensus. The parties, attorneys, and team of professionals negotiate various terms, such as the distribution of property, alimony, and child visitation and support. A collaborative law participation agreement provides the structure for how the parties will proceed.

Once the parties reach agreement on a disputed matter, they sign and file with the court the marital settlement agreement.

The purported benefits of a collaborative divorce are that the process hastens resolution of disputed issues and that the 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.[1]

The IACP found that:
- Eighty percent of all collaborative cases resolved within 1 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.[2]

Some jurisdictions disfavor the collaborative process for cases involving domestic violence, substance abuse, or severe mental illness.[3]

History of Collaborative Law Movement

The collaborative law movement, starting in 1990, began to significantly expand after 2000.[4] Known as an interdisciplinary dispute resolution process, collaborative law envisions a collaborative team of professionals assembled to assist the divorcing couple in negotiating resolution of their issues.

[1] The International Academy of Collaborative Professionals has more than 4,000 professionals as members from 24 countries. John Lande, *The Revolution in Family Law Dispute Resolution*, 24 J. AM. ACAD. MATRIM. LAW. 411, 430 (2012).
[2] Glen L. Rabenn, Marc R. Bertone, and Paul J. Toohey, *Collaborative Divorce – A Follow Up*, 55-APR Orange County Law 32, 36 (Apr. 2013).
[3] *Id*. at 36.
[4] John Lande and Forrest S. Mosten, *Family Lawyering: Past, Present, and Future*, 51 FAM. CT. REV. 20, 22 (Jan. 2013).

In the United States, at least 30,000 attorneys and family professionals have been trained in the collaborative process.[5]

Uniform Collaborative Law Act of 2009

In the United States, the Uniform Law Commission established the Uniform Collaborative Law Act of 2009 (amended in 2010). 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.[6]

Thirteen states, Alabama, Arizona, District of Columbia, Hawaii, Maryland, Michigan, Montana, Nevada, New Jersey, Ohio, Texas, Utah, and Washington have enacted the Uniform Collaborative Law Act.[7] Nine states, including Florida, address the collaborative process through local court rules.[8]

An essential component of the Uniform Collaborative Law Act (UCLA) is the mandatory disqualification of the collaborative attorneys if the parties fail to reach an agreement or intend to engage in contested litigation. Once both collaborative lawyers are disqualified from further representation, the parties must start again with new counsel. "The disqualification provision thus creates incentives for parties and Collaborative lawyers to settle."[9]

At least three sections of the American Bar Association have approved the UCLA—the Section of Dispute Resolution, the Section of Individual Right & Responsibilities, and the Family Law Section.[10] However, in 2011 when the ULC submitted the UCLA to the American Bar Association's House of Delegates for approval, it was rejected. The disqualification provision appears to have been the primary basis for the ABA's decision. Those within the ABA who

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[5] Lande, *supra* note 1, at 430.
[6] Uniform Law Commission, *Uniform Collaborative Law Rules/Act Short Summary* (on file with the Senate Judiciary Committee).
[7] *Legislative Fact Sheet*, http://www.uniformlaws.org/Act.aspx?title=Collaborative%20Law%20Act (last visited Jan. 5, 2016).
[8] Alabama, California, Florida, Indiana, Kansas, Louisiana, Maryland, Minnesota, and Wisconsin. Email correspondence with Meghan McCann, National Conference of State Legislatures (Feb. 19, 2015). 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.
[9] Lande, *supra* note 4 at 429.
[10] New Jersey Law Revision Commission, *Final Report Relating to New Jersey Family Collaborative Law Act*, 5 (Jul. 23, 2013), http://www.lawrev.state.nj.us/ucla/njfclaFR0723131500.pdf .

objected to the UCLA have stated that the disqualification provision unfairly enables one party to disqualify the other party's attorney simply by terminating the collaborative process or initiating litigation.[11]

