

RESOLUTION 01-16-05

DIGEST

Family Law: Collaborative Guidelines and Procedures

Adds Family Code sections 11000 and 11001 to provide guidelines and procedures for collaborative law as an alternative to settle and resolve family law disputes.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History

Similar to Resolution 8-10-03, which was withdrawn, and 6-01-04, which was disapproved. Similar to Resolution 01-05-05.

Reasons

This resolution adds Family Code sections 11000 and 11001 to provide guidelines and procedures for collaborative law as an alternative to settle and resolve family law disputes. This resolution should be disapproved because there are too many negative aspects to the process.

Collaborative law is a process for resolution of family law disputes. The procedure requires that the parties remove the proceedings from the rules, procedures and control of the court. The process requires full and complete disclosure of all facts and an openness so that there are no hidden agendas. The down side is that if the matter is not completely resolved through collaboration, the parties are required to start *completely* over, including retaining new counsel or proceeding in propria persona. All forensic work will be disregarded. Arguably, the loss of all work product associated with the collaborative law process and the requirement that litigants must retain new counsel, or self represent, if the process fails, provides tremendous incentive to succeed. The concern is that parties may feel coerced into an outcome less favorable than that would have otherwise be achieved due to financial and emotional exhaustion.

Despite continued interest in this subject among some family law practitioners, this resolution does not overcome the significant adverse consequences to litigants who fail in the process. These consequences do not attach to other forms of alternative dispute resolution. Moreover, the proposed resolution creates an exemption from court case management, without clearly identifying a problem, if any, within the system. It is well settled that parties cannot validly waive the Court's subject matter jurisdiction through contract. Since other forms of alternative dispute resolution are not codified, there is no reason to attempt to do so with collaborative law. Further, to codify a procedure would take away discretion from the parties and their counsel on how the process should proceed.

SECTION/COMMITTEE REPORTS

COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION

APPROVE IN PRINCIPLE

Resolution 01-16-05 proposes that new legislation be added to the Family Code to create a division to be known as "The Collaborative Family Law Act." The State Bar's Committee on Alternative Dispute Resolution ("ADR Committee") supports the concept of collaborative law as a process for resolution of disputes in a non-litigious manner. The ADR Committee's support for this resolution relates to the adoption of alternative dispute resolution procedures, in general, and not to the specific legal requirements set forth in the proposed Act.

This position is only that of the State Bar of California's Committee on Alternative Dispute Resolution. This position has not been adopted by the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to add Family Code Sections 11000 and 11001 to read as follows:

- 1 § 11000
2 This division shall be known and may be cited as The Collaborative Family Law Act.
3
- 4 § 11001
5 (a) On a written agreement of the parties and their attorneys the parties may utilize the
6 Collaborative Law Process to resolve any matter governed by the Family Code over which the
7 Superior Court is granted jurisdiction pursuant to Family Code Section 2000.
8 (b) Collaborative Law is the process in which the parties and their counsel agree in writing to
9 use their best efforts and to make a good faith attempt to resolve disputes related to Family Law
10 matters as referenced above in Section 11001 (a) on an agreed basis without resorting to adversary
11 judicial intervention, except to file the initial action and the initial response, to file stipulated orders or
12 judgments and accompanying documents as may be required under the Family Code, or to have the
13 court approve the settlement agreement, make the legal pronouncements, and sign the orders
14 required by law to effectuate the agreement of the parties as the court determines appropriate. The
15 parties' counsel may not serve as litigation counsel except to ask the court to approve the settlement
16 agreement.
17 (c) If neither party files an initial Petition for proceedings pursuant to one of the issues listed
18 above in Section 11001 (a), at any time during the Collaborative Law Process the parties may agree
19 in writing to set jurisdiction over all issues to be heard by a court of competent jurisdiction retroactive
20 to any date as far back as the date the parties entered into the Collaborative Law Agreement.
21 (d) Evidence Code Sections 1115 through 1128 regarding confidentiality protections on
22 information exchanged in Mediation shall also apply to Collaborative Law proceedings.
23 (1) All statements, communications and work product made or arising from a Collaborative
24 Family Law Case are confidential and are inadmissible in any court proceeding, except by written
25 agreement of the parties.
26 (2) Work product includes any written or oral communication between attorneys and clients,
27 and written or oral communication, reports, or analysis of any third party professionals or experts
28 used in the Collaborative Law Process.
29 (3) Notwithstanding this provision and the confidential nature of the Collaborative Law
30 Process, all written agreements entered into by the parties during the Collaborative Law Process are
31 deemed admissible in court.
32 (e) If the Collaborative Law Process terminates without settlement, both parties must seek
33 new counsel or represent himself/herself, to proceed in litigation. Neither Collaborative Law counsel
34 may act as litigation counsel for either party.
35 (1) Pursuant to paragraph d(3) above, all written agreements entered into by the parties
36 during the Collaborative Law Process are deemed admissible in court, notwithstanding the
37 termination of the process or the confidential nature of the Collaborative Law Process.
38 (f) The Collaborative Law Agreement must include, but not be limited to, provisions for:
39 (1) The parties' full compliance with disclosure requirement under Family Code §2100 et
40 seq., and candid exchange of all information between the parties and their attorneys as necessary to
41 make a proper evaluation of the case, including, but not limited to, each party's Preliminary
42 Declaration of Disclosure, Income and Expense Declaration and Schedule of Assets and Debts, all
43 under penalty of perjury, pursuant to Family Code §2104;
44 (2) Suspending court intervention in the dispute while the parties and their attorneys are
45 using Collaborative Law procedures requiring court appearances pursuant to local county rules;
46 (3) Provisions for jointly hiring mental health, financial, and/or other professionals to serve as
47 joint experts to assist the parties in the investigation, evaluation and/or resolution of issues, as well as
48 assisting the parties in making informed decisions;
49 (4) Withdrawal of all counsel involved in the Collaborative Law Process if the Collaborative
50 Law Process does not result in settlement of the dispute; and

