**South Carolina General Assembly**

120th Session, 2013-2014

**H. 3715**

**STATUS INFORMATION**

General Bill

Sponsors: Rep. J.E. Smith

Document Path: l:\council\bills\nbd\11143ac13.docx

Introduced in the House on February 28, 2013

Currently residing in the House Committee on **Judiciary**

Summary: Collaborative Law Act

**HISTORY OF LEGISLATIVE ACTIONS**

Date Body Action Description with journal page number

2/28/2013 House Introduced and read first time ([House Journal‑page 29](file:///h:\HJ%20Archive\2013\02-28-13.docx))

2/28/2013 House Referred to Committee on **Judiciary** ([House Journal‑page 29](file:///h:\HJ%20Archive\2013\02-28-13.docx))

**VERSIONS OF THIS BILL**

[2/28/2013](file:///p:\pprever\2013-14\3715_20130228.docx)

**A** **BILL**

TO AMEND THE CODE OF LAWS, OF SOUTH CAROLINA, 1976, BY ADDING CHAPTER 87 TO TITLE 15 TO ENACT THE “COLLABORATIVE LAW ACT” SO AS TO PROVIDE FOR THE ALTERNATIVE DISPUTE RESOLUTION PROCESS OF COLLABORATIVE LAW IN WHICH PARTIES TO A LEGAL DISPUTE SEEK TO NEGOTIATE A RESOLUTION OF THE MATTER WITHOUT APPEARING BEFORE, OR THE INTERVENTION OF, A TRIBUNAL; TO PROVIDE THAT THE COLLABORATIVE LAW PROCESS IS VOLUNTARY AND THAT EACH PARTY IN THE PROCESS MUST BE REPRESENTED BY A COLLABORATIVELY TRAINED LAWYER WHOSE SOLE PURPOSE IS TO NEGOTIATE AN AGREEMENT; TO PROVIDE THAT A COLLABORATIVE LAWYER IS PROHIBITED FROM REPRESENTING A PARTY IN ANY OTHER CAPACITY BEFORE A TRIBUNAL ON THE MATTER IN DISPUTE AND TO PROVIDE LIMITED EXCEPTIONS; TO ESTABLISH THE REQUIREMENTS OF A COLLABORATIVE LAW PARTICIPATION AGREEMENT; TO PROVIDE HOW A COLLABORATIVE LAW PROCESS IS INITIATED AND TERMINATED OR CONCLUDED; TO AUTHORIZE TRIBUNALS TO APPROVE AN AGREEMENT RESULTING FROM A COLLABORATIVE LAW PROCESS; TO REQUIRE PARTIES TO VOLUNTARILY DISCLOSE INFORMATION DURING THE PROCESS WITHOUT FORMAL DISCOVERY; TO PROVIDE THAT STANDARDS OF PROFESSIONAL RESPONSIBILITY AND CHILD AND ADULT ABUSE REPORTING LAWS APPLY; TO REQUIRE A COLLABORATIVE LAWYER TO ADVISE CLIENTS OF THE RISKS AND BENEFITS OF THE PROCESS AS COMPARED TO OTHER DISPUTE RESOLUTION PROCESSES; TO REQUIRE A COLLABORATIVE LAWYER TO SCREEN CLIENTS FOR DOMESTIC ABUSE TO DETERMINE IF THIS PROCESS WOULD BE APPROPRIATE; TO AUTHORIZE PARTIES TO ESTABLISH THE SCOPE OF CONFIDENTIALITY FOR INFORMATION DISCLOSED DURING THE PROCESS; TO CREATE EVIDENTIARY PRIVILEGES FOR COLLABORATIVE LAW COMMUNICATIONS AND EXCEPTIONS TO THESE PRIVILEGES; TO AUTHORIZE TRIBUNALS TO ENFORCE COLLABORATIVE LAW AGREEMENTS, ALTHOUGH A COLLABORATIVE LAWYER FAILED TO COMPLY WITH CERTAIN PROCESS REQUIREMENTS; AND TO PROVIDE THAT THIS CHAPTER MODIFIES CERTAIN FEDERAL ELECTRONIC SIGNATURE STATUTORY PROVISIONS.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Title 15 of the 1976 Code is amended by adding:

“CHAPTER 87

Collaborative Law Act

Section 15‑87‑10. This chapter may be cited as the ‘Collaborative Law Act’.

