Ohio Legislative Service Commission

Bill Analysis

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H.B. 461

129th General Assembly
(As Passed by the House)

Reps. Stebelton, R. Adams, Gonzales, Grossman, Henne, McGregor, Okey, Yuko, Bubp, Antonio, Boyd, Celeste, Combs, Huffman, Letson, Milkovich, Murray, O'Brien, Pillich, Reece, Batchelder

BILL SUMMARY

- Establishes a voluntary collaborative family law process to aid in the resolution of family law disputes without court intervention.
- Provides for the commencement of a collaborative family law process by the signing of a collaborative family law participation agreement, sets forth the formal requirements of a participation agreement, and permits a court to treat as valid an agreement that fails to meet the formal requirements if it finds that the parties intended to enter into a participation agreement, signed a record indicating an intention to do so, and reasonably believed they were participating in a collaborative family law process.
- Provides for the conclusion of a collaborative family law process by the parties' negotiated settlement or termination of the process upon the occurrence of specified actions by a party or by a party's attorney.
- Limits the right of an attorney who is representing a party in a collaborative family law process to represent a party in a proceeding related to the collaborative family law matter.
- Requires full and informal disclosure of information by parties to a collaborative family law process, provides for confidentiality of collaborative family law communications, and creates a testimonial privilege for collaborative family law communications.
- Modifies, supersedes, and limits the federal Electronic Signatures in Global and National Commerce Act as it relates to a collaborative family law process.

- Authorizes spouses who have successfully completed a collaborative family law process to file a petition for a dissolution of marriage and to make their appearance and acknowledgements in the proceeding at any time that is not more than 90 days after the dissolution petition is filed.

CONTENT AND OPERATION

Purpose and definitions

The bill creates a "collaborative family law process," a procedure intended to resolve without court intervention a "collaborative matter" (a dispute, transaction, claim, problem, or issue for resolution that arises under R.C. Title 31, which governs domestic relations, and is described in a collaborative family law participation agreement).[1] Under the procedure, the parties sign a collaborative family law participation agreement (an agreement by persons to participate in a collaborative family law process) and are represented by collaborative family lawyers.[2] A party is a person (an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity) that signs a collaborative family law participation agreement and whose consent is necessary to resolve a matter.[3] A collaborative family lawyer is a lawyer who represents a party in a collaborative family law process but is not a lawyer who is a public official (an officer or employee of the state or a political subdivision) and who does not represent individuals other than public officials in their official capacities.[4]

Participation in the process is voluntary. A court may not order a party to participate in a collaborative family law process over that party's objection. The provisions of the bill apply to a "collaborative family law participation agreement" (an agreement to participate in a collaborative family law process) that meets the bill's requirements for such an agreement and that is signed on or after the bill's effective date.[5]

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[1] R.C. 3105.41(E).

[2] R.C. 3105.41(C).

[3] R.C. 3105.41(I) and (J).

[4] R.C. 3105.41(D) and (L).

[5] R.C. 3105.41(B) and 3105.42(A).

Commencement and conclusion of a family law collaborative process

Commencement

A collaborative family law process begins when the parties sign a collaborative family law participation agreement.[6] Parties to a proceeding (a judicial, administrative, arbitral, or other adjudicative process, including related prehearing and post-hearing motions, conferences, and discovery) that is pending before a court may sign a participation agreement to seek to resolve a matter related to the proceeding (i.e., a matter involving the same parties, transaction or occurrence, nucleus of operative fact, claim, issue, or dispute as the collaborative matter).[7] In that case, the parties must promptly file a notice of the agreement with the court, and the filing operates as a stay of the proceeding, except that the court may require parties and collaborative family lawyers to provide status reports on the proceeding. A status report may not include a report, assessment, evaluation, recommendation, finding, or other communication regarding the process, but the court may require disclosure in a status report of whether the process is ongoing or concluded. A court may not consider a communication made in violation of this provision.[8]

