VIRGINIA ACTS OF ASSEMBLY -- 2021 SPECIAL SESSION I

CHAPTER 346

An Act to amend the Code of Virginia by adding in Title 20 a chapter numbered 11, consisting of sections numbered 20-168 through 20-187, relating to the Uniform Collaborative Law Act.

[H 1852]

Approved March 25, 2021

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Title 20 a chapter numbered 11, consisting of sections numbered 20-168 through 20-187, as follows:

CHAPTER 11.

UNIFORM COLLABORATIVE LAW ACT.

§ 20-168. Definitions.

As used in this chapter, unless the context requires otherwise:

"Collaborative law communication" means a statement, whether oral or in a record, or verbal or nonverbal, that (i) is made to conduct, participate in, continue, or reconvene a collaborative law process and (ii) occurs after the parties sign a collaborative law participation agreement and before the collaborative law process is concluded.

"Collaborative law participation agreement" means an agreement by persons 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 persons sign a collaborative law participation agreement and are represented by collaborative lawyers.

"Collaborative lawyer" means a lawyer who represents a party in a collaborative law process.

"Collaborative matter" means a dispute, transaction, claim, problem, or issue for resolution that is described in a collaborative law participation agreement and that is between family or household members or arises under the family or domestic relations laws of the Commonwealth, including (i) marriage, divorce, dissolution, annulment, and property distribution; (ii) child custody, visitation, and parenting time; (iii) alimony, spousal support, maintenance, and child support; (iv) adoption; (v) parentage; and (vi) negotiation or enforcement of premarital, marital, and separation agreements.

"Family abuse" has the same meaning as set forth in § 16.1-228.

"Family or household member" has the same meaning as set forth in § 16.1-228.

"Law firm" means (i) lawyers who practice law together in a partnership, professional corporation, sole proprietorship, limited liability company, or association or (ii) lawyers employed together in (a) a legal services organization or (b) the legal department of another organization.

"Nonparty participant" means a person, other than a party and the party's collaborative lawyer, that participates in a collaborative law process.

"Party" means a person who signs a collaborative law participation agreement and whose consent is necessary to resolve a collaborative matter.

"Proceeding" means a judicial, administrative, arbitral, or other adjudicative process before a tribunal, including related prehearing and post-hearing motions, conferences, and discovery.

"Prospective party" means a person who discusses with a prospective collaborative lawyer the possibility of signing a collaborative law participation agreement.

"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.

"Related to a collaborative matter" means involving the same parties, transaction or occurrence, nucleus of operative fact, dispute, claim, or issue as the collaborative matter.

"Sign" means, with present intent to authenticate or adopt a record, to (i) execute or adopt a tangible symbol or (ii) attach to or logically associate with the record an electronic symbol, sound, or 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 interest in a matter.

§ 20-169. Applicability.

This chapter applies to a collaborative law participation agreement that meets the requirements of § 20-170 and is signed on or after July 1, 2021.

§ 20-170. Collaborative law participation agreement; requirements.

A. A collaborative law participation agreement shall:

1. Be in a record;

2. Be signed by the parties;

3. State the parties' intention to resolve a collaborative matter through a collaborative law process under this chapter;

4. Describe the nature and scope of the matter;

5. Identify the collaborative lawyer who represents each party in the process; and

6. Contain a statement by each collaborative lawyer confirming the lawyer's representation of a party in the collaborative law process, which may be contained in a separate writing.

B. Parties may agree to include in a collaborative law participation agreement additional provisions not inconsistent with this chapter.

§ 20-171. Beginning and concluding collaborative law process.

A. A collaborative law process begins when the parties sign a collaborative law participation agreement.

B. A tribunal shall not order a party to participate in a collaborative law process over such party's objection.

C. A collaborative law process is concluded by a:

1. Resolution of a collaborative matter as evidenced by a signed record;

2. 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; or

3. Termination of the process.

D. A collaborative law process terminates:

1. When a party gives notice to his collaborative lawyer and to other parties in a record that the process is ended;

2. When a party:

a. Begins a proceeding related to a collaborative matter without the agreement of all parties; or

b. In a pending proceeding related to the matter, (i) initiates a pleading, motion, order to show cause, or request for a conference with the tribunal; (ii) requests that the proceeding be put on the tribunal's active docket; or (iii) takes similar action requiring notice to be sent to the parties; or

3. Except as otherwise provided by subsection G, when a party discharges a collaborative lawyer or a collaborative lawyer withdraws from further representation of a party.

E. A party's collaborative lawyer shall give prompt notice to all other parties in a record of a discharge or withdrawal.

