

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED 04/01/2019 Clerk of the Appellate Courts
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**IN RE: PETITION TO ADOPT A NEW RULE OF THE TENNESSEE
SUPREME COURT CONCERNING THE PRACTICE OF
COLLABORATIVE FAMILY LAW**

No. ADM2017-01195

ORDER

On June 13, 2017, the Tennessee Bar Association filed a petition seeking to amend the Rules of the Tennessee Supreme Court to add a new rule which would address the practice of "Collaborative Family Law." By Order filed August 22, 2017, the Court solicited written public comments to the proposed new rule. The Court received written public comments from the Board of Professional Responsibility, the Nashville Bar Association, the Knoxville Bar Association, the Middle Tennessee Collaborative Alliance, individual attorneys, and individual non-attorneys. By Order filed January 9, 2018, the Court directed the Tennessee Bar Association to respond to the written public comments, and it did so on February 9, 2018. By Order filed June 22, 2018, the Court directed the Alternative Dispute Resolution Commission to formally comment on the proposed new rule, and it responded on July 24, 2018. By Order filed September 11, 2018, the Court set this matter for hearing on October 4, 2018 and directed the Tennessee Bar Association to provide a presenter to address certain issues. The hearing was held on that date and the Tennessee Bar Association's representative addressed those issues and additional questions from the Court. On October 22, 2018, the Tennessee Bar Association provided additional information requested by the Court during the hearing. The Court thanks the Tennessee Bar Association and all of those providing comments.

After due consideration, the Court hereby amends the Rules of the Supreme Court of Tennessee to add new Rule 53 addressing Collaborative Family Law in the form set out in the Appendix to this Order. The adoption of this new Rule shall be effective immediately upon the filing of this Order.

The Clerk shall provide a copy of this Order to LexisNexis and to Thomson Reuters. In addition, this Order shall be posted on the Tennessee Supreme Court's website.

IT IS SO ORDERED.

PER CURIAM

APPENDIX

TENN. SUP. CT. R. 53

COLLABORATIVE FAMILY LAW

RULE 53 OF THE RULES OF THE SUPREME COURT OF THE STATE OF TENNESSEE

Collaborative Family Law

Section 1. Introduction

Collaborative law is a voluntary, contractually based alternative dispute resolution process for parties who seek to negotiate a resolution of their matter. The distinctive feature of collaborative law, as compared to other forms of alternative dispute resolution such as mediation, is that parties are represented during negotiations by collaborative lawyers who they retain for the limited purpose of acting as advocates and counselors during the negotiation process and obtaining court approval. The basic ground rules for a collaborative law matter are set forth in a collaborative law participation agreement in which parties designate collaborative lawyers and other professionals and agree not to seek judicial resolution of a dispute during the collaborative law process. The goal of the collaborative family law process is to achieve an agreement on all issues considered in the collaborative family law process, so that agreements signed by the parties can be submitted to a court for approval to resolve all pending or disputed matters.

Section 2. Definitions

(a) “Collaborative family law process” is a procedure intended to resolve a collaborative matter with intervention by a court limited to required review of proposed marital dissolution agreements, permanent parenting plans, or other settlement documents, in which persons:

- (1) sign a collaborative law participation agreement; and
- (2) are represented by collaborative lawyers.

(b) “Collaborative family law matter” is a dispute, transaction, claim, problem, or issue for resolution that arises under or is related to Tennessee Code Annotated Titles 36 and 37 and that is described in a collaborative family law participation agreement including but not limited to (A) marriage, divorce, dissolution, annulment, and property distribution; (B) parenting time; (C) alimony, maintenance, and child support; (D) adoption; (E) parentage; and (F) premarital, marital, and post-marital agreements.

(c) “Collaborative family law participation agreement” is an agreement by persons to participate in a collaborative family law process.

(d) “Collaborative family law communication” is a statement, whether oral or in a record, or verbal or nonverbal, that:

(1) is made to conduct, participate in, continue, or reconvene a collaborative law process; and

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

(e) “Collaborative lawyer” is a lawyer who represents a party in a collaborative family law process.

