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Senate Bill 714 (as introduced 12-5-13)
Sponsor: Senator Tonya Schuitmaker
Committee: Judiciary

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CONTENT

The bill would create the "Uniform Collaborative Law Act" to regulate collaborative law participation agreements and the collaborative law process (a procedure to resolve a dispute or issue arising under Michigan's family laws or domestic relations laws, without the intervention of a court or other tribunal). The bill would do the following:

- Establish requirements for a collaborative law participation agreement.
- Specify the procedures for engaging in a collaborative law process, and specify when the process would be concluded or would terminate.
- Allow a tribunal, during a collaborative law process, to issue personal protection orders.
- Allow a tribunal to approve a collaborative law process, under certain circumstances, even if an agreement failed to meet the uniform Act's requirements or a lawyer failed to comply with requirements for entering into an agreement.
- Allow parties in a proceeding pending before a tribunal to enter into a collaborative law participation agreement to resolve a matter related to the proceeding, and require the proceeding to be stayed during that collaborative law process.
- Establish requirements for a collaborative lawyer, including that he or she would be disqualified from appearing before a tribunal in a proceeding related to the collaborative matter, subject to various exceptions.
- Require a prospective collaborative lawyer to assess certain factors and advise a prospective party before that party signed a collaborative law participation agreement.
- Establish requirements related to disclosure of information and privileged communications related to the collaborative law process.
- Specify that the uniform Act would not affect the obligations and standards of certain professionals, or the obligation of a person to report abuse or neglect, abandonment, or exploitation of an individual under Michigan law.

The uniform Act would take effect 180 days after its enactment.

Scope & Definitions

The uniform Act would apply to a collaborative law participation agreement that met its requirements and was signed on or after the Act's effective date.

A "collaborative law participation agreement" would be an agreement by people to participate in a collaborative law process. "Collaborative law process" would mean a procedure intended to resolve a collaborative matter without intervention by a tribunal in which people sign a collaborate law participation agreement and are represented by collaborative lawyers.

"Collaborative matter" would mean a dispute, transaction, claim, problem, or issue for resolution, including a dispute, claim, or issue in a proceeding, that is described in a collaborative law participation agreement and arises under Michigan's family or domestic relations laws, including any of the following:

- Marriage, divorce, dissolution, annulment, and property distribution.
- Child custody, visitation, and parenting time.
- Alimony, maintenance, and child support.
- Adoption.
- Parentage.
- Premarital, marital, and postmarital agreements.

"Proceeding" would mean a judicial, administrative, arbitral, or other adjudicative process before a tribunal, including related prehearing and posthearing motions, conferences, and discovery. The term also would include a legislative hearing or similar process.

"Tribunal" would mean a court, arbitrator, administrative agency, or other body acting in an adjudicative capacity that, after presentation of evidence or legal argument, has jurisdiction to render a decision affecting a party's interests in a matter. The term also would include a legislative body conducting a hearing or similar process.

Collaborative Law Participation Agreement

A collaborative law participation agreement would have to be in a record and satisfy all of the following:

- Be signed by the parties.
- State the parties' intention to resolve a collaborative matter through a collaborative law process.
- Describe the nature and scope of the matter.
- Identify the collaborative lawyer who represented each party in the process.
- Contain a statement by each collaborative lawyer confirming his or her representation of a party in the collaborative law process.

Parties to a collaborative law participation agreement could agree to include additional provisions not inconsistent with the Act.

("Record" would mean information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.)

Collaborative Law Process

A collaborative law process would begin when the parties signed a collaborative law participation agreement. A tribunal could not order a party to participate in a collaborative law process over the party's objections.

A collaborative law process would be concluded by one of the following:

- Resolution of a collaborative matter as evidenced by a signed record.

- Resolution of a part of the collaborative matter, evidenced by a signed record, in which the parties agreed that the remaining parts of the matter would not be resolved in the process.
- Termination of the process.