A participation agreement must be in a record, which may be in tangible, electronic, or any other retrievable form. It must be signed by the parties. To "sign" under the bill means to execute or adopt a tangible symbol or to attach to or logically associate with the record an electronic symbol, sound, or process with present intent to authenticate or adopt a record. The agreement must include a statement of the parties' intent to resolve a matter through a collaborative family law process, a description of the nature and scope of the matter, the identity of the collaborative family lawyer who represents each party in the process, and a statement by each collaborative family lawyer confirming the lawyer's representation of a party in the process. The parties may include additional provisions not inconsistent with the bill.[9]

Even though a collaborative family law participation agreement fails to meet the foregoing requirements, a court may find that the parties intended to enter into a collaborative family law participation agreement if they signed a record indicating an intention to enter into a participation agreement and reasonably believed they were participating in a collaborative family law process. If a court makes such a finding, the

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[6] R.C. 3105.44(A).

[7] R.C. 3105.41(K) and (N) and 3105.45(A).

[8] R.C. 3105.45(C).

[9] R.C. 3105.41(M) and (O) and 3105.43.

provisions of the bill apply to the same extent as if the parties had entered into a valid participation agreement.[10]

Conclusion

The process concludes when there is a negotiated resolution of the matter as evidenced by a signed record or a negotiated resolution of a portion of the matter as evidenced by a signed record in which the parties agree that the remaining portions of the matter will not be resolved in the process or when, because of the occurrence of certain events, the process terminates.[11]

The process terminates when any of the following occurs:[12]

(1) A party gives notice in a record that the collaborative family law process is ended.

(2) A party begins a proceeding related to the collaborative family law matter without the agreement of all parties or, in a pending proceeding related to the matter, a party does any of the following:

(a) Initiates a pleading, motion, order to show cause, or request for a conference with the court;

(b) Requests that the proceeding be put on the court's docket;

(c) Takes similar action requiring notice to be sent to the parties;

(d) Discharges a collaborative family lawyer (subject to the retention of a successor lawyer, discussed below under this heading).

(3) A collaborative family lawyer withdraws from further representation of a party (subject to the retention of a successor lawyer, discussed below under this heading).

(4) Termination occurs in any other way provided for in the collaborative family law participation agreement.

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[10] R.C. 3105.53.

[11] R.C. 3105.44(B).

[12] R.C. 3105.44(C).

A party may terminate a collaborative family law process with or without cause. A notice of termination need not specify a reason for terminating the process.[13]

When a collaborative family law process terminates, the parties must promptly file a notice of termination in a record with the court. The notice may not specify any reason for the termination. The filing of a notice of termination lifts any stay that took effect when the participation agreement was filed with the court (see "**Commencement**" under "**Commencement and conclusion of a family law collaborative process commencement**," above).[14]

A collaborative family lawyer who is discharged or who withdraws must give prompt notice in a record of the discharge or withdrawal to all other parties. Notwithstanding the discharge or withdrawal of a collaborative family lawyer, the process continues if the unrepresented party engages a successor collaborative family lawyer, and, in a signed record, all parties consent to continue the process by reaffirming the collaborative family law participation agreement, the agreement is amended to identify the successor lawyer, and the successor lawyer confirms the lawyer's representation of a party in the process.[15]

A collaborative family law process does not terminate if, with the consent of all parties, a party requests a court to approve a negotiated resolution of the matter or any portion of the matter as evidenced by a signed record.[16]

Restrictions on representation by collaborative family lawyers

In general, neither a collaborative family lawyer nor a lawyer in a law firm with which the collaborative family lawyer is associated may appear before a court to represent a party in a proceeding related to the collaborative family law matter. The bill defines "law firm" as an association of lawyers who practice law together in a partnership, professional corporation, sole proprietorship, limited liability company, or other association, lawyers employed in a legal services organization, the legal department of a corporation or other organization, or the legal department of a government or governmental subdivision, agency, or instrumentality.[17] The bill further provides that this disqualification applies to a collaborative family lawyer representing

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[13] R.C. 3105.44(D).