Section 15‑87‑20. As used in this chapter, unless the context requires otherwise:

(1) ‘Collaborative law communication’ means a statement, whether oral, in a record, verbal or nonverbal, made by a collaborative lawyer, a party to the collaborative law process, or a nonparty participant in the process:

(a) is made or used when conducting, participating in, continuing, or reconvening a collaborative law process or used in resolving a collaborative matter subject to the collaborative law process; and

(b) occurs after the parties sign a collaborative law participation agreement and before the collaborative law process is concluded.

A ‘collaborative law communication’ does not include documentation presented in a collaborative law process to determine the value of property including, but not limited to, financial, business, real, or personal property unless the communication is privileged as otherwise provided for in law.

(2) ‘Collaborative law participation agreement’ means an agreement by persons to participate in a collaborative law process.

(3) ‘Collaborative law process’ means a procedure intended to resolve a collaborative matter without intervention by a tribunal in which persons:

(a) sign a collaborative law participation agreement; and

(b) are represented by collaborative lawyers.

(4) ‘Collaborative lawyer’ means a lawyer who has completed basic collaborative law training that meets the standards and qualifications for this training as established by the International Association of Collaborative Professionals and who represents a party in a collaborative law process.

(5) ‘Collaborative matter’ means a dispute, transaction, claim, problem, or issue for resolution, including a dispute, claim, or issue in a proceeding that is described in a collaborative law participation agreement.

(6) ‘Law firm’ means:

(a) lawyers who practice law together in a partnership, professional corporation, sole proprietorship, limited liability company, or association; and

(b) lawyers employed in a legal services organization or the legal department of a corporation or other organization or the legal department of a government or governmental subdivision, agency, or instrumentality.

(7) ‘Nonparty participant’ means a person, other than a party and the party’s collaborative lawyer, that participates in a collaborative law process including, but not limited to, a collaboratively trained professional who may or may not be a party to the collaborative participation agreement.

(8) ‘Party’ means a person that signs a collaborative law participation agreement and whose consent is necessary to resolve a collaborative matter.

(9) ‘Person’ means 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.

(10) ‘Proceeding’ means:

(a) a judicial, administrative, arbitral, or other adjudicative process before a tribunal, including related prehearing and post‑hearing motions, conferences, and discovery; or

(b) a legislative hearing or similar process.

(11) ‘Property’ means real or personal property including, but not limited to, assets, debts, and liabilities subject to the collaborative law process.

(12) ‘Prospective party’ means a person that discusses with a collaborative lawyer the possibility of entering into a collaborative law participation agreement.

(13) ‘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.

(14) ‘Related to a collaborative matter’ means a matter involving the same parties, transaction or occurrence, nucleus of operative fact, dispute, claim, or issue as the collaborative matter.

(15) ‘Sign’ means, with present intent to authenticate or adopt a record:

(a) to execute or adopt a tangible symbol; or

(b) to attach to or logically associate with the record an electronic symbol, sound, or process.

(16) ‘Tribunal’ means:

(a) 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 interests in a matter; or

(b) a legislative body conducting a hearing or similar process.

Section 15‑87‑30. This chapter applies to a collaborative law participation agreement that meets the requirements of Section 15‑87‑60 and is signed after December 31, 2014.

Section 15‑87‑40. (A) Persons engaged in a dispute may elect to enter into a collaborative law participation agreement whether or not a proceeding seeking resolution of the dispute by a tribunal has been initiated. Persons may seek resolution through the collaborative law process of all or part of the issues involved in a dispute.

(B) Participation in a collaborative law process is voluntary, and a tribunal may not order a party to participate in a collaborative law process over that party’s objection.

Section 15‑87‑50. A collaborative lawyer engaged in a collaborative law process, and a lawyer in a law firm with which the collaborative lawyer is associated, may not represent a party in a proceeding during the collaborative law process or subsequent to the conclusion of the process if the proceeding pertains to the collaborative matter or is related to the collaborative matter or to a matter brought pursuant to Section 15‑87‑100 except to represent a party to ask a tribunal to approve an agreement resulting from the collaborative law process and as otherwise provided for in Sections 15‑87‑200 and 15‑87‑210.

Section 15‑87‑60. (A) A collaborative law process begins when the parties sign a collaborative law participation agreement. (B)(1) A collaborative law participation agreement must:

(a) be in a record;

(b) be signed by the parties and their respective collaborative lawyers;

(c) state the parties’ intention to resolve a collaborative matter through a collaborative law process pursuant to this chapter;

(d) describe the nature and scope of the matter;

(e) identify the collaborative lawyer who represents each party in the process; and

(f) contain a statement by each collaborative lawyer confirming the lawyer’s representation of a party in the collaborative law process.