A collaborative law process would terminate when a party gave notice to other parties in a record that the process was ended; a party discharged a collaborative lawyer or a collaborative lawyer withdrew from further representation of a party (except as provided below); or a party either began a proceeding related to a collaborative matter without the agreement of all parties, or in a pending proceeding related to the matter, did one of the following:

- Initiated a pleading, motion, order to show cause, or request for a conference with the tribunal.
- Requested that the proceedings be put on the tribunal's active calendar.
- Took similar action requiring notice to be sent to the parties.

A party's collaborative lawyer would have to give prompt notice to all other parties in a record of a discharge or withdrawal. A party could terminate a collaborative law process with or without cause.

Regardless of the discharge or withdrawal of a collaborative lawyer, a collaborative law process would continue if, within 30 days after the notice of discharge or withdrawal was sent to the parties, the unrepresented party engaged a successor collaborative lawyer and the parties signed a record that satisfied all of the following:

- The parties consented in the record to continue the process by reaffirming the collaborative law participation agreement.
- The agreement was amended in the record to identify the successor collaborative lawyer.
- The successor collaborative lawyer confirmed in the record his or her representation of a party in the collaborative law process.

A collaborative law process would not conclude if, with the consent of the parties, a party requested a tribunal to approve a resolution of the collaborative matter or any part of the matter, as evidenced by a signed record.

A collaborative law participation agreement could provide additional methods of concluding a collaborative law process.

During a collaborative law process, a tribunal could issue emergency orders to protect the health, safety, welfare, or interest of a party as provided under Section 2950 of the Revised Judicature Act (which provides for the issuance of personal protection orders in domestic relations matters).

A tribunal could approve an agreement resulting from a collaborative law process.

If an agreement failed to meet the requirements for a collaborative law participation agreement, or a lawyer failed to comply with requirements for entering into an agreement, a tribunal still could find that the parties intended to enter into a collaborative law participation agreement if both of the following applied:

- The parties signed a record indicating an intention to enter into a collaborative law participation agreement.
- The parties reasonably believed they were participating in a collaborative law process.

If a tribunal made those findings, and the interests of justice required, the tribunal could do all of the following:

- Enforce an agreement evidenced by a record resulting from the process in which the parties participated.
- Apply the disqualification provisions of the uniform Act.
- Apply a privilege under the uniform Act.

Collaborative Matter Relating to a Proceeding

The parties to a proceeding pending before a tribunal could sign a collaborative law participation agreement to seek to resolve a collaborative matter related to the proceeding. The parties would have to file with the tribunal a notice of the agreement promptly after it was signed. The filing generally would operate as an application for a stay of the proceeding.

The parties would have to file notice promptly with the tribunal, in a record, when a collaborative law process concluded. The stay of the proceedings would be lifted when the notice was filed. The notice could not specify any reason for termination of the process.

A tribunal in which a proceeding was stayed could require the parties and collaborative lawyers to provide a status report on the collaborative law process and the proceeding. A status report could include only information on whether the process was ongoing or concluded. It could not include a report, assessment, evaluation, recommendation, finding, or other communication regarding a collaborative law process or collaborative law matter. A tribunal could not consider a communication made in violation of this provision.

A tribunal would have to give parties notice and an opportunity to be heard before dismissing a proceeding in which a notice of collaborative process was filed based on delay or failure to prosecute.

Collaborative Lawyer

Except as described below, a collaborative lawyer would be disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter, and a lawyer in a law firm with which the collaborative lawyer was associated would be disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter. This disqualification would apply to a collaborative lawyer representing a party with or without fee.

A collaborative lawyer, or a lawyer in a law firm with which the collaborative lawyer was associated, could represent a party to do either of the following:

- Ask a tribunal to approve an agreement resulting from the collaborative law process.
- Seek or defend an emergency order to protect the health, safety, welfare, or interest of a party if a successor lawyer were not immediately available to represent that person.

