The Untapped Potential of Arbitration

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2:00 p.m. – 3:00 p.m.
THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS OHIO CHAPTER
THIRTY-SIXTH ANNUAL HAROLD R. KEMP FAMILY LAW SYMPOSIUM

AAML RESOLUTION IN FAVOR OF DIVORCE AND FAMILY LAW ARBITRATION

On March 14, 2024, the American Academy of Matrimonial Lawyers (AAML) reinforced their 1990 endorsement of the use of arbitration in divorce and family law issues throughout the country.

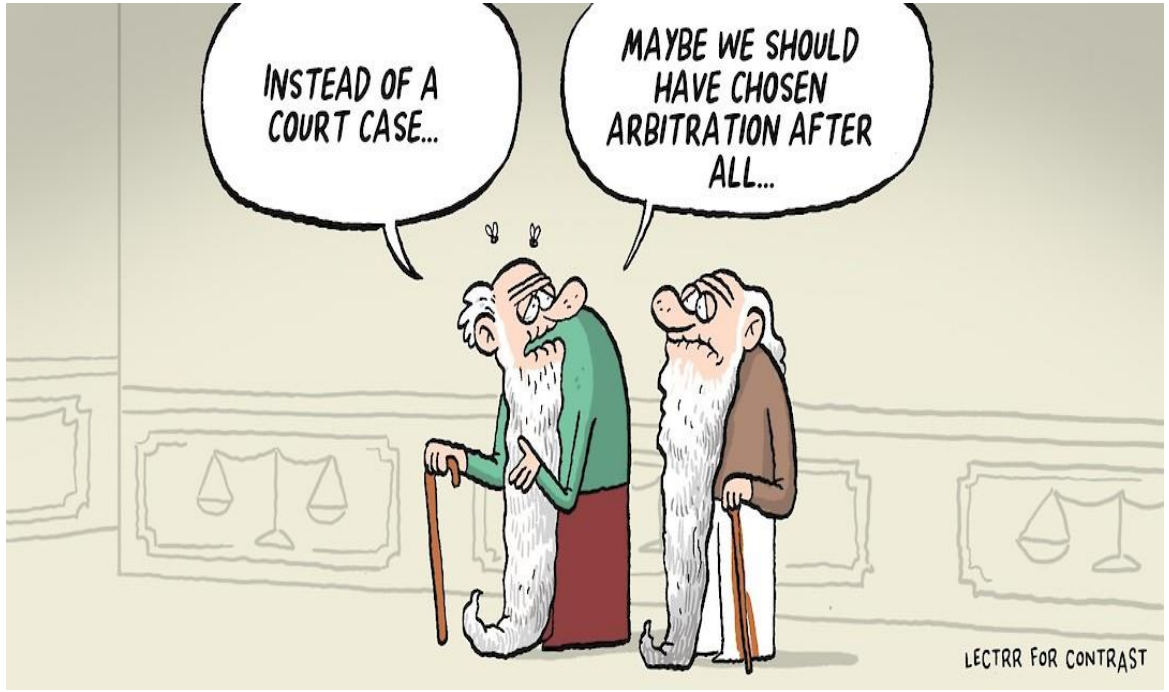
- Encouraged states to rely on the Uniform Family Law Arbitration Act (UFLAA) to adopt family law-specific legislation
  - Emphasized the UFLAA's ability to permit experienced attorneys and arbitrators to resolve disputes in an enforceable, streamlined, and private way, while recognizing the states' need to account for already-existing legislation.
- Called on the Judiciary to join them in supporting and encouraging the use of arbitration in family law issues.
  - Emphasized the goal of the Judiciary as helping litigants resolve matters in a competent, expedient, and cost-effective way.

AAML™

AMERICAN ACADEMY OF MATRIMONIAL LAWYERS

ADVANTAGES OF ARBITRATION

- **Self-direction** by the parties
- **Quality of arbitrators**, who are typically experienced family law litigators
- **Expediency** in having the arbitration scheduled according to the calendars of the participants
- **Cost efficiency** in allowing the parties to set the parameters of their arbitration up front
- **Consolidation** in allowing one decision-maker on all issues related to the divorce
- **Privacy** in having the family law claims decided outside of the public scrutiny
- **Efficiency** of a timely award within 30 days of the agreed-upon hearing
- **Closure** in that the arbitrated decision is binding and usually not appealable



FAMILY LAW-SPECIFIC ARBITRATION STATUTES

UNIFORM FAMILY LAW ARBITRATION ACT (2016)

- The Uniform Family Law Arbitration Act (UFLAA) establishes procedural safeguards to protect the rights of individuals involved in family law matters, ensuring that their claims are resolved fairly, efficiently, and in accordance with relevant state law.
- Adopted in Arizona, District of Columbia, Hawaii, Montana, North Dakota, Washington and Pennsylvania.
  - Introduced in Kansas

"HERE COMES THE GREAT ARBITRATOR."

SCOPE OF THE UFLAA

The UFLAA was drafted with the goal of promoting fairness and efficiency in family law arbitration proceedings.

Permits arbitration of issues such as:

- Equitable distribution of property and debt
- Spousal support
- Alimony pendente lite and alimony
- Counsel fees
- Interpretation of marital agreements

Excludes arbitration of issues such as:

- Termination of parental rights
- Approval of an adoption or guardianship
- The entry of a divorce or annulment decree
- Dependency or delinquency of a child

UFLAA PROTECTION OF VULNERABLE FAMILY MEMBERS

- **Unrepresented Parties.** If all parties are not represented and a party is subject to a protection order or the arbitrator reasonably believes a party's safety or ability to participate effectively in arbitration is at risk, the arbitrator must refer the parties to court.
  - The arbitration may not proceed unless the party at risk confirms their intention to proceed with arbitration and the court determines the consent is voluntary, the arbitration is not inconsistent with the protection order, and there are procedures in place to protect the party.
- **Children.** The arbitrator who reasonably believes that a child who is the subject of a child custody dispute is abused or neglected must stop the arbitration and report the abuse or neglect to the court or appropriate authority.
  - Arbitration awards regarding child custody or support must be confirmed by the court as compliant with applicable law and in the best interest of the child.
- **Parties or Children at Risk.** The arbitrator may make temporary awards to protect a party or a child who is the subject of a child custody dispute from harm, harassment, or intimidation.

SELECTING AN ARBITRATOR UNDER THE UFLAA

- Because the parties may select the arbitrator of their choosing, the UFLAA gives parties more control over the resolution of their claims.
- If the parties are unable to agree or arbitrator is unwilling or unable to serve, on the motion of a party, the court shall select an arbitrator.
  - Court appointed arbitrators must be (1) a practicing or inactive attorney trained in domestic violence and child abuse, or (2) a senior judge trained in domestic violence and child abuse.
- Before agreeing to arbitrate, the proposed arbitrator must disclose any known facts that may reasonably affect the arbitrator's impartiality or ability to provide a timely award.

ARBITRATION AWARDS UNDER THE UFLAA

"Then it's settled. She gets the house, he gets the cars and the video games go to the winner of a game of 'Guitar Hero'."

- Arbitration awards of family law claims are generally binding on the parties.
  - Must be confirmed by a court of law to be enforceable as a judgment
  - No right of substantive appeal
  - Must comply with principles of fairness and due process
- Child-related arbitration awards are subject to judicial review and can be vacated.
- The UFLAA allows any party to request a fact-based modification of an award after it has been confirmed by the court.
  - Can be resolved judicially or by arbitration

OHIO FAMILY LAW ARBITRATION:
WHAT LAW APPLIES?