(f) “Law firm” is:

(1) Lawyers who practice law together in a partnership, professional corporation, limited liability company, an association of professionals, or other business entities; and

(2) Lawyers employed in a non-profit legal services organization or in the legal department of a corporation or other organization or a government or governmental subdivision, agency, or instrumentality.

(g) “Nonparty participant” is a person, other than the collaborative lawyer and a party, who participates in a collaborative family law process.

(h) “Party” is a person, other than a collaborative professional, who signs a collaborative law participation agreement and whose consent is necessary to resolve a collaborative family law matter.

(i) “Proceeding” is an actual or anticipated judicial, administrative, arbitral, or other adjudicative process before a court, including related pre-hearing and post-hearing motions, conferences, and discovery.

(j) “Prospective party” is a person who discusses with a collaborative lawyer the possibility of signing a collaborative family law participation agreement.

(k) “Related to a collaborative family law matter” is a matter involving the same parties, transaction or occurrence, nucleus of operative fact, dispute, claim, or issue as the collaborative family law matter.

(l) “Court” includes the Tennessee Supreme Court, the Tennessee Court of Appeals, Circuit, Chancery, Law and Equity and Probate courts, General Sessions courts, Juvenile courts, and Municipal courts.

(m) “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.

Section 3. Applicability.

This Rule applies to a collaborative law participation agreement that meets the requirements of Section 4 of this Rule signed on or after the effective date of the Rule.

Section 4. Requirements for Collaborative Family Law Participation Agreement.

- (a) A collaborative family law participation agreement must:
- (1) be memorialized in a record;
 - (2) be signed by the parties;
 - (3) state the parties’ intent to resolve a collaborative family law matter through a collaborative law process under this Rule;
 - (4) describe the nature and scope of the collaborative family law 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 family law process.

(b) A collaborative family law participation agreement must include provisions for:

(1) the parties to forgo seeking intervention of the court in the collaborative family law matter while the parties are using the collaborative family law process; and

(2) jointly engaging any professionals, experts, or advisors serving in a neutral capacity, and

(3) mandatory withdrawal from the case by both collaborative lawyers if one or both of the parties chooses to terminate the collaborative process and in fact moves the matter into litigation. This requirement of mandatory withdrawal may not be waived by the parties or their respective collaborative lawyers.

(c) Parties may agree to include in a collaborative family law participation agreement additional provisions not inconsistent with this Section, including but not limited to agreements for payment of professional fees.

Section 5. Beginning and Concluding Collaborative Family Law Process.

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

(b) Participation in the collaborative family law process is voluntary and a court may not order a party to participate in a collaborative family law process over the party's objection.

(c) A collaborative family law process concludes by:

(1) resolution of a collaborative family law matter as evidenced by a signed record, and when necessary approved by a court;

(2) resolution of a part of a collaborative family law matter, evidenced by a signed record, and when necessary approved by a court, 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 under Subsection (d).

(d) A collaborative family law process terminates:

(1) when a party gives written notice to other parties in a record that the process is ended;

(2) when a party:

a. begins a proceeding related to a collaborative family law matter without the agreement of all parties; or

b. in a pending proceeding related to the matter:

i. without the agreement of all the parties, initiates a pleading, motion, or request for a conference with the court;

ii. initiates an order to show cause or requests that the proceeding be put on the court's active calendar; or

iii. takes similar action requiring notice to be sent to the parties; or

c. 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 written notice in a record to all other parties of the collaborative lawyer's discharge or withdrawal.

(f) A party may terminate a collaborative family law process with or without cause.

(g) Notwithstanding the discharge or withdrawal of a collaborative lawyer, a collaborative family law process continues if, not later than the 30th day after the date the notice of the collaborative lawyer's discharge or withdrawal 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 family 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.

(h) A collaborative family law participation agreement may provide additional methods of concluding a collaborative family law process including, but not limited to, mediation.

Section 6. Proceedings Pending Before Court; Status Report.