F. A party may terminate a collaborative law process with or without cause.

G. Notwithstanding the discharge or withdrawal of a collaborative lawyer, a collaborative law process continues if, not later than 30 days after the date that the notice of the discharge or withdrawal of a collaborative lawyer required by subsection E is sent to the parties:

1. The unrepresented party engages a successor collaborative lawyer; and

2. In a signed record:

a. The parties consent to continue the process by reaffirming the collaborative law participation agreement;

b. The collaborative law participation agreement is amended to identify the successor collaborative lawyer; and

c. The successor collaborative lawyer confirms the lawyer's representation of a party in the collaborative process.

H. A collaborative law process does 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 such matter as evidenced by a signed record, including any orders necessary to effectuate the terms of an agreement reached in the collaborative law process and evidenced in a signed record.

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

§ 20-172. Proceedings pending before tribunal; status report.

A. Persons in 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 shall file promptly with the tribunal a notice of the collaborative law participation agreement after it is signed. Subject to subsection D and §§ 20-173 and 20-174, the filing operates as an application for a stay of the proceeding.

B. In the event that a stay is not granted by the tribunal, the proceeding shall be nonsuited by the parties before the collaborative law process may continue.

C. In the event that a stay of the proceeding is granted by the tribunal, the parties shall promptly file with the tribunal a notice in a record when their collaborative law process concludes. A stay of the proceeding under subsection A is lifted when the notice is filed. The notice shall not specify any reason for termination of the process.

D. A tribunal in which a proceeding is stayed under subsection A 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 shall not include a report, assessment, evaluation, recommendation, finding, or other communication regarding a

collaborative law process or collaborative law matter.

E. A tribunal shall not consider a communication made in violation of subsection D.

F. A tribunal shall provide 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.

§ 20-173. Emergency order.

During a collaborative law process, a tribunal may issue emergency orders to protect the health, safety, welfare, or interest of a party or a party's family or household member.

§ 20-174. Affirmation of agreement by tribunal.

A tribunal may affirm, ratify, and incorporate into a court order any agreement resulting from a collaborative law process.

§ 20-175. Disqualification of collaborative lawyer and lawyers in associated law firm; exception.

A. Except as otherwise provided in subsection C, a collaborative lawyer is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter.

B. Except as otherwise provided in subsection C and § 20-176, 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 if the collaborative lawyer is disqualified from doing so under subsection A.

C. A collaborative lawyer or another lawyer in a law firm with which the collaborative lawyer is associated may represent a party:

1. To ask a tribunal to affirm, ratify, and incorporate any agreement resulting from the collaborative law process into a court order;

2. To ask a tribunal to enter any order necessary to effectuate the terms of any agreement resulting from the collaborative law process; or

3. To seek or defend an emergency order to protect the health, safety, welfare, or interest of a party or a party's family or household member, if a successor lawyer is not immediately available to represent such person.

D. If subdivision C 3 applies, a collaborative lawyer, or another lawyer in a law firm with which the collaborative lawyer is associated, may represent a party or a party's family or household member only until such person is represented by a successor lawyer or reasonable measures are taken to protect the health, safety, welfare, or interest of the person.

§ 20-176. Low-income parties; exception from imputed disqualification.

A. The disqualification provisions of § 20-175 apply to a collaborative lawyer representing a party with or without fee.

B. After a collaborative law process concludes, another lawyer in a law firm with which a collaborative lawyer disqualified pursuant to § 20-175 is associated may represent a party without fee in the collaborative matter or a matter related to such collaborative matter if:

1. The party has an annual income that qualifies the party for free legal representation under the criteria established by the law firm for free legal representation;

2. The collaborative law participation agreement so provides for such subsequent representation; and

3. The collaborative lawyer is isolated from any participation in the collaborative matter or a matter related to the collaborative matter through procedures within the law firm that are reasonably calculated to isolate the collaborative lawyer from such participation.

§ 20-177. Disclosure of information.

Except as otherwise provided by law, during the collaborative law process, on the request of another party, a party shall make timely, full, candid, and informal disclosure of information related to the collaborative matter without the requirement of the formal discovery procedures set forth in Part 4 of the Rules of Supreme Court of Virginia. A party shall also promptly update previously disclosed information that has materially changed. The parties may define the scope of disclosure during the collaborative law process.

§ 20-178. Standards of professional responsibility and mandatory reporting not affected.

This chapter does not affect the professional responsibility obligations and standards applicable to a lawyer or other licensed professional or the obligation of a person to report abuse or neglect, abandonment, or exploitation of a child or adult under the laws of the Commonwealth.