Family law arbitration is permitted in Ohio pursuant to Ohio Revised Code Section 2711.01, which states in part:

"(A) A provision in any written contract, except as provided in division (B) of this section, to settle by arbitration a controversy that subsequently arises out of the contract, or out of the refusal to perform the whole or any part of the contract, or any agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, or arising after the agreement to submit, from a relationship then existing between them or that they simultaneously create, shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract." ORC § 2711.01(A).

OHIO FAMILY LAW ARBITRATION:
WHAT ISSUES ARE ARBITRABLE?

- All disputes involving domestic relations may be arbitrated, with one notable exception.
  - While issues involving child support may be arbitrated, custody and visitation matters may not.
    - Instead, the Court has the sole ability to resolve those issues under the doctrine of *parens patriae*. *See Kelm v. Kelm* (2001), 92 Ohio St. 3d 223, 2001-Ohio-168.

Snow White and the Wicked Queen submit the fairness question to binding arbitration.

OHIO FAMILY LAW ARBITRATION:
IS NON-BINDING FAMILY LAW ARBITRATION AVAILABLE?

Cases may be referred to non-binding arbitration pursuant to Rule 15 of the *Rules of Superintendence for the Courts of Ohio*, which states:

"**(B)** Arbitration in juvenile and domestic relations cases.

(1) The judge or judges of a division of a court of common pleas having domestic relations or juvenile jurisdiction may, at the request of all parties, refer a case or a designated issue to arbitration.

(2) The parties shall propose an arbitrator to the court and identify all issues to be resolved by the arbitrator. The arbitrator shall consent to serve and shall have no interest in the determination of the case or relationship with the parties or their counsel that would interfere with the impartial consideration of the case. An arbitrator selected pursuant to this section is not required to be an attorney.

(3) The request for arbitration submitted by the parties shall provide for the manner of payment of the arbitrator.

(4) The arbitrator shall file a report and award pursuant to division (A)(2)(c) of this rule.

(5) Any party may appeal the report and award pursuant to division (A)(2)(d) of this rule."

ADVANTAGES AND DISADVANTAGES OF NON-BINDING ARBITRATION

"Hell, I was hoping we could avoid binding arbitration."

ADVANTAGES

- **Not Binding.** Parties can reject the arbitrator's recommendation and continue to explore other options.
- **"Second Bite at the Apple."** Non-binding arbitration does not preclude parties from renegotiating, reconsidering, or litigating their claims.
- **Preservation of Appeal.** When the stakes are high, a party can additional layer of review and potential correction through the right to appeal.

DISADVANTAGES

- **Not Binding**. Since either party can reject the arbitrator's decision, there is no certainty that the dispute will be resolved.
- **"Second Bite at the Apple."** Negates the time-saving and cost-effectiveness typically associated with non-binding arbitration.
- **Preservation of Appeal**. Even when the chances of winning on appeal are slim, parties may still choose to continue litigation, leading to unnecessary delays, legal costs, and emotional strain.

HOW CAN THE BINDING ARBITRATION PROCESS BE IMPROVED?

- **Adopt family-law specific legislation based on the UFLAA**
- Highlights of the UFLAA:
  - Addresses family-law specific concerns
  - Integrates the state's existing contractual arbitration law to supplement gaps in the Act
  - Allows for agreements to arbitrate future disputes
  - Requires court review of child-related awards
  - Safeguards for domestic violence victims
  - Mandatory disclosure of potential conflicts
  - Allows for post-decree modifications of alimony, child support and child custody awards
  - Confidentiality of proceedings and award

NEXT STEPS IN ADOPTING THE UFLAA

- Establish a task force to discuss the UFLAA
  - Consider which options would be best suited to Ohio Family Law Practice
- Educate local and state bar associations, the state judicial conference, and stakeholder groups (domestic violence, child advocacy, etc.)
- Draft legislation with the assistance of UFLAA commissioners and liaisons
- Promote the proposed legislation to state legislature

THANK YOU!

Questions?

Comments?

Shall We Arbitrate Family Law Issues?

Finally ... *Yes!*

By Jeannine Turgeon and Carolyn Moran Zack

On May 8, 2024, Gov. Josh Shapiro signed into law Act 12 of 2024, the Pennsylvania Uniform Family Law Arbitration Act (UFLAA). Alternative Dispute Resolution methods such as mediation and arbitration have provided a confidential and less costly way to resolve divorce and other disputes for decades. However, arbitration was rarely used in the absence of a predictable process that would require the arbitrator to apply substantive law and expressly permit modifiability of alimony and child-related awards. Now, at long last, the UFLAA provides a roadmap for the expedient and confidential arbitration of custody, property, alimony and support disputes, along with guardrails needed to protect victims of domestic violence and child abuse.

Arbitration affords litigants a much more expeditious resolution than most courts and judicial systems can provide. It delivers a prompt and confidential resolution of parties' issues by an experienced lawyer or senior judge they personally select. It is usually much less costly than traditional litigation, as the parties control the timing and can consolidate most related matters in one arbitration hearing. Arbitration is also binding, except for the permissive review of child-related awards to ensure that the child's best interests are met. For child-related awards, the arbitrator must make specific findings consistent with the custody factors or guidelines sufficient to allow judicial review. The court shall vacate a child-related award if a party establishes that the arbitrator's statement of reasons in the award is inadequate for the court to review.

Lawyers have an obligation to resolve their client's issues diligently and promptly and to consult with the client about how their objectives are to be accomplished. When a matter is likely to involve litigation, the lawyer may need to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. Arbitration may be the most cost-effective and expedient manner of resolving your client's custody, property and support claims, particularly now that there is family-law specific legislation in place.

When considering whether arbitration is right for your clients, ask yourself three simple questions:

1. Would they like to have their family law case finally resolved in weeks or a few months from today?

2. Would they appreciate being able to select the factfinder vs. being assigned a hearing officer or judge?

3. Would they prefer their personal and business information to remain confidential rather than revealed in a public courtroom and becoming part of the permanent public record?

If the answer is a resounding "Yes!," then you should advise them about the benefits of arbitration. This article will give you the information you need to discuss this option with your clients.

Allowing the parties to resolve their dispute in a private forum may also help families to avoid the conflict and stress associated with the adversarial process.

A party may be accompanied in an arbitration proceeding by a person who will not be called as a witness or act as an advocate to reduce the possibility that one party will be intimidated or overpowered by the other.

Overview of the Uniform Family Law Arbitration Act

Under the UFLAA, the parties' agreement must include the name of the arbitrator or the method of selecting one and which issues will be arbitrated. If the issue relates to child support or child custody, the parties cannot enter into the arbitration agreement until the dispute arises, unless a judge previously approved the agreement or the parties affirm the agreement after the dispute arises.

The arbitrator must be an attorney, a former attorney on inactive status or a senior judge and must have completed five hours of continuing legal education in domestic violence and child abuse, unless the parties agree otherwise. An arbitrator must apply Pennsylvania's substantive family law, including choice of law rules and, except as the parties may agree, shall provide a written explanation for the arbitrator's decision(s).

The arbitrator has broad authority to conduct the proceeding, including setting the rules for the arbitration; holding a conference before the hearing; requiring a party to provide information; interviewing a child who is the subject of a custody dispute; appointing a private expert; issuing a subpoena for the attendance of a witness or the production of documents; compelling discovery; prohibiting a party from disclosing information for good cause; appointing an attorney, guardian ad litem or other representative for the child at the parties' expense; imposing a procedure to protect a party or child from the risk of harm, harassment or intimidation; allocating fees and costs; or imposing sanctions for bad faith or misconduct.

In other words, arbitration can provide litigants with the same due process as a court of law, plus the added protection of confidentiality, closure, expediency and more, as described below:

1. Promotes timely resolution of disputes and reduced conflict between parents.

Research shows that parents place their children's emotional health at risk by continuing conflict in litigation and that they will benefit from alternative processes to promptly decide their disputes. Complaints to establish custody or petitions to modify custody may take months or years from start to conclusion, given the limited judicial resources available to handle thousands of custody case filings, including those of many self-represented litigants.

