2016 FAMILY LAW LEGISTATIVE UPDATE
VIEW FROM THE BENCH
BY General Magistrate Robert Jones

HB 967

This Bill was approved by the Governor on March 24, 2016, ch. 2016-93, and will become effective on July 1, 2016.

The **Bill creates s. 61.55, F.S**., to provide for the applicability and purpose of the **collaborative law process.**

In 2012, the Florida Family Law Rules committee proposed to the Florida Supreme Court a new rule 12.745, to be known as the Collaborative Process Rule. In declining to adopt the rule, the court explained: Given the possibility of legislative action addressing the use of the collaborative law process and the fact that certain foundations, such as training or certification of attorneys for participation in the process, have not yet been laid, we conclude that the adoption of a court rule on the subject at this time would be premature.

Although the Florida Supreme Court has not adopted rules on collaborative law, at least four judicial circuits in Florida-the 9th, 11th, 13th, and 18th-have adopted local court rules on collaborative law. Each administrative order includes the requirement that an attorney disqualify himself or herself if the collaborative process is unsuccessful. Other circuits have recognized the collaborative process in the absence of issuing a formal administrative order.

The authority for the collaborative process is limited to issues governed by ch. 61, F.S. (Dissolution of Marriage; Support; Time-sharing) and ch. 742, F.S. (Determination of Parentage). More specifically, the following issues are subject to resolution through the collaborative law process:

*Marriage, divorce, dissolution, annulment, and marital property distribution;
*Child custody, visitation, parenting plans, and parenting time;
*Alimony, maintenance, child support;
*Parental relocation with a child;
*Premarital, marital, and postmarital agreements; and
*Paternity.

The Bill creates s. 61.56, F.S., to provide definitions applicable to the Act.

The Bill creates s. 61.57, F.S., to provide conditions upon which a collaborative law process begins, concludes, and terminates. The bill provides that a tribunal may not order a party to participate in a collaborative law process over that party's objection and a party may terminate the collaborative law process with or without cause. The process begins when the parties enter into a collaborative participation agreement. If a legal proceeding is pending, the proceeding is put on hold while the collaborative law process is ongoing.

The collaborative law process is concluded in one of four ways. First, the parties may provide for a method by agreement. Second, the parties may sign a record providing a resolution of the matter. Third, the parties may sign a record indicating resolution of certain matters while leaving other matters unresolved. Fourth, the process is concluded by a termination of the process, evidenced when a party:

*Gives notice to other parties that the process is ended;

*Begins a legal proceeding related to a collaborative law matter without the agreement of all the parties;

*Initiates a pleading, motion, order to show cause, or request for a conference with a tribunal in a pending proceeding related to the matter;

*Requests that the proceeding be put on the tribunal's active calendar in a pending proceeding related to the matter or takes a similar action requiring notice to be sent to the parties; or

*Discharges a collaborative lawyer or a collaborative lawyer withdraws.

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

A collaborative law process may survive the discharge or withdrawal of a collaborative lawyer under the following conditions:

*The unrepresented party engages a successor collaborative lawyer;
*The parties consent in a signed record to continue the process;
*The agreement is amended to identify the successor collaborative lawyer; and
*The successor collaborative lawyer confirms the representation in a signed record.

The Bill creates s. 61.58, F.S., to provide that a collaborative law communication is confidential to the extent agreed upon by the parties in a signed record or as otherwise provided by law, with limitations as discussed below.

The Bill creates s. 61.58(1), F.S., to provide a privilege against disclosure for collaborative law communications, within limits provided in the bill. A collaborative law communication is not subject to discovery or admissible in evidence in a proceeding before a tribunal. Each party (including a party's attorney during the collaborative law process) has a privilege to refuse to disclose a collaborative law communication, and to prevent any other person from disclosing a communication. A nonparty to the collaborative law process (which is any person other than the party or the party's attorney, in this context) may also refuse to disclose any communication or may prevent any other person from disclosing the nonparty's communication. Therefore, a party has an absolute privilege as to all communications, while the nonparty has a privilege for his or her own communications. However, evidence that would otherwise be admissible does not become inadmissible or protected from discovery solely because it may have been a communication during a collaborative law process. The privilege does not apply if the parties agree in advance in a signed record or if all parties agree in a proceeding that all or part of a collaborative law process is not privileged, as long as the parties had actual notice before the communication was made.

The Bill creates s. 61.58(2), F.S., to provide that a privilege may be expressly waived either orally or in writing during a proceeding if all the parties agree. If a nonparty has a privilege, the nonparty must also agree to waive the privilege. However, if a person makes a disclosure or representation about a collaborative law communication that prejudices another person during a proceeding before a tribunal, that person may not assert a privilege to the extent that it is necessary for the prejudiced person to respond.