Florida Court System

In the 1990s, the court system began to move towards establishing family law divisions and support services to accommodate families in conflict. In 2001, the Florida Supreme Court adopted the Model Family Court Initiative. This action by the Court combined all family cases, including dependency, adoption, paternity, dissolution of marriage, and child custody into the jurisdiction of a specially designated family court. The Court noted the need for these cases to have a "system that provide[s] nonadversarial alternatives and flexibility of alternatives; a system that preserve[s] rather than destroy[s] family relationships; … and a system that facilitate[s] the process chosen by the parties."[12] The court also noted the need to fully staff a mediation program, anticipating that mediation can resolve a high percentage of disputes.[13]

In 2012, the Florida Family Law Rules committee proposed to the Florida Supreme Court a new rule 12.745, to be known as the Collaborative Process Rule.[14] In declining to adopt the rule, the court explained:

> Given the possibility of legislative action addressing the use of the collaborative law process and the fact that certain foundations, such as training or certification of attorneys for participation in the process, have not yet been laid, we conclude that the adoption of a court rule on the subject at this time would be premature.[15]

Although the Florida Supreme Court has not adopted rules on collaborative law, at least four judicial circuits in Florida have adopted local court rules on collaborative law through an administrative order. These are the 9th, 11th, 13th, and 18th judicial circuits. Each of the administrative orders includes the requirement that an attorney disqualify himself or herself if the collaborative process is unsuccessful. Other circuits have recognized the collaborative process in the absence of issuing a formal administrative order.

III. Effect of Proposed Changes:

Collaborative Law Process Act

This bill establishes the Collaborative Law Process Act as a basic framework for the collaborative law process, for use in dissolution of marriage and paternity cases. The collaborative law process, a type of alternative dispute resolution, is designed to facilitate the out-of-court settlement of dissolution of marriage cases. The process employs collaborative

[11] Andrew J. Meyer, *The Uniform Collaborative Law Act: Statutory Framework and the Struggle for Approval by the American Bar Association*, 4 Y.B. ON ARB. & MEDIATION 212, 216 (2012).
[12] *In re Report of Family Court Steering Committee*, 794 So. 2d 518, 523 (Fla. 2001).
[13] *Id*. at 520.
[14] *In Re: Amendments to the Florida Family Law Rules of Procedure*, 84 So. 3d 257 (March 15, 2012).
[15] *Id*.

attorneys, mental health professionals, and financial specialists to help the parties reach agreement.

By placing the Act in law, the bill offers another kind of alternative dispute resolution, besides mediation, to parties involved in dissolution of marriage and parentage cases. However, unlike mediation, which may be court-ordered, participation in the collaborative process is voluntary.[16]

The authority for the collaborative process provided in the bill is limited to issues governed by chapter 61, F.S. (Dissolution of Marriage; Support; Time-sharing) and chapter 742, F.S. (Determination of Parentage). More specifically, the following issues are proper issues for resolution through the collaborative law process:

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

Beginning and End of Collaborative Process

The bill defines the circumstances in which a collaborative law case begins and ends. The collaborative law process begins when the parties enter into a collaborative law participation agreement. The agreement governs the terms of how the process will proceed. Parties may enter into the agreement before or after petitioning a court for the dissolution of marriage or determination of parentage.

The collaborative law process concludes when issues are resolved and the parties sign the agreement. But the bill also allows for the collaborative law process to partially resolve the issues. If partially resolved, parties agree to reserve remaining issues for the judicial process.

Alternatively, a collaborative law process may terminate before any issues are resolved. The collaborative law process terminates when a party:

- Provides notice to the other parties that the process has ended;
- Begins a court proceeding without consent of the other party, or asks the court to place the proceeding on a court calendar;
- Initiates a pleading, motion, order to show cause, or requests a conference with a court; or
- Discharges a collaborative attorney or a collaborative attorney withdraws as counsel.

The bill allows the process to continue if a party hires a successor collaborative attorney to replace his or her previous attorney. The unrepresented party must hire, and identify in the agreement, a successor collaborative attorney within 30 days after providing notice that the party is unrepresented.

[16] Section 61.183(1), F.S., provides, in part: "In any proceeding in which the issues of parental responsibility, primary residence, access to, visitation with, or support of a child are contested, the court may refer the parties to mediation … ."