The UFLAA specifically empowers arbitrators to protect victims of domestic violence and abuse.

Arbitration of custody matters provides parents and their children with a more responsive, efficient and less expensive forum than traditional litigation. Allowing the parties to resolve their dispute in a private forum may also help families to avoid the conflict and stress associated with the adversarial process.

The maxim "Justice delayed is justice denied" could not be more pertinent to every litigant today — especially children who are caught between quarrelsome parents in custody litigation that sometimes drags on for years. An arbitrator can schedule a custody hearing promptly, hear the case without interruption and issue a decision within a few weeks. Finally, under the new UFLAA, there is a reliable process for arbitrating child custody issues that will help to reduce the backlog of these cases and reduce conflict in families.

2. Provides ability to select the decision-maker.

Personal selection of the decision-maker is a key aspect of the UFLAA. While attorneys and their clients cannot select the hearing officer or judge assigned to their case, they can select their arbitrator from among many distinguished and seasoned senior or retired judges and reputable, experienced

lawyers who know and understand the complexities of family law. Most lawyers and litigants prefer to have their case decided promptly by someone they respect and trust will give the case their undivided attention and who will resolve the issues raised promptly and fairly for all parties.

3. Protects confidentiality of personal and business matters.

Another key aspect of the UFLAA is confidentiality. Confidentiality is extremely important to most family law litigants, who abhor the fact their personal life or private business matters will be presented and possibly twisted during cross-examination in a courtroom open to the public and recorded for the never-ending future. The UFLAA provides that, "unless the parties otherwise agree, the arbitration proceedings and the arbitration award are confidential." If either party requests in a motion to confirm the award that the award shall be filed under seal, then the court shall file the award under seal. The UFLAA, therefore, helps the parties resolve their family matters in private and for the decisions on these matters to be inaccessible to the public unless the parties mutually agree.

4. Allows for a more family-friendly setting for children and parents.

Few courthouses can provide separate rooms or safe, calming locations for parties and their children to await court proceedings. Dozens, if not hundreds, of other litigants and criminal defendants may be waiting in the surrounding area. Simply entering a courthouse or annex building creates anxiety for most litigants (and some lawyers as well, if we recall our early days in the profession!).

No arbitration participant need enter a courthouse. Under the UFLAA, unless the parties otherwise agree, the arbitrator will select the rules for conducting the

arbitration and select the date, time and place of the hearing. Most arbitrators hold their hearings in professional offices with separate conference rooms and pleasant waiting areas, and the participants are attended to by friendly, professional staff. This setting is relaxed and conducive to reducing stress for everyone.

5. Provides protection for victims of domestic violence and abuse.

The arbitrator will likely have years of experience, including firsthand knowledge about domestic violence and abuse issues. While most parties who select arbitration will not have a history of domestic violence, some who are subject to a protection order or are subject to harassment and intimidation may choose the process. The UFLAA provides that if a party is subject to a protection order or the arbitrator determines that there is a reasonable basis to believe that a party is the victim of domestic violence or that his or her safety or ability to participate effectively in the arbitration is at risk, the arbitrator must stop the arbitration and refer the parties to the court. The arbitration may not proceed unless the party at risk consents to arbitrate and the court determines that this consent is informed and voluntary; the arbitration is not inconsistent with the protection order and reasonable measures are in place to protect the party from harassment, intimidation or harm. In addition, a party may be accompanied in an arbitration proceeding by a person who will not be called as a witness or act as an advocate to reduce the possibility that one party will be intimidated or overpowered by the other.

If the arbitrator determines that there is a reasonable basis to believe that a child who is the subject of a child custody dispute is abused or neglected, the arbitrator shall terminate the arbitration and report the abuse or neglect to the court or other appropriate authority. The arbitrator may make a temporary award to protect a party or child from "harm, harassment or intimidation," that will supplement other remedies available under law. The court may stay the arbitration and review a determination or temporary award protecting a party or child on motion of a party. Thus, the UFLAA specifically empowers arbitrators to protect victims of domestic violence and abuse.

6. Helps parties to avoid expensive litigation and related expenses.

The prompt scheduling of an arbitration depends primarily on the parties providing timely and complete discovery and the participants scheduling the hearing and any conferences on mutually convenient dates for the parties, lawyers and any witnesses. Nevertheless, once the arbitration agreement is signed, the arbitrator will set deadlines to keep the matter moving forward without delay. The arbitrator will also be available if matters arise after the initial conference, including addressing delays in providing discovery, obtaining a valuation of an asset or listing a property for sale. These matters can be brought to the attention of the arbitrator by an email, copied to the other side, and the arbitrator can address the matter by a Zoom conference or telephone call, avoiding the need for the parties to prepare motions or travel to court to argue the issue. Arbitration allows for more casual communications to be made among all of the participants, consistent with due process.

The parties also conserve fees because the arbitrator will schedule hearings when the parties, their counsel or their experts are available. These hearings will allow the parties to avoid the cost of paying for multiple court appearances to address different issues, as these can be consolidated and addressed efficiently in one proceeding.

Arbitration allows for more casual communications to be made among all of the participants, consistent with due process.

This is especially helpful when the issues overlap, such as child custody being resolved before child support is determined or where net income available must be decided in connection with a support issue and a business valuation. Fees for these arbitration matters may be significant, depending on the complexity and number of issues involved, but they are rarely as high as they would be if the issues were being adjudicated separately or over multiple days of hearings. Further, the arbitrator has the discretion to allocate fees, including attorneys' fees and the arbitrators' fees, as part of the final award.

7. Prevents years of appeals and related expenses.

Although there is no specific time required under the UFLAA, the arbitrator will typically make an award within 30 days of the hearing. The parties may ask the arbitrator to correct the award within 20 days of its issuance for a mathematical miscalculation or mistake in the description of a person, thing or property, or to clarify an award. The parties may ask the court to correct an arbitration award within 30 days for such an evident mistake or because the arbitrator made an award on a dispute not submitted, and the award may be corrected without affecting the merits of the dispute. The award must be confirmed on motion of a party once the award is corrected, unless a motion to vacate the award is pending. Except in child-related matters, a motion to vacate the award can only be filed for matters concerning due process, such as that the award was procured by corruption, fraud or other means; that there was evident partiality, corruption or misconduct by the arbitrator substantially prejudicing the rights of a party; the arbitrator refused to postpone a hearing, consider evidence or otherwise conducted the hearing contrary to the statute so as to prejudice the rights

of a party; exceeded his or her powers or no agreement to arbitrate exists. Such a motion must be filed within 30 days of issuance of the award or within 30 of the asserted corruption, fraud or other undue means being known by the exercise of reasonable care.

Appeals are limited to the procedural bases set forth in the act. There are no substantive appeals of arbitration awards, except in the case of child-related awards. Thus, absent those extremely rare circumstances, the parties avoid a future of expensive and endless litigation and appeals and can receive a final, prompt and fair resolution of their dispute.

8. Specific provisions related to child-related awards.

Just as judges now must issue opinions in custody cases addressing each factor, arbitrators must also issue written findings stating the reasons for the award under applicable law. No transcript of the arbitration hearing is required, except as may be requested by a party or parties. Such a recording may be requested by a party or the arbitrator in a child-related arbitration proceeding in order to avoid the need for the witnesses to testify again before the court, which may only confirm the award after it finds — following a review of the record if necessary — that the award on its face complies with substantive law and is in the best interest of the child. A court can vacate an unconfirmed award that determines a child custody or child support dispute only if the moving party establishes that the award does not comply with the UFLAA, with substantive law, is contrary to the child's best interest or the statement of reasons in the award is inadequate for the court to review the award.