(a) Persons in a proceeding pending before a court may sign a collaborative family law participation agreement to seek to resolve a collaborative matter related to the proceeding. The parties shall file promptly with the court a notice of the agreement after it is signed. Subject to Subsection (c) and Sections 7 and 8, the filing operates as an application for a stay of the proceeding.

(b) The parties shall file promptly with the court notice in a record when a collaborative family law process concludes. The stay of the proceedings under Subsection (a) is lifted when the notice is filed. The notice may not specify any reason for termination of the process.

(c) A court in which a proceeding is stayed under Subsection (a) may require the parties and collaborative lawyers to provide a status report on the collaborative family law process and the proceeding. A status report may include only information on whether the process is ongoing or concluded. It may not include a report, assessment, evaluation, recommendation, finding, or other communication regarding a collaborative family law process or collaborative law matter.

(d) A court may not consider a communication made in violation of Subsection (c).

(e) A court shall provide parties notice and an opportunity to be heard before dismissing a proceeding in which a notice of a collaborative family law process is filed based on delay or failure to prosecute.

Section 7. Emergency Order.

During a collaborative family law process, nothing herein or in a collaborative family law participation agreement will prevent a court from issuing an emergency order to protect the health, safety, welfare, or interest of a party, or members of a family or household.

Section 8. Effect of Written Settlement Agreement.

A settlement agreement under this Rule is enforceable in the same manner as a written settlement agreement under Tennessee law.

Section 9. Disqualification of Collaborative Lawyer and Lawyers in Associated Law Firm; Exception.

(a) Except as provided by Subsection (c), a collaborative lawyer is disqualified from appearing before a court to represent a party in a proceeding related to the collaborative family law matter regardless of whether the collaborative lawyer is representing the party for a fee.

(b) Except as provided in Subsection (c) and Section 10, a lawyer in a law firm with which the collaborative lawyer is associated is disqualified from appearing before a court to represent a party in a proceeding related to the collaborative family law matter if the collaborative lawyer is disqualified from doing so under Subsection (a).

(c) A collaborative lawyer or a lawyer in a law firm with which the collaborative lawyer is associated may represent a party:

(1) to request a court to approve an agreement resulting from the collaborative family law process; or

(2) to seek or defend an emergency order to protect the health, safety, welfare, or interest of a party or a family if a successor lawyer is not immediately available to represent that party.

(d) The exception prescribed by Subsection (c)(2) does not apply after the party is represented by a successor lawyer or reasonable measures are taken to protect the health, safety, welfare, or interest of that party or family.

Section 10. Exception from Disqualification for Representation of Low-Income Parties.

After a collaborative family law proceeding concludes, another lawyer in a law firm with which a collaborative lawyer disqualified under Section 9, Subsection (a), is associated may represent a party without a fee in the collaborative family law matter or a matter related to the collaborative family law matter if:

(a) 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;

(b) the collaborative family law participation agreement authorizes that representation; and

(c) the collaborative lawyer is isolated from any participation in the collaborative family law matter through procedures with the law firm that are reasonably calculated to isolate the collaborative lawyer from such participation as set out in Tenn. Sup. Ct. Rule 8, RPC 1.10.

Section 11. Governmental Entity as Party.

(a) In this Section “governmental entity” is the State of Tennessee, a political subdivision of the State, or an agency of the State.

(b) The disqualification prescribed in Section 9, Subsection (a), applies to a collaborative lawyer representing a party that is a governmental entity.

(c) After a collaborative family law process concludes, another lawyer in a law firm with which the collaborative lawyer is associated may represent a governmental entity in the collaborative family law matter or a matter related to the collaborative family law matter if:

(1) the collaborative family law participation agreement authorizes that representation; and

(2) the collaborative lawyer is isolated from any participation in the collaborative family law matter or a matter related to the collaborative family law matter through procedures within the law firm that are reasonably calculated to isolate the collaborative lawyer from such participation as set out in Tenn. Sup. Ct. Rule 8, RPC 1.10.

Section 12. Disclosure of Information.

(a) Except as otherwise provided by law, during the collaborative family law process a party shall make timely, full, candid, and informal disclosure of information related to the collaborative family law matter without formal discovery. A party shall also update promptly any previously disclosed information that has materially changed and/or which becomes available.

