



Senate Fiscal Agency  
P. O. Box 30036  
Lansing, Michigan 48909-7536



Telephone: (517) 373-5383  
Fax: (517) 373-1986

Senate Bill 714 (as enacted)  
Sponsor: Senator Tonya Schuitmaker  
Senate Committee: Judiciary  
House Committee: Judiciary

**PUBLIC ACT 159 of 2014**

Date Completed: 6-23-14

**RATIONALE**

Collaborative law is a system in which parties and attorneys enter into a participation agreement in order to avoid litigation. Reportedly collaborative law is practiced in all American jurisdictions and some foreign countries. Using collaborative law to settle and resolve domestic relations issues appears to be a growing trend throughout the country, but Michigan has had no statutory framework for this alternative dispute resolution process. Typically, in Michigan and throughout the United States, collaborative law has been governed by a patchwork of state laws and state court rules. The Uniform Law Commission, therefore, developed the Uniform Collaborate Law Act to give states a consistent framework to regulate the use and practice of collaborative law. At least eight other states and the District of Columbia have adopted the Uniform Collaborative Law Act, and it was suggested that Michigan do so as well.

**CONTENT**

The bill enacts 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 does the following:

- Establishes requirements for a collaborative law participation agreement.
- Specifies the procedures for engaging in a collaborative law process, and specifies when the process will conclude or terminate.
- Allows a tribunal, during a collaborative law process, to issue personal protection orders.
- Allows a tribunal to approve a collaborative law process, under certain circumstances, even if an agreement fails to meet the Act's requirements or a lawyer fails to comply with requirements for entering into an agreement.
- Allows 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 requires the proceeding to be stayed during that collaborative law process.
- Disqualifies a collaborative lawyer from appearing before a tribunal in a proceeding related to the collaborative matter, subject to various exceptions, and establishes other requirements for a collaborative lawyer.
- Requires a prospective collaborative lawyer to assess certain factors and advise a prospective party before that party signs a collaborative law participation agreement.
- Establishes requirements related to disclosure of information and privileged communications related to the collaborative law process.
- Specifies that the Act does 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 Act was signed into law on June 12, 2014, and will take effect 180 days after that date.

### Scope & Definitions

The Act will apply to a collaborative law participation agreement that meets its requirements and is signed on or after the Act's effective date.

The Act defines "collaborative law participation agreement" as an agreement by people to participate in a collaborative law process. "Collaborative law process" means 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" means 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" means a judicial, administrative, arbitral, or other adjudicative process before a tribunal, including related prehearing and posthearing motions, conferences, and discovery. The term also includes a legislative hearing or similar process.

"Tribunal" means 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 includes a legislative body conducting a hearing or similar process.

### Collaborative Law Participation Agreement

A collaborative law participation agreement must 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 represents 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 may agree to include additional provisions not inconsistent with the Act.

("Record" means 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 will begin when the parties sign a collaborative law participation agreement. A tribunal may not order a party to participate in a collaborative law process over the party's objections.

A collaborative law process will 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 agree that the remaining parts of the matter will not be resolved in the process.
- Termination of the process.

A collaborative law process will terminate when a party gives notice to other parties in a record that the process is ended; a party discharges a collaborative lawyer or a collaborative lawyer withdraws from further representation of a party (except as provided below); or a party either begins a proceeding related to a collaborative matter without the agreement of all parties, or in a pending proceeding related to the matter, does one of the following:

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

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

Regardless of the discharge or withdrawal of a collaborative lawyer, a collaborative law process will continue if, within 30 days after the notice of discharge or withdrawal is sent to the parties, the unrepresented party engages a successor collaborative lawyer and the parties sign a record that satisfies all of the following:

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

A collaborative law process will not conclude if, with the consent of the parties, a party requests 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 may provide additional methods of concluding a collaborative law process.

During a collaborative law process, a tribunal may 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 may approve an agreement resulting from a collaborative law process.

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

- 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 makes those findings, and the interests of justice require it, the tribunal may 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 Act.

-- Apply a privilege under the Act.

#### Collaborative Matter Relating to a Proceeding

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

The parties must file notice promptly with the tribunal, in a record, when a collaborative law process concludes. The stay of the proceedings will be lifted when the notice is filed. The notice may not specify any reason for termination of the process.

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

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

#### Collaborative Lawyer

Except as described below, a collaborative lawyer is 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 is associated is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter. This disqualification applies to a collaborative lawyer representing a party with or without a fee.

A collaborative lawyer, or a lawyer in a law firm with which the collaborative lawyer is associated, may 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 is not immediately available to represent that person.