9. Decisions enforceable as a court order.

Under the UFLAA, the court must enforce a confirmed arbitrator's award as though it were entered as an order of the court and must give full faith and credit to an arbitration award confirmed by another state. Of course, an order confirming an award can be modified under appropriate circumstances. A party may seek modification of the judgment entered on the award as provided under substantive law (i.e., modification of child support, spousal support/alimony pendente lite or alimony, except as otherwise agreed by the parties, and custody), and the matter will proceed in court unless the parties agree to arbitrate.

Conclusion

The Pennsylvania Uniform Family Law Arbitration Act is a welcome development in the law. It provides an option for family law litigants who want to avoid the stress, uncertainty and expense of litigation in court, and to achieve an expedient and cost-efficient resolution of their family law claims. The act also provides guardrails to promote reliability of the process and to protect the interests of family law participants. Given the ever-increasing burdens on the courts and the resulting delays and backlogs in scheduling cases, there could never be a better and more opportune time to recommend the newly available arbitration option to your family law clients. ⚖

Jeannine Turgeon retired as a trial court judge after nearly 40 years. She is an arbitrator for the American Arbitration Association and a mediator/arbitrator for Optimal ADR.

Carolyn Moran Zack is a partner at the Philadelphia firm of Momjian Anderer LLC, where she practices family law and acts as an arbitrator, mediator and parenting coordinator.

Editor's Note: Carolyn Zack is a former chair of the PBA Family Law Section Arbitration Committee. The committee was instrumental in creating and shepherding the UFLAA into law over a number of years.

If you would like to comment on this article for publication in our next issue, please send an email to editor@pabar.org.

RESOLUTION IN SUPPORT OF

DIVORCE AND FAMILY LAW ARBITRATION

Adopted by the American Academy of Matrimonial Lawyers Board of Governors on March 14, 2024.

WHEREAS, the American Academy of Matrimonial Lawyers (AAML), founded in 1962, is a national organization of attorneys specializing in family law practice, the mission of which is "to provide leadership that promotes the highest degree of professionalism and excellence in the practice of family law";

WHEREAS, the AAML provides leadership and guidance in family law policy matters, assisting states in evaluation, enacting, and enforcing effective laws which protect the self-determination and autonomy of diverse family systems and individuals;

WHEREAS, the AAML endorsed the concept of arbitration in domestic relations matters in 1990,[1] adopted Rules for Arbitration of Financial Issues in 1990,[2] and published the Model Family Law Arbitration Act in 2005, based on the Revised Uniform Arbitration Act;[3]

WHEREAS, the AAML promotes alternative dispute resolution ("ADR") in general in its Bounds of Advocacy published in 2000,[4] which recognized that the matrimonial lawyer should consider alternative means of achieving resolution of marital disputes by agreement and be knowledgeable about different ways to resolve them, including negotiations, mediation, arbitration and litigation;

WHEREAS, the AAML Bounds of Advocacy provide that a lawyer should act as an arbitrator only if competent to do so; the AAML provides high level training for arbitrators, including the AAML Arbitration Training Institute, and webinars by experienced arbitrators, to provide attorneys with the necessary knowledge and skills to act as arbitrators or to represent parties in a family law arbitration;

WHEREAS, the Conference of Chief Justices endorsed the Family Justice Initiative Principles for Family Justice Reform that included encouraging parties to try and reach resolutions themselves, through alternate means, including the use of arbitration, rather than to undergo a full adversarial proceeding;[5]

WHEREAS, The Uniform Family Law Arbitration Act ("UFLAA") was recommended by the Uniform Law Commission for enactment in all the states at its annual meeting Jul 8-14, 2016, and was approved by the American Bar Association House of Delegates on February 6, 2017;

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[1] See Joan F. Kessler et al., Why Arbitrate Family Law Matters? 14 Am. Acad. Matrim. Law 333, 333 f.n.3 (1997), citing *Matrimonial Arbitration-The Board Votes to Take the Lead*, AAML NEWSL.(AAML, Chicago, IL), Apr. 1990;.
[2] Uniform Family Law Arbitration Act, Prefatory Note, at 1.
[3] *Id*.
[4] See American Academy of Matrimonial Lawyers Bounds of Advocacy, 1.4, 1.5, and 9.1.
[5] Conference of Chief Justices, Resolution 3 In Support of the Family Justice Initiative Principles, In Support of the Family Justice Initiative Principles (ncsc.org).Principle 1, commentary, p.2.

WHEREAS, the UFLAA creates a statutory scheme for the arbitration of family law disputes, including key provisions that do not appear in the Uniform Arbitration Act or Revised Uniform Arbitration Act, to protect vulnerable individuals during the arbitration process, including children and victims of domestic violence, requires close judicial review of child-related issues, requires that the arbitrator apply the substantive law of the state, and allows for post-modification of the award or expansive appeal rights consistent with state law;

WHEREAS, the UFLAA permits experienced divorce and family law arbitrators to decide disputes arising under a state's domestic relations law, including disagreements about property, spousal support, alimony, and includes optional provisions for arbitrating child-related disputes, while permitting judicial review of a child-related arbitral award to ensure that the award is in the child's best interest;

WHEREAS, the UFLAA does not authorize an arbitrator to make an award that grants a divorce, terminates parental rights, grants an adoption or guardianship of a child or incapacitated individual, determines dependency, or issues a final protection order, and allows a state to exclude arbitration of child-related awards; and

WHEREAS, the UFLAA provides for the enforcement of out-of-state arbitration awards.

WHEREAS, family law arbitration offers the parties and their counsel the opportunity to resolve a family law dispute quicker, cost-effectively and at the convenience of the parties and arbitrator;

WHEREAS, family law arbitration provides a more tailored approach to the parties' needs by affording parties the ability to submit small as well as complex family law disputes to an arbitrator; and

WHEREAS, the family law arbitration process provides a streamlined pathway by permitting the parties to engage their decision-maker earlier in the process, which enables the arbitrator to move the dispute process along more constructively, lessening adversarial posturing and the emotional toll upon the family;

WHEREAS, family law arbitration allows litigants to be involved and empowered by having control over the selection of the arbitrator, the arbitration process, and its costs; and

WHEREAS, family law arbitration is more private, less formal and more flexible than traditional litigation:

NOW THEREFORE, IT IS RESOLVED that the American Academy of Matrimonial Lawyers reinforces its decision to support the use of arbitration of divorce and family law issues throughout our country; endorses the adoption of family law-specific legislation to address the unique needs of vulnerable family law participants; and, if a state does not have in place a family law-specific arbitration statute or rule, encourages the state's AAML chapter to work with their legislature to introduce the Uniform Family Law Arbitration Act, with modifications as appropriate to codify or incorporate any established family law arbitration caselaw, statutes, policies or procedures, with the goal of helping family law litigants resolve their matters expeditiously, competently, cost-efficiently, and confidentially in this alternative dispute forum, and

IT IS FURTHER RESOLVED that the members of the American Academy of Matrimonial Lawyers call upon the Judiciary throughout this nation to similarly support and encourage the use of arbitration of divorce and family law issues to the extent permitted by the laws of each state, recognizing that a goal of our judiciary is to help family law litigants resolve their matters expeditiously, competently, and cost-efficiently.

Uniform Law Commission
NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

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WHY YOUR STATE SHOULD ADOPT THE UNIFORM FAMILY LAW ARBITRATION ACT (2016)

The Uniform Family Law Arbitration Act (UFLAA) provides necessary guidelines for the arbitration of family law matters. As popularity grows for this form of alternative dispute resolution, enacting the UFLAA ensures predictability and consistency. Some features of the UFLAA include:

- ***The UFLAA offers an efficient alternative for the resolution of family law disputes.*** The Act gives parties a private, efficient method to solve family law problems. The UFLAA also gives parties control over selection of their arbitrator, and thus, more control over the timing of their dispute resolution process.