(b) The parties may define the scope of the disclosure under Subsection (a) during the collaborative family law process.

(c) The parties shall each sign, under oath, a joint sworn complete statement of assets and liabilities, including contingent assets and possessory interests, verifying that they have fully disclosed all marital and separate property as well as liabilities, including but not limited to contingent assets and contingent liabilities. A jointly retained financial neutral may prepare the sworn statement. The parties shall make available documents to verify their sworn statements.

Section 13. Standards of Professional Responsibility and Mandatory Reporting not Affected.

This Rule does not affect:

(a) Except as provided in Sections 9 and 10, the professional responsibility obligations and standards applicable to a lawyer or other licensed professional; or

(b) The obligation of any person under other law to report abuse or neglect, abandonment, or exploitation of a child or adult.

Section 14. Appropriateness of Collaborative Family Law Process

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

(a) assess with the prospective party factors the lawyer reasonably believes relate to whether a collaborative family law process is appropriate for the prospective party's matter;

(b) provide the prospective party with information that the lawyer reasonably believes is sufficient for the prospective party to make an informed decision about the material benefits and risks of a collaborative family law process as compared to the material benefits and risks of other reasonably available alternatives for resolving the proposed collaborative matter, including litigation, mediation, arbitration, or expert evaluation; and

(c) advise the prospective party that;

(1) after signing a collaborative family law participation agreement, if a party initiates a proceeding or seeks court intervention in a pending proceeding related to the collaborative family law matter, the collaborative family law process terminates, other than to submit the agreement achieved in the collaborative family law process to the court for approval and entry of final order;

(2) participation in a collaborative family law process is voluntary and any party has the right to terminate unilaterally a collaborative family law process with or without cause; and

(3) the collaborative lawyer and any lawyer in a law firm with which the collaborative lawyer is associated may not appear before a court to represent a party in a proceeding related to the collaborative family law matter, except as authorized by Section 9, Subsection (a), Section 10, and Section 11, Subsection (c).

Section 15. Family Violence.

(a) In this Section:

(1) "Dating relationship" means a relationship between individuals who have or have had a continuing relationship of a romantic or intimate nature.

(2) “Family violence” means an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself.

(3) “Household” means a unit composed of persons living together in the same dwelling, without regard to whether they are related to each other.

(4) “Member of a household” includes a person who previously lived in a household.

(b) Before a prospective party signs a collaborative family law participation agreement in a collaborative family law matter in which another prospective party is a member of the prospective party’s family or household or with whom the prospective party has or has had a dating relationship, a prospective collaborative lawyer must make reasonable inquiry regarding whether the prospective party has a history of family violence with the other prospective party.

(c) If a collaborative lawyer reasonably believes that the party the lawyer represents, or the prospective party with whom the collaborative lawyer consults, as applicable, has a history of family violence with another party or prospective party, the lawyer may not begin or continue a collaborative family law process unless:

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

(2) the collaborative lawyer determines with the party or prospective party what, if any, reasonable steps could be taken to address the concerns regarding family violence.

Section 16. Confidentiality of Collaborative Family Law Communication.

A collaborative family law communication is confidential to the extent agreed to by the parties in a signed record. Evidence of conduct or statements made in the course of a collaborative family law proceeding shall be inadmissible to the

same extent as conduct or statements are inadmissible under Tennessee Rule of Evidence 408.

Section 17. Privilege Against Disclosure of Collaborative Family Law Communication.

(a) Except as provided by Section 18, a collaborative family law communication, whether made before or after the institution of a proceeding, is privileged and not subject to discovery and may not be admissible in evidence against a party or nonparty participating in a proceeding.

(b) Any record of a collaborative family law communication is privileged, and neither the parties nor the nonparty participants may be required to testify in a proceeding related to or arising out of the collaborative family law matter or be subject to a process requiring disclosure of privileged information related to the collaborative matter.

(c) An oral communication or written material used in or made a part of a collaborative family law process is admissible or discoverable if it is admissible or discoverable independent of the collaborative family law process.

