

SUBJECT: Collaborative law procedures for resolving family law disputes

COMMITTEE: Civil Practices — committee substitute recommended

VOTE: 9 ayes — Bosse, Janek, Clark, Dutton, Hope, Martinez Fischer, Nixon, Smithee, Zbranek
0 nays

WITNESSES: For — Tommy Fibich, Texas Trial Lawyers Association; Michael Hiller; Sheryl Johnson; John McShane, Collaborative Law Institute of Texas; William W. Morris; Donald R. Royall; Andrea K. Stoller; Harry Tindall.
Against — None
On — Barbara Hannon

BACKGROUND: Family Code, ch. 6 sets forth procedures for dissolving a marriage, while ch. 153 provides rules and procedures for an initial suit affecting the parent-child relationship, otherwise known as a child custody suit.

Civil Practice & Remedies Code, ch. 154 defines and provides rules for various methods of alternative dispute resolution (ADR). Sec. 154.073 also protects the confidentiality of the communications made regarding ADR and any records made of the proceedings.

DIGEST: CSHB 1363 would add identical sections to Family Code, chs. 6 and 153. The new sections would define and outline the procedures for an alternative method of dispute resolution procedure known as collaborative law that could be used in divorce and certain child-custody cases.

The bill would define the collaborative law procedure as one in which the parties to a divorce or child-custody case agreed in writing to act in good faith to attempt to resolve their dispute without the intervention of a court except to approve the settlement and sign the divorce decree. A collaborative law agreement would require the parties to agree, among other things, to:

- ! make full and candid disclosure to each other of all information needed for both parties and their counsel to evaluate the case;
- ! forego court intervention in the dispute while the collaborative law procedure was in use;
- ! hire jointly agreed upon experts to be used during the procedure;
- ! withdraw both parties' counsel from the collaborative procedure if it failed to result in a settlement.

So long as the collaborative law agreement contained a prominent statement that the agreement could not be revoked and the statement was either boldfaced, capitalized, or underlined, then a party would be entitled to judgment on a settlement reached under a collaborative law agreement if the settlement were signed by each party and his or her attorney. The bill would permit a party to receive a judgment on a signed settlement regardless of whether the agreement met the requirements for an enforceable settlement under the rules of civil procedure or any other law.

Under the bill, if the parties notified the court 30 or more days before trial that they were using the collaborative law procedure, the court could not set a hearing in the case, set the case for trial, impose discovery deadlines, require the parties to comply with a scheduling order, or dismiss the case until one of the parties notified the court that the procedure has failed. The parties also would be required to notify the court if the collaborative law procedures resulted in a settlement.

While the collaborative law procedures were ongoing, the parties would be required to file status reports with the court within 180 days of and before the end of one year following the signing of the collaborative law agreement. The one-year status report would have to be accompanied by a motion for a continuance of the case, which the court would be required to grant if the parties indicated they wished to continuing using the collaborative law procedures. Finally, if two years after entering the collaborative law agreement, the parties had not reached a settlement, the court either could set the case for trial or dismiss it without prejudice to refileing.

The bill would take effect September 1, 2001, and apply to actions commenced on or after that date or for which the trial had not begun before the effective date.

SUPPORTERS
SAY:

CSHB 1363 would add a progressive and useful ADR procedure to the tools that individuals engaged in a family law dispute could use to resolve their conflict amicably. Being subject to the deadlines and adversary proceedings of litigation can cause parties who might otherwise be able to resolve their differences amicably to take a more belligerent stance and for those positions to become entrenched. CSHB 1363 would offer a procedure that the parties could agree to that could help reduce such adversarial conduct by removing the parties from the court's procedures and deadlines and encouraging them to work together for a resolution.

Furthermore, the bill would promote collaboration and provide parties and their attorneys an incentive to make the process work by forcing the attorneys for both parties to withdraw from the representation if the procedure failed. For collaboration to work, each party must feel free to disclose information to the other without fear that the other party's attorney would be using that information against the discloser if the collaboration failed. Requiring withdrawal of each parties' attorney to the collaboration would preclude the parties from maintaining a hidden agenda.

While most parties and their attorneys would write confidentiality provisions into their collaborative law agreements, confidentiality should not be an issue in the collaborative procedure. The parties are supposed to be bargaining in good faith, and therefore, should not be thinking about the potential for the process to fail.

OPPONENTS
SAY:

It is not clear that records and communications involved or produced in the collaborative law procedures would be protected by the confidentiality provisions of Civil Practice and Remedies Code, sec. 154.073 that apply to ADR procedures, since the procedure is not described by that section.

Further, having the attorneys for the collaborative law procedure withdraw if it failed would not be sufficient to protect the parties and promote openness in the collaborative law procedures. The attorneys who withdrew still could consult with their former client's trial counsel, and this would eliminate much of the protection of the withdrawal rule.

NOTES:

The committee substitute moved the collaborative law provisions from the Civil Practices and Remedies Code where they would apply to all cases, to

the two chapters of the Family Code, where they would apply only to certain family law cases. The substitute also added the provisions for the parties to file status reports with the court and gave the trial court the authority to dismiss the case or set it for trial after two years. On the other hand, the substitute expanded the list of actions a trial court could not take after receiving notice that the parties are engaged in the collaborative law procedure to include enforcing discovery deadlines and scheduling orders. The committee substitute added the language allowing parties to receive a judgment on a collaborative law settlement that would not otherwise be permitted under the existing law.