[14] R.C. 3105.45(B).

[15] R.C. 3105.44(E).

[16] R.C. 3105.44(F).

[17] R.C. 3105.41(G).

a party that is a government or governmental subdivision, agency, or instrumentality. However, a collaborative family lawyer or a lawyer in a law firm with which the collaborative family lawyer is associated may represent a party for the following purposes:

(1) To ask a court to approve an agreement resulting from the collaborative family law process;

(2) To seek or defend an emergency order to protect the health, safety, welfare, or interests of a party or of a family or household member of a party if a successor lawyer is not immediately available to represent the party or family or household member. If a successor lawyer is not immediately available to represent the party or family or household member, the general restrictions on representation do not apply until a successor lawyer assumes representation of the party or family or household member or reasonable measures are taken to protect the health, safety, welfare, or interests of the party or family or household member.[18]

The bill uses the same definition of "family or household member" as in the statute that provides for civil protection orders. That statute defines family or household member in terms of a person's relationship to the respondent in a proceeding under that statute. A family or household member is the natural parent of any child of whom the respondent is the other natural parent or putative other natural parent or any of the following who is residing with or has resided with the respondent: (1) a spouse, a person living as a spouse, or a former spouse of the respondent, (2) a parent or a child of the respondent, or another person related by consanguinity or affinity to the respondent, or (3) a parent or a child of a spouse, person living as a spouse, or former spouse of the respondent, or another person related by consanguinity or affinity to a spouse, person living as a spouse, or former spouse of the respondent.[19]

Disclosure, confidentiality, and privilege

Disclosure

During the collaborative family law process, at the request of another party, a party must make timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery and must update promptly

[18] R.C. 3105.46.

[19] R.C. 3105.41(F), incorporating R.C. 3113.31(A)(3) (not in the bill).

information that has materially changed. Parties may define the scope of disclosure, except as otherwise provided by law.[20]

The bill does not affect the professional responsibility obligations and standards applicable to a lawyer or other licensed professional or the statutory obligation of a person to report abuse or neglect of a child or adult.[21]

Confidentiality

A collaborative family law communication is any statement that occurs after the parties sign a collaborative family law participation agreement and before the collaborative family law process is concluded and that is made for the purpose of conducting, participating in, continuing, or reconvening a collaborative law process. Such a communication is confidential to the extent agreed by the parties in a signed record or as provided by Ohio law.[22]

Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a collaborative family law process.[23]

Privilege

Privileged communications

With the exceptions noted below, a collaborative family law communication is privileged, is not subject to discovery, and is not admissible in evidence. In a proceeding, a party may refuse to disclose, and may prevent any other person from disclosing, a collaborative family law communication, and a nonparty participant (a person, other than a party and the party's collaborative family lawyer, that participates in a collaborative family law process[24]) may refuse to disclose, and may prevent any other person from disclosing, a collaborative family law communication of the nonparty participant.[25]

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[20] R.C. 3105.47.

[21] R.C. 3105.48.

[22] R.C. 3105.41(A) and 3105.49.

[23] R.C. 3105.50(C).

[24] R.C. 3105.41(H).

[25] R.C. 3105.50(A) and (B).

Waiver of privilege

A privilege created by the bill 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, it is also expressly waived by the nonparty participant. A person that discloses or makes a representation about a collaborative family law communication that prejudices another person in a proceeding may not assert a privilege created by the bill relating to that communication.[26]

The privileges created by the bill do 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 family law process is not privileged. However, a collaborative family law communication made by a person that did not receive actual notice of the agreement before the communication was made remains privileged.[27]

Exceptions to privilege

There is no privilege under the bill for a collaborative family law communication that is any of the following:[28]

(1) Available to the public under the Public Records Law[29] or made during a session of a collaborative family law process that is open, or is required by law to be open, to the public;

(2) A threat or statement of a plan to inflict bodily injury or commit a crime of violence;

(3) Intentionally used to plan a crime, commit or attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity;

(4) In an agreement resulting from the collaborative family law process, evidenced by a record signed by all parties to the agreement.