(2) Parties may agree to include in a collaborative law participation agreement additional provisions not inconsistent with this chapter including, but not limited to, confidentiality of communications and the scope of disclosure of information.

Section 15‑87‑70. The date on which a collaborative law participation agreement is finally executed by both parties is deemed the date established for:

(1) determining the value of property involved in a collaborative matter; and

(2) tolling the statute of limitations on collaborative matters.

Section 15‑87‑80. Before a prospective party signs a collaborative law participation agreement, a 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, including, but not limited to, litigation, mediation, arbitration, or expert evaluation; and

(3) advise the prospective party:

(a) that the collaborative law process is voluntary;

(b) how a collateral law process is initiated and how it may be concluded or terminated;

(c) that a collaborative lawyer, and an associate of the collaborative lawyer, pursuant to Section 15‑87‑50, are prohibited from representing a party in a simultaneous or subsequent proceeding relating to the collaborative matter.

Section 15‑87‑90. (A) Before a prospective party signs a collaborative law participation agreement, a collaborative lawyer shall make reasonable inquiry whether the prospective party has a history of a coercive or violent relationship with a child or another prospective party.

(B) Throughout a collaborative law process, a collaborative lawyer reasonably and continuously shall assess whether the party the collaborative lawyer represents has a history of a coercive or violent relationship with another party or with a child of the prospective party or another prospective party.

(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 a coercive or violent relationship with another party or prospective party or with a child of the prospective party or another prospective party, the lawyer may not begin or continue the collaborative law process unless:

(1) the party or the prospective party requests beginning or continuing the process; and

(2) the collaborative lawyer reasonably believes that the safety of the party or prospective party or the child can be protected adequately during the process.

Section 15‑87‑100. During a collaborative law process, a tribunal may issue emergency orders to protect the health, safety, welfare, or interest of a party or a household member, as defined in Section 20‑4‑20. However, such an order may not be sought by or defended by a collaborative lawyer representing a party in the collaborative law process.

Section 15‑87‑110. Except as may otherwise be provided by law, on the request of a party during the collaborative law process, another party shall make timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery. A party also promptly shall update previously disclosed information that has materially changed. The parties may define the scope of disclosure during the collaborative law process.

Section 15‑87‑120. (A) A collaborative law communication, including, but not limited to, the contents of a report, examination, or another document received, created, prepared, compiled, used, or made as part of, or in connection with, the collaborative law process is confidential unless otherwise agreed to by the parties, collaborative lawyers, and nonparty participants in a signed record or as otherwise provided for in law.

(B)(1) Parties, collaborative lawyers, and nonparty participants must not rely on, or introduce as evidence in any proceeding, a collaborative law communication having occurred during the collaborative law process including, but not limited to:

(a) views expressed or suggestions made with respect to a possible settlement of the dispute;

(b) admissions made in the course of the process;

(c) proposals made or views expressed;

(d) the fact that another party had or had not indicated willingness to accept a proposal for resolution of the collaborative matter;

(e) records, reports, or other documents received for or created solely for use in the collaborative law process.

(2) Documentation presented in a collaborative law process to determine the value of property, including, but not limited to, financial, business, real, or personal property, is not a collaborative law communication and is not a privileged communication. Accordingly, such documentation is subject to discovery and is admissible in any proceeding except documentation that is privileged pursuant to an attorney‑client privilege.

(C) No collaborative law communication by a party, a collaborative lawyer, or a nonparty participant waives any attorney‑client privilege.

(D) A collaborative lawyer and a nonparty participant in a collaborative law process must not be compelled by subpoena or otherwise to divulge any collaborative law communication, record, or information or the subject matter, content, or process of a specific collaborative law process in which the attorney or nonparty participant participated.

Section 15‑87‑130. (A) Subject to Sections 15‑87‑140 and 15‑87‑150, a collaborative law communication is privileged as provided for in subsection (B) and is not subject to discovery and is not admissible into evidence.

(B) In a proceeding, the following privileges apply:

(1) A party may refuse to disclose, and may prevent another person from disclosing, a collaborative law communication.

(2) A nonparty participant may refuse to disclose, and may prevent another 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 compilation, disclosure, or use during or in a collaborative law process.

Section 15‑87‑140. (A) A privilege under Section 15‑87‑130 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.

(B) A person that discloses a collaborative law communication that prejudices another person in a proceeding may not assert a privilege under Section 15‑87‑130, but the removal of this privilege applies only to the extent necessary for the person prejudiced to respond to the disclosure.