(d) If this Section conflicts with other legal requirements for disclosure of communications, records, or materials, the issue of privilege may be presented to the court having jurisdiction of the proceeding to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure. The presentation of the issue of privilege under this Subsection does not constitute a termination of the collaborative family law process under Section 5, Subsection (d)(2) b.

(e) A party or nonparty participant may disclose privileged collaborative family law communications to a party's successor counsel, subject to the terms of confidentiality in the collaborative family law participation agreement. Collaborative family law communications disclosed under this Subsection remain privileged.

(f) A person who makes a disclosure or representation about a collaborative family law communication that prejudices the rights of a party or nonparty participant in a proceeding may not assert a privilege under this Section.

The restriction provided by this Subsection applies only to the extent necessary for the person prejudiced to respond to the disclosure or representation.

Section 18. Waiver and Preclusion of Privilege.

(a) a privilege under Section 17 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 makes a disclosure or representation about a collaborative law communication which prejudices another person in a proceeding may not assert a privilege under Section 17, but this preclusion applies only to the extent necessary for the person prejudiced to respond to the disclosure or representation.

Section 19. Limits of Privilege.

(a) The privilege prescribed in Section 17 does not apply to a collaborative family law communication that is:

(1) in a record resulting from the collaborative family law process, evidenced in a record signed by all parties to the agreement;

(2) subject to an express waiver of the privilege in a record or orally during a proceeding if the waiver is made by all parties and nonparty participants;

(3) available to the public under the Tennessee Open Records Act, Tenn. Code Ann. § 10-7-503 et seq.;

(4) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;

(5) a disclosure of a plan to commit or attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity;

(6) a disclosure in a report of

a. suspected abuse or neglect of a child to an appropriate agency under Tenn. Code Ann. § 37-1-403 and Tenn. Code Ann. § 37-1-605 or in

a proceeding regarding the abuse or neglect of a child, except that evidence may be excluded in the case of communications covered by the attorney client privilege; or

b. abuse, neglect, or exploitation of an elderly or disabled person to an appropriate agency under Tenn. Code Ann. § 71-6-103; or

(7) a disclosure sought or offered to prove or disprove:

a. a claim or complaint of professional misconduct or malpractice arising from or related to a collaborative family law process;

b. an allegation that the settlement agreement was procured by fraud, duress, coercion, or other dishonest means or that terms of the settlement agreement are illegal;

c. the necessity and reasonableness of attorney's fees and related expenses incurred during a collaborative family law process; or

d. a claim against a third person who did not participate in the collaborative family law process, or if offered for proving bias, prejudice, undue delay, or obstruction.

(b) If a collaborative family law communication is subject to an exception under Subsection (a), only the part of the communication necessary for the application of the exception may be disclosed or admitted.

(c) The disclosure or admission of evidence excepted from the privilege under Subsection (a) does not make the evidence or any other collaborative family law communication discoverable or admissible for any other purpose.

Section 20. Authority of Court in Case of Noncompliance.

(a) Notwithstanding that an agreement fails to meet the requirements of Section 4(a) and/or (b) or that a lawyer has failed to comply with Sections 14 and 15, a court may find that the parties intended to enter into a collaborative family law participation agreement if the parties:

(1) signed a writing indicating an intent to enter into a collaborative family law participation agreement; and

(2) reasonably believed the parties were participating in a collaborative family law process.

(b) If a court makes the findings specified in Subsection (a) and determines that the interests of justice require the following action, the court may:

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

(2) apply the disqualification provisions of Sections 9 and 10; and

(3) apply the collaborative family law privilege under Section 17.

Section 21. Other Alternative Dispute Resolution Permitted.

Nothing in this Rule shall be construed to prohibit the parties from using, by mutual agreement, other forms of alternative dispute resolution not requiring court intervention, including mediation, to reach a settlement on any of the issues included in the collaborative law agreement. The parties' collaborative lawyers for the collaborative family law proceeding may also serve as counsel for any such alternate dispute resolution pursued as part of the collaborative law agreement.

Section 22. Effective date.

This rule shall take effect immediately upon the filing of the Court's Order adopting this Rule.