In the second situation, a collaborative lawyer, or lawyer in a firm with which the collaborative lawyer was associated, could represent a party only until the person was represented by a successor lawyer or reasonable measures were taken to protect the person's health, safety, welfare, or interest.

After a collaborative law process concluded, another lawyer in a law firm with which a disqualified collaborative lawyer was associated could represent a party without fee in the collaborative matter or a matter related to it if all of the following applied:

- The party had an annual income that qualified him or her for free legal representation under criteria established by the law firm.
- The collaborative law participation agreement allowed the representation.
- The collaborative lawyer was isolated from any participation in the collaborative matter or a matter related to it through procedures within the law firm that were reasonably calculated to isolate the collaborative lawyer from participation.

Disqualification of a collaborative lawyer would apply to a lawyer who represented a party that was a government or governmental subdivision, agency, or instrumentality. After a collaborative law process concluded, another lawyer in a law firm with which the collaborative lawyer was associated could represent a government or governmental subdivision, agency, or instrumentality in the collaborative matter or a matter related to it, if the collaborative law participation agreement allowed the representation and the collaborative lawyer were isolated from any participation in the collaborative matter.

Assessment of Collaborative Law Process

Before a prospective party signed a collaborative law participation agreement, a prospective collaborative lawyer would have to assess with the prospective party factors the lawyer reasonably believed related to whether a collaborative law process was appropriate for the matter. A prospective collaborative lawyer also would have to give the prospective party information that the lawyer reasonably believed was sufficient for the party to make an informed decision about the material benefits and risks of a collaborative law process as compared to the material benefits and risks of other reasonably available alternatives for resolving the matter, such as litigation, mediation, arbitration, or expert evaluation.

Before a prospective party signed an agreement, a prospective collaborative lawyer also would have to advise him or her of all of the following:

- That, after signing an agreement, if a party initiated a proceeding or sought tribunal intervention in a pending proceeding related to the collaborative matter, the collaborative law process would terminate.
- That participation in a collaborative law process was voluntary and any party would have the right to terminate it unilaterally, with or without cause.
- That the collaborative lawyer and any lawyer in a law firm with which he or she was associated could not appear before a tribunal to represent a party in a proceeding related to the matter, except as authorized by the uniform Act.

In addition, before a prospective party signed a collaborative law participation agreement, a prospective collaborative lawyer would have to make reasonable inquiry as to whether the prospective party had a history of a coercive or violent relationship with another prospective party. A reasonable inquiry would include the use of the domestic violence screening protocol for mediation provided by the State Court Administrative Office.

Throughout a collaborative law process, a collaborative lawyer reasonably and continuously would have to assess whether the party he or she represented had a history of a coercive or violent relationship with another party. If the lawyer reasonably believed that to be the case, he or she could not begin or continue a collaborative law process unless both of the following applied:

- The party or the prospective party requested beginning or continuing a process.
- The collaborative lawyer reasonably believed that the safety of the party or prospective party could be protected adequately during a process.

Disclosure & Privileged Communications

During the collaborative law process, on the request of another party, a party would have to make timely, full, candid, and informal disclosure of information related to the matter without formal discovery, except as provided by another law. A party also would have to promptly update previously disclosed information that had materially changed. The parties could define the scope of disclosure during the collaborative law process.

A collaborative law communication would be confidential to the extent agreed by the parties in a signed record or as provided by Michigan law other than the uniform Act.

"Collaborative law communication" would mean a statement, whether oral or in a record, or verbal or nonverbal, to which both of the following apply:

- The statement is made to conduct, participate in, continue, or reconvene a collaborative law process.
- The statement occurs after the parties sign a collaborative law participation agreement and before the collaborative law process is concluded.

Except as described below, a collaborative law communication would be privileged, would not be subject to discovery, and would not be admissible in evidence.