- ***The UFLAA seamlessly integrates the state's existing contractual arbitration law.*** The Act looks to the state's existing statutory law and procedural rules for contractual arbitration to fill in gaps not covered by the UFLAA.

- ***The UFLAA guards the role of the courts with respect to children.*** Arbitration awards regarding child custody or child support cannot be confirmed unless the court finds that the award complies with applicable law and is in the best interests of the child. If the parties are arbitrating a child-related dispute under the Act and the arbitrator has a reasonable basis to believe the child is subject to abuse or neglect, then the arbitrator ends the arbitration, and the matter will be sent to the court for resolution.

- ***The UFLAA protects victims of domestic violence.*** The Act provides safeguards to ensure that one party to the arbitration will not intimidate or overpower another. For example, a party to the arbitration process may be accompanied by a friend or supporter who will not be called as a witness or act as an advocate. The Act's default rule is that all arbitrators be attorneys with domestic violence training unless the parties waive that requirement in their arbitration agreement. If the arbitrator detects domestic violence, the arbitrator will stay the arbitration and refer the parties to court.

- ***The UFLAA addresses post-decree modifications.*** The Act allows a party to request to modify an award or judgment after it has been confirmed by the court. The modification must be based on facts occurring after confirmation and may be resolved judicially or, if the parties agree, by arbitration.

For more information about the UFLAA, please contact Legislative Counsel Kari Bearman at (312) 450-6617 or kbearman@uniformlaws.org.

UNIFORM FAMILY LAW ARBITRATION ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TWENTY-FIFTH YEAR
STOWE, VERMONT
JULY 8 - JULY 14, 2016

WITH PREFATORY NOTE AND COMMENTS

October 7, 2016

ABOUT ULC

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UNIFORM FAMILY LAW ARBITRATION ACT

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UNIFORM FAMILY LAW ARBITRATION ACT

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UNIFORM FAMILY LAW ARBITRATION ACT

Prefatory Note

Family law arbitration offers parties an alternative to negotiation, litigation, collaborative law, mediation or court-sponsored methods of dispute resolution. In arbitration, the parties, usually spouses, agree to submit one or more issues arising from the dissolution of their relationship to an arbitrator, who is a neutral third party, for resolution. The arbitrator makes a decision, called an award, based on the facts presented. Unlike litigation, parties choose the arbitrator or the method of selecting the arbitrator and pay the arbitrator's fee. Arbitration awards typically are subject to limited judicial review. In exchange, arbitration offers an alternative for those who want an experienced decision-maker in a proceeding that is potentially faster, more confidential, and less adversarial.

The Uniform Law Commission has promulgated two arbitration acts – the Uniform Arbitration Act in 1955 and the Revised Uniform Arbitration Act in 2000. Every state has one of these arbitration statutes which are used extensively in labor and commercial law. Arbitration has been advocated for family law disputes as early as the 1960s. See Coulson, *Family Arbitration – An Exercise in Sensitivity*, 3 FAM. L.Q. 22 (1969). Most states have little law on the topic of family law arbitration and rely on their commercial arbitration statutes.

Arbitration clauses began to appear in premarital and mediated settlement agreements partly because increasing numbers of contested family law cases have flooded court dockets, resulting in delays in getting hearings and trials. In 1990, the American Academy of Matrimonial Lawyers (AAML) adopted Rules for Arbitration of Financial Issues. In 1999 North Carolina enacted the first comprehensive family law arbitration act patterned on the Uniform Arbitration Act. N.C. GEN. STAT. § 50-41 to 62. In 2005, the AAML adopted a Model Family Law Arbitration Act, patterned after North Carolina and the Revised Uniform Arbitration Act (2000). Although no state has adopted the AAML Model Act, the AAML conducts trainings to certify family law arbitrators. The American Arbitration Association has developed a family dispute service and offers arbitration, as well as mediation services.

Courts have held that parties may arbitrate property and spousal support issues because parties may release property rights by contract. Because the agreement to arbitrate is a contract, the parties are bound. Spencer v. Spencer, 494 A.2d 1279 (D. C. App. 1985). Arbitration awards are subject to limited review and appeal rights. Child-related issues, however, present different issues because of the court's traditional role as *parens patriae* acting to protect the child. Additionally, child-related issues are never "final" because they are modifiable throughout a child's minority.

Several states have enacted court rules or statutes authorizing arbitration of all issues arising at divorce, including property, spousal maintenance, child custody and child support. See, e.g., ARIZ. R. FAM. L. PRO. R. 67(c); MICH. COMP. L. §600.5071 (parties may stipulate to binding arbitration governing property, child custody, child support, parenting time, spousal support, attorneys' fees, enforceability of prenuptial and postnuptial agreements, allocation of debt, and "other contested domestic relations matters."); N.J. SUP. CT. R. 5:1-5 (2015).

The Uniform Law Commission Executive Committee appointed the Family Law Arbitration Study Committee in April 2012. After considering the feasibility and desirability of a uniform or model act on family law arbitration for several months, the Study Committee unanimously recommended that a drafting committee be appointed to develop an act on family law arbitration. The Study Committee further suggested that the act need only contain the features of arbitration law that are essential for family law arbitration and are typically not addressed by commercial arbitration statutes. The Study Committee envisioned an act that would incorporate by reference the existing structure of a state's commercial arbitration statutes – whether it is the original Uniform Arbitration Act of 1955 (UAA) or the 2000 Revised Uniform Arbitration Act (RUAA). In 2013 the Uniform Law Commission approved a drafting committee to write a Family Law Arbitration Act.

The Committee originally tried to draft a free-standing act addressing family law arbitration in full, rather than a partial act with references that incorporate other arbitration law in the state. As the drafting process developed, it appeared a free-standing act would repeat much of the existing arbitration law. Therefore, the final Act incorporates by reference a state's existing arbitration law—whether it be the RUAA or the UAA—for many steps in the arbitration process. The UFLAA expressly tracks certain RUAA provisions that are necessary for family law arbitration and do not appear in the UAA, such as sections giving arbitrators the power to conduct arbitration in a manner appropriate to the fair and expeditious disposition of the proceeding, recognizing the parties' rights to engage in discovery, and providing arbitrator immunity.

The UFLAA potentially covers the arbitration of any contested issue arising under the enacting state's family law. See Section 3. Typical issues would be property division, allocation of debt, spousal support, parenting time, child support, interpretation of marital agreements, and attorneys' fees. Importantly, the Act excludes certain status determinations, such as the termination of parental rights or the granting of an adoption, from the arbitrator's authority. The UFLAA does not cover agreements to arbitrate according to the tenets of a particular religion or before a religious tribunal.

A central question was whether disputes about child custody or child support should be subject to arbitration. While states disagree, most states now permit arbitration of child custody and child support as long as meaningful judicial review of the awards is preserved. See COLO. REV. STAT. ANN. § 14-10-128.5; GA. CODE ANN. § 19-9-1.1; N.M. STAT. ANN.§ 40-4-7.2; TEX. FAM. CODE § 153.0071; WIS. STAT. ANN. § 802.12. In at least one state, courts have held that parents have a constitutional right to resolve their custody disputes by arbitration. See Fawzy v. Fawzy, 973 A.2d 347 (N.J. 2009). A minority of states exclude some or all child-related issues from contractual arbitration, either by statute or by case law. See, e.g., CONN. GEN. STAT. ANN. § 46b-66 (binding arbitration is not permitted to resolve child visitation, custody, or support); Goldberg v. Goldberg, 1 N.Y.S.3d 360 (App. Div. 2015) (finding child custody is not subject to arbitration because of court's exclusive *parens patriae* authority but allowing arbitration of child support as long as the award complies with the Child Support Act). In order to provide needed guidelines for the majority of states, including a requirement for vigorous judicial review, the Act presumptively extends to child-related disputes. In deference to the minority of states opposed to arbitration of child-related issues, however, the Act includes an opt-out provision

under Section 3.