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

After a collaborative law process concludes, another lawyer in a law firm with which a disqualified collaborative lawyer is associated may represent a party without a fee in the collaborative matter or a matter related to it if all of the following apply:

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

Disqualification of a collaborative lawyer applies to a lawyer who represents a party that is a government or governmental subdivision, agency, or instrumentality. After a collaborative law process concludes, another lawyer in a law firm with which the collaborative lawyer is associated may 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 allows the representation and the collaborative lawyer is isolated from any participation in the collaborative matter.

#### Assessment of Collaborative Law Process

Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer must assess with the prospective party factors the lawyer reasonably believes relate to whether a collaborative law process is appropriate for the matter. A prospective collaborative lawyer also must give the prospective party 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 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 signs an agreement, a prospective collaborative lawyer also must advise the party of all of the following:

- That, after signing an agreement, if a party initiates a proceeding or seeks tribunal intervention in a pending proceeding related to the collaborative matter, the collaborative law process will terminate.
- That participation in a collaborative law process is voluntary and any party has 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 is associated may not appear before a tribunal to represent a party in a proceeding related to the matter, except as authorized by the Act.

In addition, before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer must make reasonable inquiry as to whether the prospective party has a history of a coercive or violent relationship with another prospective party. A reasonable inquiry includes 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 must assess whether the party he or she represents has a history of a coercive or violent relationship with another party. If the lawyer reasonably believes that to be the case, he or she may not begin or continue a collaborative law process unless both of the following apply:

- The party or the prospective party requests beginning or continuing a process.
- The collaborative lawyer reasonably believes that the safety of the party or prospective party may be protected adequately during a process.

#### Disclosure & Privileged Communications

During the collaborative law process, on the request of another party, a party must 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 must promptly update previously disclosed information that has materially changed. The parties may define the scope of disclosure during the collaborative law process.

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

("Collaborative law communication" means 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 is privileged, is not subject to discovery, and is not admissible in evidence.

In a proceeding, the following privileges apply:

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

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

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

A person who makes a disclosure or representation about a collaborative law communication that prejudices another person in a proceeding will 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 will be no privilege for a collaborative law communication that is 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 is open, or is 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.
- Evidenced by a record signed by all parties to an agreement resulting from the collaborative law process.

The privileges for a collaborative law communication will not apply to the extent that a communication is 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 is a party to or otherwise participates in the process.

There will be no privilege if a tribunal finds, after a hearing in camera (in private), that the party seeking discovery or the proponents of the evidence have shown that it is not otherwise available, the need for it substantially outweighs the interest in protecting confidentiality, and the collaborative communication is 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 is asserted.

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

The privileges will not apply if the parties agree in advance in a signed record, or if a record of a proceeding reflects agreement by the parties, that all or part of a collaborative law process is not privileged. This provision will not apply to a collaborative law communication made by a person who does not receive actual notice of the agreement before the communication is made.

#### Construction & Applicability of the Act

The Act will 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 Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.

The Act states that it modifies, limits, and supersedes the Federal Electronic Signatures in Global and National Commerce Act (15 USC 7001-7031), but does 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 cancellation or termination of utility services or health insurance benefits, or the recall of a product that risks endangering health or safety).)

MCL 691.1331-691.1354

#### **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

#### **Supporting Argument**

According to the Uniform Law Commission, 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". In collaborative law, parties and lawyers work together and the process promotes full and open disclosure. Attorneys cooperate to achieve a settlement in the parties' best interests, rather than proceeding in an adversarial manner toward litigating a dispute.

According to the Family Law Section of the State Bar of Michigan, collaborative law has been practiced in this State for more than 10 years without statutory authorization or framework. The Act will regulate the practice and require collaborative law practitioners to screen their clients and give them full information about the process, enabling clients to make informed decisions about whether to use the collaborative process. The Act clarifies and makes enforceable standards for attorney disqualification, and specifies that information disclosed in a collaborative process is privileged against use in any subsequent litigation if the collaboration does not resolve the matter. Also, adoption of the uniform law will allow cases that involve interested parties in different states to be handled consistently.

In addition to establishing standards for the practice of collaborative law, the Act will encourage increased and more effective use of the collaborative law process in Michigan, which will benefit both the judicial system and the public. As is the case with other forms of alternative dispute resolution (such as mediation), the goal of collaborative law is to resolve a conflict without

litigation. Collaborative law has an 87% success rate, however, while mediation is successful about 70% of the time, according to a representative of the Family Law Section. The process also substantially reduces family conflict, making parties more likely to be successful in shared parenting and children more likely to have positive relationships with both parents.

Legislative Analyst: Patrick Affholter

### **FISCAL IMPACT**

The bill will provide an opportunity for parties to reach family and domestic relations law agreements through nonjudicial means. This collaborative law process may reduce the caseload of the tribunals that oversee this area of the law. The bill likely will 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 will be used is unknown. Through higher use of this dispute resolution alternative, it is possible there may be increased savings to the resources of State and local courts.

Fiscal Analyst: John Maxwell

A1314\sb714a

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.