The privileges created by the bill for a collaborative family law communication do not apply to the extent that a communication is (1) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice arising from or related to a collaborative family law process, or (2) sought or offered to prove or

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[26] R.C. 3105.51.

[27] R.C. 3105.52(G).

[28] R.C. 3105.52(A).

[29] R.C. 149.43 (not in the bill).

disprove abuse, neglect, abandonment, or exploitation of a child, unless a children's protective service agency or an adult protective services agency is a party to or otherwise participates in the collaborative family law process.[30]

The bill does not create a privilege for a communication sought in connection with or offered in any criminal proceeding involving a felony, a delinquent child proceeding based on what would be a felony if committed by an adult, or a proceeding initiated by the state or a child protection agency in which it is alleged that a child is an abused, neglected, or dependent child.[31]

There is no privilege under the bill if a court finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, the need for the evidence substantially outweighs the interest in protecting confidentiality, and the collaborative family law communication is sought or offered in a criminal action or in a proceeding seeking rescission or reformation of a contract arising out of the collaborative family law process or in which a defense to avoid liability on the contract is asserted.[32]

If a collaborative family law communication is subject to an exception under any of the three preceding paragraphs, only the portion of the communication necessary for the application of the exception may be disclosed or admitted. Disclosure or admission of evidence excepted from the privilege under any of the three preceding paragraphs does not render the evidence or any other collaborative family law communication discoverable or admissible for any other purpose.[33]

Electronic signatures

In 2000, Congress enacted the Electronic Signatures in Global and National Commerce Act to facilitate the use of electronic records and signatures in interstate and foreign commerce. The act ensures the validity and legal effect of contracts entered into electronically. The act allows a state, by statute, regulation, or rule of law, to modify, limit, or supersede certain of its provisions with respect to state law only if the statute, regulation, or rule of law either constitutes an enactment or adoption of the Uniform Electronic Transactions Act or specifies alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the

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[30] R.C. 3105.52(B).

[31] R.C. 3105.52(C).

[32] R.C. 3105.52(D).

[33] R.C. 3105.52(D) and (E).

legal effect, validity, or enforceability of contracts or other records. Ohio has adopted the Uniform Electronic Transactions Act.[34]

The bill stipulates that its provisions modify, limit, and supersede the Electronic Signatures in Global and National Commerce Act but do not modify, limit, or supersede a specified consumer-protection provision or authorize electronic delivery of certain types of notices, including court orders, court notices, and official court documents, such as briefs and pleadings.[35]

Title

The bill authorizes citations of its provisions, R.C. 3105.41 to 3105.55, as the Ohio Collaborative Family Law Act.[36]

Effect of collaborative family law process on dissolution

Under existing law, spouses seeking a dissolution of marriage must, in most cases, appear in court not less than 30 nor more than 90 days after the petition for dissolution is filed to acknowledge having voluntarily entered into a separation agreement and to being satisfied with its terms. The bill allows spouses who have successfully completed a collaborative family law process to file a petition for dissolution and to make their appearance and acknowledgements at any time that is not more than 90 days after the filing.[37]

HISTORY

ACTION	DATE
Introduced	02-22-12
Reported, H. Judiciary and Ethics	05-23-12
Passed House (95-0)	05-24-12

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[34] 15 U.S.C. § 7001 *et seq.*; 15 U.S.C. § 7002(a); R.C. Chapter 1306.

[35] R.C. 3105.54. The consumer-protection provision is 15 U.S.C. § 7001(c). The notices are described in 15 U.S.C. § 7003(b).

[36] R.C. 3105.55.

[37] R.C. 3105.64(C).