The UFLAA provides several safeguards to protect the *parens patriae* power of the court to protect children. Section 14 requires that arbitration proceedings involving child-related disputes must be recorded, and under Section 15 any award affecting children must spell out the underlying reasons. Sections 16 and 19 provide for robust judicial scrutiny of child-related awards. A court cannot confirm an award determining child custody or child support unless it finds that the award complies with applicable law and is in the child's best interests. Another safeguard for a child is Section 12 which provides that if an arbitrator finds that a child is the subject of abuse or neglect, the arbitration must stop and the arbitrator must report his or her findings to the appropriate state authority. In addition, if domestic violence is evident between the parties, a court—not the arbitrator—decides whether arbitration may proceed.

One policy issue concerned whether the Federal Arbitration Act (FAA) might preempt a state family law arbitration statute if the state law imposed special requirements inconsistent with the FAA. As a general rule, family law is state law. State courts have jurisdiction over family law disputes and presumably can set out the parameters for family law arbitration. The Federal Arbitration Act (FAA) establishes a strong nationwide policy favoring the enforceability of arbitration agreements in contracts affecting interstate commerce. See 9 U.S.C. §§ 1-16. Section 2 of the FAA expressly covers agreements to arbitrate existing controversies as well as future disputes that may arise between the parties. 9 U.S.C. § 2. The Supreme Court has construed the FAA to preempt state laws that categorically prohibit the arbitration of a particular type of claim or impose special requirements on arbitration agreements. See, e.g., Marmet Health Care Center, Inc. v. Brown, ___U.S.___,132 S. Ct. 1201 (2012) (per curiam) (invalidating a state policy that categorically barred enforcement of arbitration clauses in nursing home admission agreements); Doctor's Associates, Inc. v. Lombardi, 517 U.S. 681 (1996) (invalidating a state law that required arbitration clauses to be in underlined capital letters on first page of contract).

A problem of preemption can arise if the family law matter has interstate aspects. Because conflicts over marital property or spousal maintenance often have interstate elements, agreements to arbitrate such conflicts could potentially fall within the FAA, and courts have recognized as much. See In re Provine, 312 S.W.3d 824 (Tex. App. 2009) (noting FAA not applicable because all marital property was in Texas); Verlander Family Ltd. Partnership v. Verlander, 2003 WL 304098 (Tex. App. Feb. 13, 2003) (unpublished) (FAA applicable because parties held assets in family partnership located in both Texas and New Mexico). As a result, the Act tracks the language of the FAA regarding the general validity of arbitration agreements. Ordinary contract defenses (lack of voluntariness, fraud, duress, and the like) remain available as a basis to challenge the validity of an arbitration agreement at the time of enforcement.

A point of contention during the drafting was whether to permit pre-dispute arbitration agreements—that is, agreements to arbitrate a dispute that may arise in the future. The use of pre-dispute agreements in consumer contracts of adhesion has been the subject of widespread criticism. In family law arbitration, however, actual consent to the process is a prerequisite, whether in an earlier agreement or an agreement entered into at the time of marital dissolution. The inclusion of arbitration clauses in premarital agreements is fairly common, and courts have enforced such clauses so long as the premarital agreement itself is valid and the clause is not

otherwise subject to challenge. See, e.g., LaFrance v. Lodmell, ___ A.3d ___, 2016 WL 4505748 (Conn. Sept. 6, 2016) (upholding agreement to arbitrate in premarital agreement); Kelm v. Kelm, 623 N.E.2d 39 (Ohio 1993) (upholding enforceability of arbitration clause in premarital agreement to arbitrate child support and spousal support); LINDA J. RAVDIN, PREMARITAL AGREEMENTS – DRAFTING AND NEGOTIATION 286-89 (ABA 2011) (providing practice guidelines on including arbitration clauses in premarital agreements). In addition, there is no built-in bias favoring one party over the other in family law arbitration. Instead, arbitrators are selected by the parties or the court, often bringing specialized expertise to the parties' particular dispute. The parties might choose a family law specialist who has represented both fathers and mothers, a retired domestic relations judge, or another professional to arbitrate all, or just a part, of a case.

With respect to child-related disputes, however, the state's strong interest in protecting children warrants greater restrictions. The Act bars a pre-dispute arbitration agreement of child-related issues unless the parties reaffirm the agreement after the dispute arises or the agreement was incorporated in a court decree in a family law proceeding—such as a marital settlement agreement. See UFLAA Section 5.

Family law arbitration is on the rise across the United States, but state law in general has not kept up with the trend. The Uniform Family Law Arbitration Act provides needed guidelines for this growing form of dispute resolution to ensure that the process is fair and efficient for the participants and protects the interests of vulnerable family members.

UNIFORM FAMILY LAW ARBITRATION ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Family Law Arbitration Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Arbitration agreement" means an agreement that subjects a family law dispute to arbitration.

(2) "Arbitration organization" means an association, agency, board, commission, or other entity that is neutral and initiates, sponsors, or administers an arbitration or is involved in the selection of an arbitrator.

(3) "Arbitrator" means an individual selected, alone or with others, to make an award in a family law dispute that is subject to an arbitration agreement.

(4) "Child-related dispute" means a family law dispute regarding [legal custody, physical custody, custodial responsibility, parental responsibility or authority, parenting time, right to access, visitation], or financial support regarding a child.

(5) "Court" means [the family court] [insert name of a tribunal authorized by this state to hear a family law dispute].

(6) "Family law dispute" means a contested issue arising under the [family] [domestic relations] law of this state.

(7) "Party" means an individual who signs an arbitration agreement and whose rights will be determined by an award.

(8) "Person" means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal entity.

(9) "Record", used as a noun, 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.

(10) "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.

(11) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. [The term includes a federally recognized Indian tribe.]

Legislative Note: *In paragraph (4), a state should insert the term used under state law to refer to a dispute over custodial responsibility and parenting time for a child. In paragraph (6), a state should insert the term used under state law to refer to the family or domestic relations law of the state.*

Comment

The definition of "arbitrator" includes one or more individuals. Family law arbitration ordinarily involves only a single neutral arbitrator, selected by the parties or by the court. It is possible, however, that parties might want a panel of three arbitrators to resolve a particularly complex or contentious issue. In that event, the normal practice would be to have each party independently select an arbitrator and for the two independent arbitrators to jointly select a third arbitrator.

"Arbitration organization" tracks the definition in the Revised Uniform Arbitration Act § 1(1). Under UFLAA Section 5, an arbitration agreement must identify the arbitrator, a method of selecting the arbitrator, or an arbitration organization from which the arbitrator will be drawn. Several professional organizations maintain lists of arbitrators that meet their own screening standards. In addition, entities associated with family courts may offer arbitration services.

Two key terms in the act are "family law dispute" and "child-related dispute." A family law dispute incorporates the domestic relations law of the particular state. In most states, the subject matters within family or domestic relations law include issues relating to defining, classifying, valuing, and dividing real and personal property; determining and allocating debt; awarding alimony, maintenance, or spousal support; determining custodial responsibility, parenting time, and child support; construing and enforcing agreements—premarital, postmarital or marital incident to a divorce; and awards of attorney fees. In some states marital tort issues may be included. In other words, each state's family or domestic law will dictate the potential scope of a family law arbitration in that state unless a state excludes a particular category of dispute under Section 3. State law will provide the meaning of "child," "parent," and "spouse,"

for example, and will determine whether claims arising out alternative relationships such as civil unions are covered. Similarly, if state law authorizes nonparents under defined circumstances to seek access to a child, that category of claim would fall within this act and be subject to arbitration if all relevant parties agreed to arbitrate.