The Bill creates s. 61.58(3), F.S., to provide that a privilege does not apply to a collaborative law communication that is:

*Available to the public under Florida's Public Records statutes in ch. 119, F.S.;
*Made during a collaborative law session that is open to the public or 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 or commit a crime, or conceal an ongoing crime or ongoing criminal activity; or

*In an agreement resulting from the collaborative process if there is a record memorializing the

A privilege does not apply to the extent that the communication is 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
*Abuse, neglect, abandonment, or exploitation of a child or adult, unless the Florida Department of Children and Families is a party or otherwise participates in the collaborative law process.

Only the portion of the communication needed for proof or disproof may be disclosed or admitted.

There are other limited circumstances where a privilege does not apply that requires the approval of the court. A party seeking discovery or a proponent of certain evidence may show that the evidence is not otherwise available, the need for the evidence substantially outweighs the interest in protecting confidentiality, and the communication is either in a court proceeding involving a felony or a proceeding seeking rescission or reformation of a contract arising out of the collaborative law process or where a defense is asserted to avoid liability on the contract. Only the portion of the communication needed for evidence may be disclosed or admitted.

The framework created by the Bill will become effective 30 days after the Florida Supreme Court adopts rules of procedure and professional responsibility consistent with the collaborative law process. The Legislature may not create rules or procedures relating to litigation, as this would violate the separation of powers and the Supreme Court's exclusive right to "adopt rules for the practice and procedure in all courts . . ."

CS/CS/CS/ SB 590

This Bill was approved by the Governor on March 23, 2016, ch. 2016-71, and will become effective on July 1, 2016.

The Florida Adoption Act, Ch. 63, F.S., applies to all **adoptions,** whether private or from the child welfare system. The chapter's intent is to provide stable and permanent homes for adoptive children in a prompt manner, prevent the disruption of adoptive placement, and hold parents accountable for meeting the needs of children.

For children in the child welfare system whose permanency goal is adoption, community-based care lead agencies work to find adoptive families. The court approves such placements using the best interest standard in Ch. 39, F.S., which authorizes the court to look broadly at all relevant factors to determine what would be in a child's best interest.

Section 63.082, F.S., allows a private adoption entity to intervene in the child welfare case to instead place a dependent child with prospective adoptive parents chosen by the child's parent or the private adoption entity. However, the best interest standard that applies in this instance is narrower than that in Ch. 39, F.S. Section 63.082(6)(e), F.S., lists 4 specific factors the court must consider to determine whether it is in the best interest of the child to transfer custody to the prospective adoptive parents.

This Bill changes the standard in s. 63.082(6)(e), F.S., for determining whether the transfer of a child's placement is in the child's best interest. **The bill requires** the court to consider and weigh all relevant factors, including new factors regarding whether a petition for termination of parental rights has been filed pursuant to s. 39.806(1)(f), (g), or (h), F.S., the stability of the current placement, the child's wishes, and what is best for the child.

For situations where a child's placement is transferred through the intervention process, **the bill permits** the court to establish requirements for the transfer of custody over a reasonable period of time rather than ordering an immediate transfer.

The Bill creates timelines for intervention and placement hearings under s. 63.082(6), F.S., as well as increased requirements for notice to a parent of the right to private adoption from the child welfare system.

The Bill also amends s. 39.01, F.S., providing additional specificity to the definitions of "abandoned" or " abandonment" and "parent".

CS/SB 380

This Bill was approved by Governor on April 6, 2016 , ch. 2016-187, and will become effective on October 1, 2016.

This Bill amends ss. 741.31(4), 784.047, and 784.0487(4), F.S., to provide enhanced criminal penalties for a person who commits a third or subsequent violation of an injunction for protection or a foreign protection order against domestic violence, repeat violence, sexual violence, dating violence, stalking or cyberstalking.

Currently, a person who violates an injunction for protection or a foreign protection order commits a **misdemeanor of the first degree**, regardless of how many times a person is convicted of this offense.

The Bill increases the penalty to a **third degree felony** for a person who has two or more prior convictions for violating an injunction for protection or foreign protection order and commits a third or subsequent violation against the same victim. A third degree felony is punishable by probation or up to a maximum of five years in prison and up to a $5,000 fine.

SB 498

This Bill was approved by Governor on April 6, 2016 , ch. 2016-188, The bill takes effect upon becoming a law, i.e. April 6, 2016

Florida law, 798.02, F.S., previously made it a second degree misdemeanor for a man and woman to lewdly and lasciviously associate and cohabit together without being married to each other, or if married or unmarried engage in open and gross lewdness and lascivious behavior. This law, originally enacted in 1868, made the crime of cohabitation punishable by up to 2 years in prison, up to 1 year in the county jail, or up to a $300 fine. Somewhat similarly, s. 800.02, F.S., makes it a second degree misdemeanor for a person to engage in any unnatural and lascivious act with another person.

The **Bill repeals only the portion** of s. 798.02, F.S., which makes it a second degree misdemeanor for <u>any man and woman, not being married to each other, to lewdly and lasciviously associate and cohabit together</u>.