51 (5) Expectation that the parties and attorneys will use their best efforts and good faith to
52 resolve the dissolution of marriage through the Collaborative Law Process.
53 (g) Subject to the Subsections below, a court that is notified 30 days before trial that the
54 parties are using the Collaborative Law Process to attempt to settle a dispute may not, until a party
55 notifies the court that the Collaborative Law Process did not result in a settlement:
56 (1) Set a hearing or trial in the case;
57 (2) Impose discovery deadlines;
58 (3) Require compliance with Pre-Trial orders; or
59 (4) Dismiss the case.
60 (h) The parties shall notify the court if the Collaborative Law Process results in a settlement.
61 (i) If the Collaborative Law Process does not result in a settlement on or before the second
62 anniversary of the date that the suit was filed, the Court may set the matter for Case Management
63 Conference.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

Existing Law: There are currently no provisions in the Family Code for approaching family law issues in a collaborative manner.

This Resolution: Would introduce a new section to the Family Code recognizing and encouraging the process of Collaborative Family Law as a legitimate means by which to resolve and complete dissolution proceedings. This resolution would also establish jurisdiction and retroactivity, as the parties will sign a Collaborative Law contract stipulating to an extension of time to answer to retroactivity of issues.

The Problem: This resolution is based on the Texas statute regarding Collaborative Family Law. This resolution was submitted to the Conference of Delegates of California Bar Association in 2004. That resolution was not passed because of certain problems within the proposed resolution which was directed toward idiosyncrasies of some counties. This is a cleaner, more general resolution which promotes the collaborative practice. The resolution is designed to promote and encourage the collaborative practice in family law. It is believed that if the statute is in place more practitioners will look to the collaborative model and the judiciary will put their weight of approval behind the process.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

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COUNTERARGUMENT

SANTA CLARA COUNTY BAR ASSOCIATION

This resolution seeks to codify the practice of collaborative law in order to gain recognition as a legitimate process and make the practice more commonplace. The arguments against this resolution are: 1) section 11001(b) does not identify what happens to the parties when one party fails to use his/her best efforts or fails to act in good faith, whether or not sanctions, for example, are issued, and how the failure to act in good faith

or use best efforts would be adjudicated, or not adjudicated; 2) section 11001(d)(3) only speaks of the admissibility of agreements, but fails to address the method in which to prove a party failed to use good faith efforts in light of the collaborative process failing apart; 3) the resolution fails to identify how parties will be screened for the collaborative process; 4) it fails to identify what liability the collaborative attorneys inherit for failure to evaluate the parties effectively as proper for the collaborative process; and 5) the practice of collaborative law should not be codified because it is a private practice that does not belong in the codes. Lastly, the authors seem to seek recognition of the collaborative process as though the practice, at this time, does not have publicity. However, I, and many others in the county, have learned about the process through county bar meetings, pamphlets that are handed out, speakers that discuss the topic, through websites, and through other channels of communication. A resolution for the collaborative process specifically in regard to the family codes is not appropriate.

COUNTERARGUMENT

SAN DIEGO COUNTY BAR ASSOCIATION

This resolution addresses same issues of Collaborative Divorce as are addressed in Resolution 1-05-05. However, the text of Resolution 01-05-05 includes reporting requirements to the court which are necessary to ensure that the collaborative process is moving forward and is not being used as a stall tactic.