A child-related dispute, in turn, is a subset of a family law dispute and includes all aspects of custodial responsibility, parenting time, and child support. If state policy requires, a state may exclude child-related disputes from arbitration under Section 3.

The terms "person" "record," "sign," and "state" comport with the current definitions used in other uniform laws.

SECTION 3. SCOPE.

(a) This [act] governs arbitration of a family law dispute.

(b) This [act] does not authorize an arbitrator to make an award that:

(1) grants a [legal separation], [divorce] [dissolution of marriage], or annulment;

(2) terminates parental rights;

(3) grants an adoption or a guardianship of a child or incapacitated individual; [or]

(4) determines the status of [dependency] [a child in need of protection] [;][or]

[(5) determines a child-related dispute] [; or

(6) determines [other specified dispute to be excluded from arbitration]].

Legislative Note: *In the bracketed language in subsection (b)(1) and (4), a state should insert the appropriate term used under state law.*

If a state wants to exclude child-related disputes from arbitration under this act, it should enact subsection (b)(5). If a state excludes child-related disputes from arbitration, the state should delete the following provisions from the act: Sections (5)(c); 12(c); 13(c)(5) and (12); 14(b); 15(c); 16(c); and 19(b), (c), and (d); and the introductory phrase in Section 15(b).

If a state wants to exclude other family law disputes from arbitration, it should enact subsection (b)(6) and identify the category of dispute to be excluded.

Comment

In most states, a family law dispute would include the interpretation and enforcement of premarital and other agreements between the parties; the characterization, valuation and division of property and allocation of debt; awards of alimony; custodial responsibility and parenting

time; child support; and award of attorney's fees. If a state enacts the UFLAA, the parties can choose to have an arbitrator decide any family law dispute that could be decided by a judge, except the status determinations listed in this section. The arbitrator cannot divorce the parties, grant an adoption or guardianship, terminate parental rights, adjudicate a child in need of care, or the like. Parties may not delegate these powers to the arbitrator.

The trend appears to be in the direction of permitting arbitration of child-related disputes so long as courts retain their essential role in overseeing awards affecting children. See Vanderborgh v. Krauth, 370 P.3d 661 (Colo. App. 2016); Brazzel v. Brazzel, 789 S.E.2d 626 (Ga. Ct. App. 2016); In re Marriage of Golden and Friedman, 874 N.E.2d 927 (Ill. 2012); Harvey v. Harvey, 680 N.W.2d 835 (Mich. 2004); Vanderheiden v. Marandola, 994 A.2d 74 (R.I. 2010). In fact, the New Jersey Supreme Court has held that parents have a constitutional right to resolve their custody disputes by arbitration. See Fawzy v. Fawzy, 973 A.2d 347 (N.J. 2009).

Nevertheless, a minority of states exclude child-related disputes from arbitration altogether. See, e.g., Goldberg v. Goldberg, 1 N.Y.S.3d 360 (App. Div. 2015) (because of court's exclusive *parens patriae* authority, arbitrator may not decide child custody dispute but could decide child support); CONN. GEN. STAT. ANN. § 46b-66(c) (arbitration shall not include issues related to child custody, visitation, or support). Subsections (b)(5) and (6) are bracketed provisions permitting states to carve out child-related disputes and additional categories of disputes from arbitration. The Legislative Note explains that the carve-out option allows a state to exclude child custody or child support from arbitration and identifies later subsections of the Act that should be deleted if child-related disputes are excluded. The last bracketed subsection would allow states to choose to exclude child custody but not child support or to identify another area, such as parentage, that the legislature does not want parties to arbitrate.

SECTION 4. APPLICABLE LAW.

(a) Except as otherwise provided in this [act], the law applicable to arbitration is [cite this state's statutes and procedural rules governing contractual arbitration].

(b) In determining the merits of a family law dispute, an arbitrator shall apply the law of this state, including its choice of law rules.

Comment

Subsection (a) incorporates by reference a state's existing law and procedure applicable to arbitration. To date, about one-third of the states have enacted the Revised Uniform Arbitration Act. In the majority of states, the Uniform Arbitration Act is still in effect. The RUAA contains more detailed procedures than the UAA. A state using the UAA may want to incorporate some provisions of the RUAA.

Subsection (b) provides that the merits of the case will be determined by the law of the forum state, including its choice of law principles. In general, family courts apply forum law to

the disputes that fall within their jurisdiction. In most cases, parties can consent to personal jurisdiction but not subject-matter jurisdiction. Under this subsection, the parties may choose to use the law of another state to apply to their dispute if permissible under forum law. For example, parties might enter into a post-nuptial agreement and select the law of a particular state to govern the agreement's interpretation. If they included an arbitration clause in the agreement, the arbitrator would apply the law chosen by the parties if a court of the forum state would do so. If, however, child custody is at issue, jurisdiction is determined under the Uniform Child Custody Jurisdiction and Enforcement Act, and the law of the state with jurisdiction applies.

Because of the privacy and flexibility of arbitration, couples can use some creative alternatives in their choice of law. The subject of pet custody, for instance, is of interest to a growing number of family law clients. Through private arbitration agreements, parties could define the decision-making criteria governing custody of family pets, so long as the agreement does not violate the forum's choice-of-law rules.

Except for child-related awards, an isolated error of law is not a basis for vacating an award under this act. Nevertheless, an arbitrator's complete disregard of forum law might be subject to challenge as action beyond the arbitrator's authority. See Section 19(a)(4); Washington v. Washington, 770 N.W.2d 908 (Mich. App. 2009) (awards are not subject to vacatur for mere mistake of law, but clear disregard of controlling law could be ground for vacating). Also, states may enact additional grounds for vacating awards through the bracketed provision in Section 19(a)(7).

Because of the state's *parens patriae* responsibility to protect children, judicial review of child-related awards is rigorous. Accordingly, with respect to child-related disputes, the arbitrator's failure to follow applicable law is a basis for vacating the award. See Section 19(b). Additionally, the Uniform Child Custody Jurisdiction and Enforcement Act and the Uniform Interstate Enforcement of Family Support Act will determine jurisdiction for child-related disputes.

Any federal law applicable to the family law dispute will govern of its own force. With regard to child-related disputes, for example, the Parental Kidnapping Prevention Act, 28 U.S.C. 1738A, may be relevant to the court's exercise of jurisdiction.

SECTION 5. ARBITRATION AGREEMENT.

(a) An arbitration agreement must:

(1) be in a record signed by the parties;

(2) identify the arbitrator, an arbitration organization, or a method of selecting an arbitrator; and

(3) identify the family law dispute the parties intend to arbitrate.

(b) Except as otherwise provided in subsection (c), an agreement in a record to arbitrate a

family law dispute that arises between the parties before, at the time, or after the agreement is made is valid and enforceable as any other contract and irrevocable except on a ground that exists at law or in equity for the revocation of a contract.

(c) An agreement to arbitrate a child-related dispute that arises between the parties after the agreement is made is unenforceable unless:

(1) the parties affirm the agreement in a record after the dispute arises, or

(2) the agreement was entered during a family law proceeding and the court approved or incorporated the agreement in an order issued in the proceeding.

(d) If a party objects to arbitration on the ground the arbitration agreement is unenforceable or the agreement does not include a family law dispute, the court shall decide whether the agreement is enforceable or includes the family law dispute.