In a proceeding, the following privileges would apply:

- A party could refuse to disclose, and could prevent any other person from disclosing, a collaborative law communication.
- A nonparty participant could refuse to disclose, and could prevent any other person from disclosing, a collaborative law communication of the nonparty participant.

Evidence or information that was otherwise admissible or subject to discovery would not become inadmissible or protected from discovery solely because of its disclosure or use in a collaborative law process.

A privilege described above could be waived in a record or orally during a proceeding if it were expressly waived by all parties and, in the case of the privilege of a nonparty participant, he or she also expressly waived the privilege.

A person who made a disclosure or representation about a collaborative law communication that prejudiced another person in a proceeding would be precluded from asserting a privilege described above, but only to the extent necessary for the person prejudiced to respond to the disclosure or representation.

There would be no privilege for a collaborative law communication that was any of the following:

- Available to the public under the Freedom of Information Act, or made during a session of a collaborative law process that was open, or was required by law to be open, to the public.
- 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, or conceal an ongoing crime or ongoing criminal activity.
- In an agreement resulting from the collaborative law process, evidenced by a record signed by all parties to the agreement.

The privileges for a collaborative law communication would not apply to the extent that a communication was sought or offered to prove or disprove either of the following:

- A claim or complaint of professional misconduct or malpractice arising from or related to a collaborative law process.
- Abuse, neglect, abandonment, or exploitation of a child or adult, unless the Department of Human Services were a party to or otherwise participated in the process.

There would be no privilege if a tribunal found, after a hearing in camera (in private), that the party seeking discovery or the proponents of the evidence had shown that it was not otherwise available, the need for it substantially outweighed the interest in protecting confidentiality, and the collaborative communication was sought or offered in either of the following:

- A court proceeding involving a felony or misdemeanor.
- A proceeding seeking rescission or reformation of a contract arising out of the collaborative law process or in which a defense to avoid liability on the contract was asserted.

If a collaborative law communication were subject to one of the exceptions described above, only the part of the communication necessary for the application of the exception could be disclosed or admitted. Disclosure or admission of evidence excepted from the privilege would not make the evidence or any other collaborative law communication discoverable or admissible for any other purpose.

The privileges would not apply if the parties agreed in advance in a signed record, or if a record of a proceeding reflected agreement by the parties, that all or part of a collaborative law process was not privileged. This provision would not apply to a collaborative law communication made by a person who did not receive actual notice of the agreement before the communication was made.

Construction & Applicability of the Uniform Act

The uniform Act would not affect either of the following:

- The professional responsibility obligations and standards applicable to a lawyer or other licensed professional.
- The obligation of a person to report abuse or neglect, abandonment, or exploitation of a child or adult under Michigan law.

In applying and construing the uniform Act, consideration would have to be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.

The uniform Act would modify, limit, and supersede the Federal Electronic Signatures in Global and National Commerce Act (15 USC 7001-7031), but would not modify, limit, or supersede Section 101(c) of that Act, or authorize electronic delivery of any of the notices described in Section 103(b) of that Act.

(Section 101(c) of the Federal Act relates to consumer disclosures and generally allows the use of an electronic record to provide or make available certain information that is required by law to be made available in writing. Section 103(b), however, provides that Section 101 allowing electronic delivery of records does not apply to court orders or notices, official court documents, or certain notices (such as the cancelation or termination of utility services or health insurance benefits, or the recall of a product that risks endangering health or safety).)

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

The bill would provide an opportunity for parties to reach family and domestic relations law agreements through nonjudicial means. This collaborative law process could reduce the caseload of the tribunals that oversee this area of the law. The bill would likely have a limited positive fiscal impact on State and local government. At this time, the magnitude of the cost savings is indeterminate as the extent to which this permissive legal process would be used is unknown. Through higher use of this dispute resolution alternative, it is possible there could be increased savings to the resources of State and local courts.

Fiscal Analyst: John Maxwell

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.