Section 15‑87‑150. (A) There is no privilege under Section 15‑87‑130 for a collaborative law communication that is:

(1) available to the public pursuant to the Freedom of Information Act, Chapter 4, Title 30, or made during a session of a collaborative 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; 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 Section 15‑87‑130 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 Department of Social Services is a party to or otherwise participates in the collaborative law process.

(C) There is no privilege under Section 15‑87‑130 if a tribunal finds, after a hearing en camera, that the party seeking discovery or the proponent of the evidence has shown 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:

(1) a court proceeding involving a felony; or

(2) 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) 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 Section 15‑87‑130 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 that did not receive actual notice of the agreement before the communication was made.

Section 15‑87‑160. (A) A collaborative law process is concluded by:

(1) resolution of a collaborative matter as evidenced by a signed record, when the resolution is not to be submitted to a tribunal pursuant to item (2);

(2) issuance of an order by a tribunal approving the resolution of a collaborative matter that was evidenced by a record signed by the parties and that by agreement of the parties was submitted to the tribunal for approval;

(3) 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

(4) termination of the process as provided for in Section 15‑87‑170.

(B) A collaborative law participation agreement may provide additional methods of concluding a collaborative law process.

Section 15‑87‑170. (A) A collaborative law process terminates if a party:

(1) gives notice to other parties in a record that the process is ended; a party may terminate a collaborative law process with or without cause;

(2) begins a proceeding related to a collaborative matter without the agreement of all parties; or

(3) in a pending proceeding related to the matter:

(a) initiates a pleading, motion, rule to show cause, or request for a conference with the tribunal;

(b) requests that the proceeding be put on the tribunal’s docket; or

(c) takes similar action requiring notice to be sent to the parties.

(B)(1) Except as provided for in Section 15‑87‑180, if a party discharges a collaborative lawyer or a collaborative lawyer withdraws from further representation of a party, the collaborative law process terminates.

(2) A party’s collaborative lawyer promptly shall give notice of the collaborative lawyer’s discharge or withdrawal to the other parties in a record.

(C) A collaborative law participation agreement may provide additional methods of terminating a collaborative law process.

Section 15‑87‑180. Notwithstanding the discharge or withdrawal of a collaborative lawyer, as provided in Section 15‑87‑170, a collaborative law process continues, if no later than thirty days after the date that the notice of the discharge or withdrawal of a collaborative lawyer required by Section 15‑87‑170(B) 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 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.

Section 15‑87‑190. (A) If a collaborative law participation agreement fails to meet the requirements of Section 15‑87‑60, or a lawyer fails to comply with Section 15‑87‑80 or 15‑87‑90, a tribunal may find that the parties intended to enter into a collaborative law participation agreement if the parties: (1) signed a record indicating an intention to enter into a collaborative law participation agreement; and

(2) 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:

(1) enforce an agreement evidenced by a record resulting from the process in which the parties participated;

(2) apply the disqualification provisions of Sections 15‑87‑50, 15‑87‑200, and 15‑87‑210; and

(3) apply a privilege under Section 15‑87‑130.

Section 15‑87‑200. Notwithstanding Section 15‑87‑50, after a collaborative law process concludes, another lawyer in a law firm with which the collaborative lawyer is associated may represent a party without a fee in the collaborative matter or a matter related to the collaborative matter if:

(1) the party has an annual income that qualifies the party for free legal representation under the criteria, if any, established by the law firm for free legal representation; or

(2) provided for in the collaborative law participation agreement; 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.

Section 15‑87‑210. Notwithstanding Section 15‑87‑50, after a collaborative law process concludes, another lawyer in a law firm with which the collaborative lawyer is associated may represent a party that is a government or governmental subdivision, agency, or instrumentality in the collaborative matter or a matter related to the collaborative matter if:

(1) provided for in the collaborative law participation agreement; and

(2) 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.

Section 15‑87‑220. This chapter does not affect:

(1) the professional responsibility obligations and standards applicable to a lawyer or other licensed professional; or

(2) the obligation of a person to report abuse or neglect, abandonment, or exploitation of a child or adult under the laws of this State.

Section 15‑87‑230. This chapter modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).”

SECTION 2. If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

SECTION 3. This act takes effect January 1, 2014 and applies to collaborative matters, as defined in Section 15‑87‑20(5) of the 1976 Code, as added by Section 1 of this act, pending or initiated on or after January 1, 2014. This act also applies to subsequent litigation pending or initiated on or after January 1, 2014, to the extent that the litigation involves a collaborative matter previously subject to a collaborative law process.

‑‑‑‑XX‑‑‑‑