§ 20-179. Appropriateness of collaborative law process.

Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall:

1. Assess with the prospective party factors the lawyer reasonably believes relate to whether a collaborative law process is appropriate for the prospective party's matter;

2. Provide the prospective party with 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 proposed collaborative matter, such as litigation, mediation, arbitration, or expert evaluation; and

3. Advise the prospective party that:

a. After signing a collaborative law participation agreement, if a party initiates a proceeding or seeks tribunal intervention in a pending proceeding related to the collaborative matter, the collaborative law process terminates;

b. Participation in a collaborative law process is voluntary, and any party has the right to unilaterally terminate a collaborative law process with or without cause; and

c. The collaborative lawyer and any lawyer in a law firm with which the collaborative lawyer is associated may not appear before a tribunal to represent a party in a proceeding related to the collaborative matter, except as authorized by subsection C of § 20-175 or by § 20-176.

§ 20-180. History of family abuse.

A. Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall make reasonable inquiry into whether there exists a history of family abuse between the prospective parties.

B. Throughout a collaborative law process, a collaborative lawyer shall reasonably and continuously assess whether there exists a history of family abuse between the parties.

C. If a collaborative lawyer reasonably believes that the party the lawyer represents or the prospective party who consults the lawyer has a history of family abuse with another party or prospective party, the lawyer shall not begin or continue a collaborative law process unless (i) the party or the prospective party requests beginning or continuing the process and (ii) the collaborative lawyer reasonably believes that the safety of the party or prospective party can be protected adequately during the process.

§ 20-181. Confidentiality of collaborative law communication.

A collaborative law communication is confidential to the extent agreed upon by the parties in a signed record or as provided by another law of the Commonwealth.

§ 20-182. Privilege against disclosure of collaborative law communication; admissibility; discovery.

A. Subject to §§ 20-183 and 20-184, a collaborative law communication is privileged under subsection B, is not subject to discovery, and is not admissible in evidence.

B. In a proceeding, the following privileges apply:

1. A party may refuse to disclose, and may prevent any other person from disclosing, a collaborative law communication.

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

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

§ 20-183. Waiver and preclusion of privilege.

A. A privilege under § 20-182 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 such participant.

B. A person who makes a disclosure or representation about a collaborative law communication that prejudices another person in a proceeding shall not assert a privilege under § 20-182; such preclusion applies only to the extent necessary for the person prejudiced to respond to the disclosure or representation.

§ 20-184. Limits of privilege.

A. There is no privilege under § 20-182 for a collaborative law communication that is:

1. Available 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; or

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

B. The privileges under § 20-182 for a collaborative 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 law process; or

2. Sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation of a child or adult, unless the child protective services or adult protective services unit of the local department of social services is a party to or otherwise participates in the process.

C. There is no privilege under § 20-182 if a tribunal 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 law communication is sought or offered in (i) a court proceeding involving a felony or misdemeanor or (ii) 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.

D. If a collaborative law communication is subject to an exception under subsection B or C, only the

part of the communication necessary for the application of the exception may be disclosed or admitted.

E. Disclosure or admission of evidence excepted from the privilege under subsection B or C does not make the evidence or any other collaborative law communication discoverable or admissible for any other purpose.

F. The privileges under § 20-182 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 law process is not privileged. This subsection does not apply to a collaborative law communication made by a person who did not receive actual notice of the agreement that all or part of a collaborative law process is not privileged before the communication was made.

§ 20-185. Authority of tribunal in case of noncompliance.

A. If a collaborative law participation agreement fails to meet the requirements of § 20-170, or a lawyer fails to comply with § 20-179 or 20-180, a tribunal may nevertheless find that the parties intended to enter into a collaborative law participation agreement if they (i) signed a record indicating an intention to enter into a collaborative law participation agreement and (ii) reasonably believed they were participating in a collaborative law process.

B. If a tribunal makes the findings specified in subsection A, and the interests of justice require, the tribunal may (i) enforce an agreement evidenced by a record resulting from the collaborative law process in which the parties participated, (ii) apply the disqualification provisions of § 20-175, and (iii) apply a privilege under § 20-182.

§ 20-186. Uniformity of application and construction.

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

§ 20-187. Relation to Electronic Signatures in Global and National Commerce Act.

This chapter modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 et seq., but does not modify, limit, or supersede § 101(c) of that act, 15 U.S.C. § 7001(c), or authorize electronic delivery of any of the notices described in § 103(b) of that act, 15 U.S.C. § 7003(b).