In allowing parties to begin the process before or after filing a petition, partially resolve issues, and hire successor collaborative attorneys, parties can customize the process as they see fit.

Mandatory Disqualification

This bill does not provide for mandatory disqualification of the collaborative attorneys if the process does not result in an agreement. Therefore, the primary incentive to encourage resolution is not in the bill. Although the bill conforms to the Uniform Collaborative Law Act in other respects, the failure to include mandatory disqualification is a significant departure from the UCLA. However, the Supreme Court could include the disqualification requirement in its implementing rules.

The bill also departs from local court rules on collaborative divorce. All circuits in which courts have adopted local rules on the collaborative process require counsel to withdraw from further representation if the process breaks down and an agreement is not reached.[17]

Confidentiality and Privilege

The bill generally provides that collaborative law communications are confidential and privileged from disclosure. As such, communications made during the collaborative law process are not subject to discovery or admissible as evidence.

The bill identifies a number of exceptions to the privilege. The privilege does not apply to communications if:

- The parties agree to waive privilege.
- A person makes a prejudicial statement during the collaborative law process. In this instance, preclusion applies to enable the person prejudiced to respond to the statement.
- A participant makes statements available to the public under the state's public records law or made during a meeting of the process that is required to be open to the public.
- A participant makes a threat, or describes a plan to inflict bodily injury.
- A participant makes a statement that is intentionally used to plan, commit, attempt to commit, or conceal a crime.
- A person seeks to introduce the statement in a claim or complaint of professional misconduct or malpractice arising from the collaborative law process.
- A person seeks to introduce the statement to prove or disprove abuse, neglect, abandonment, or exploitation of children or adults unless the Department of Children and Families is involved.
- A court finds that the evidence is not otherwise available, the need for the evidence substantially outweighs the interest in confidentiality, and the communication is sought or offered in a felony proceeding or a proceeding involving contract disputes.

[17] Order Authorizing Collaborative Process Dispute Resolution Model in the Ninth Judicial Circuit of Florida, Fla. Admin. Order No. 2008-06 (Mar. 28, 2008); *In re:* Authorizing the Collaborative Process Dispute Resolution Model in the Eleventh Judicial Circuit of Florida, Fla. Admin Order No. 07-08 (Oct. 2007); Collaborative Family Law Practice, Fla. Admin. Order No. S-2012-041 (Jul. 31, 2012); *In re:* Domestic Relations—Collaborative Conflict Resolution in Dissolution of Marriage Cases, Fla. Admin. Order No. 14-04 Amended (Feb. 23, 2014) (on file with the Senate Judiciary Committee).

Other than the discrete categories of exceptions to the privilege, the bill provides a broad level of confidentiality and protection from disclosure to collaborative law communications. Additionally, disclosure is limited to only the part of the communication needed for the purpose of the disclosure. Parties will be encouraged to communicate openly during the collaborative law process.

Rule Adoption by the Florida Supreme Court

Although the bill becomes law July 1, 2016, its provisions do not take effect until 30 days after the Florida Supreme Court adopts rules of procedure and professional responsibility.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill does not contain a mandate because the bill does not affect cities or counties.

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:

Although some family law attorneys already practice collaborative law in the state, the bill could theoretically expand the use of collaborative law as an alternative to traditional litigation in dissolution of marriage cases. To the extent that collaborative law reduces costs of litigation, parties undergoing divorce could benefit financially from electing to proceed in a collaborative manner.

C. Government Sector Impact:

The Office of the State Courts Administrator (OSCA) indicates that the bill could potentially decrease judicial workload due to fewer filings, hearings, and contested issues. Some judicial workload, however, could result from *in camera* hearings regarding privilege determinations. Due to the unavailability of data needed to quantifiably establish the impact on judicial or court workload, fiscal impact is indeterminate.[18]

[18] Office of the State Courts Administrator, *2016 Judicial Impact Statement* (Dec. 21, 2015).

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

None.

B. Amendments:

None.