Comment

Arbitration is a matter of contract. Arbitrators derive their authority to resolve the dispute from the parties' agreement. Therefore, the agreement to arbitrate is the foundational document that governs the arbitration. The court cannot unilaterally order the parties to arbitration without an agreement. See Budrawich v. Budrawich, 115 A.3d 39 (Conn. App. 2015) (absent specific agreement between parties, trial court lacked authority to require parties to arbitrate child support question). The parties, however, can voluntarily choose to arbitrate one or more issues.

To ensure that parties voluntarily enter an arbitration agreement, the agreement must be in a record which identifies the arbitrator or method of selecting the arbitrator and the family law dispute the parties want to arbitrate. Among the factors that a court might consider in determining if the agreement was voluntary would be whether parties knew what they were waiving and understood the essential features of arbitration. Arbitration as a means of resolving family law disputes must be a voluntary and informed choice of the parties, not an alternative that is the product of coercion or a contract of adhesion. See MICH. COMP. L. § 600.5072 (requiring that parties acknowledge in a record that they have been informed of the essential features of arbitration, including that arbitration is voluntary, binding, and right of appeal is limited; arbitration is not recommended for cases involving domestic violence; the arbitrator will decide each issue assigned to arbitration and the court will enforce the decision; the parties may consult with an attorney before and during the arbitration process; and the parties are obligated to pay for arbitration).

The UFLAA recognizes that the use of pre-dispute arbitration clauses in premarital

agreements is fairly common and courts generally accept them. See, e.g., LaFrance v. Lodmell, ___A.3d ___, 2016 WL 4505748 (Ct. 2016); Kelm v. Kelm, 623 N.E.2d 39 (Ohio 1993). In addition, the core mandate of the Federal Arbitration Act (9 U.S.C. § 2) (FAA) applies to any agreement to arbitrate an existing or subsequent dispute arising out of a contract affecting interstate commerce. A case in which divorcing spouses have agreed to arbitrate competing claims to property located in more than one state or interests in a multi-state business would likely be construed as involving interstate commerce. Indeed, marital or community property often includes real property, accounts in financial institutions, interests in business entities, and retirement benefits, whether federal, state or private. Thus, the FAA may apply to those family law arbitration agreements involving interstate property, broadly defined.

This section provides that the arbitration agreement is enforceable as any other contract and irrevocable except on grounds for revocation of a contract at law or equity. The language is drawn from the FAA and the Revised Uniform Arbitration Act (RUAA). There is a rich body of case law on the issue of enforceability of arbitration agreements. As with ordinary contract law, the agreement may be challenged at the time of enforcement on the basis of duress, fraud in the inducement, unconscionability, or other traditional grounds. See Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420 (2008). In a few states, courts have enforced agreements to arbitrate family disputes according to the tenets of a particular religion or before religious tribunals. See, e.g., Berg v. Berg, 927 N.Y.S.2d 83 (App. Div. 2011). Because this act has no application to religious arbitration, the enforceability of agreements to arbitrate under religious doctrine is governed by other law of the state.

With respect to child-related awards, the general enforceability of agreements to arbitrate disputes that might arise in the future does not apply. Subsection (c) bars pre-dispute arbitration agreements for child-related awards unless the parties reaffirm the agreement after the dispute arises or the agreement was incorporated in a court decree—such as a marital settlement agreement.

Subsection (d) makes clear that, if challenged, the validity of an agreement to arbitrate is for the court to decide, not an arbitrator. Similarly, if in question, the court decides whether a particular family law dispute is subject to arbitration. See Lippman v. Lippman, 20 So. 3d 457 (Fla. Dist. Ct. App. 2009) (a shareholder agreement requiring arbitration of all claims arising from the agreement that was incorporated into a final judgment of divorce did not create an omnibus agreement to arbitrate all post-dissolution marital disputes).

The allocation of authority is non-waivable. In this respect, the UFLAA differs from the RUAA. While the RUAA likewise gives the court the power to decide both questions, that default is waivable by the parties. See RUAA §§ 4 and 6(b). Because of the state's interest in ensuring the fair resolution of family law disputes, the UFLAA requires that the court determine the basic question whether a valid agreement to arbitrate exists and whether a dispute is subject to the agreement.

SECTION 6. NOTICE OF ARBITRATION. A party may initiate arbitration by giving notice to arbitrate to the other party in the manner specified in the arbitration agreement

or, in the absence of a specified manner, under the law and procedural rules of this state other than this [act] governing contractual arbitration.

Comment

Consistent with many other provisions of the UFLAA, this section permits parties to choose their own method of initiating an arbitration or to fall back on the arbitration law of the forum state. The parties may want to provide for notice as for a civil suit under state law or chose a more informal process by letter, email, or phone call. The Uniform Arbitration Act (1955) has no general notice provision. It does provide that notification of a hearing be sent by registered mail not less than five days before the hearing. UAA § 5. The Revised Uniform Arbitration Act (2000) § 2 provides that except as otherwise provided, a person gives notice to another person by taking action that is reasonably necessary to inform the other person in the ordinary course, whether or not the other person acquires knowledge of the notice. A person has notice if the person has knowledge of the notice or has received notice. A person receives notice when it comes to the person's attention or the notice is delivered at the person's place of residence or place of business or other place the person has held out as a place of delivery for such communications.

SECTION 7. MOTION FOR JUDICIAL RELIEF.

(a) A motion for judicial relief under this [act] must be made to the court in which a proceeding is pending involving a family law dispute subject to arbitration or, if no proceeding is pending, a court with jurisdiction over the parties and the subject matter.

(b) On motion of a party, the court may compel arbitration if the parties have entered into an arbitration agreement that complies with Section 5 unless the court determines under Section 12 that the arbitration should not proceed.

(c) On motion of a party, the court shall terminate arbitration if it determines that:

(1) the agreement to arbitrate is unenforceable;

(2) the family law dispute is not subject to arbitration; or

(3) under Section 12, the arbitration should not proceed.

(d) Unless prohibited by an arbitration agreement, on motion of a party, the court may order consolidation of separate arbitrations involving the same parties and a common issue of

law or fact if necessary for the fair and expeditious resolution of the family law dispute.

Comment

This section provides the framework for motions for judicial relief. Motions must be filed in the court where the family law proceeding is pending or, if no proceeding is pending, in a court with proper jurisdiction. Motions for judicial relief are made and heard in the manner provided by law or rule of court for making and hearing motions. Revised Uniform Arbitration Act § 5 provides that unless a civil action involving the agreement to arbitrate is pending, notice of an initial motion must be served in the manner provided by law for the service of a summons in a civil action. Otherwise notice of the motion is given in the manner prescribed by law or rule of court for serving motions in pending cases.

If necessary, a party seeking to enforce an arbitration agreement may file a motion in court to compel arbitration. Conversely, a party opposing arbitration may file a motion to terminate arbitration. In either case, the court must determine whether the agreement is enforceable and covers the dispute. Both the Uniform Arbitration Act § 2 and the RUAA § 7 contain more detailed procedures for compelling or staying arbitration. Therefore, the state's procedural rules for arbitration will be used. In addition, the UFLAA allows a party to file a motion under subsection (c) to terminate arbitration based on a finding of family violence or child abuse under Section 12.

Subsection (d) permits consolidation of related arbitrations when it would lead to a fair and efficient resolution of the family law dispute. For example, a divorcing couple's assets might include a family business. If the parties agreed to arbitrate the dissolution of the business, the consolidation of that arbitration with the core family law arbitration might be appropriate. A decision on consolidation must be based on whether it is necessary for the fair and expeditious resolution of the family law dispute, not whether it might serve the interests of one party. This provision is more restrictive than the RUAA's consolidation provision (§ 10) in that it requires that the arbitrations to be consolidated involve the same parties. The RUAA concerns commercial arbitration where a more liberal consolidation policy makes sense.

SECTION 8. QUALIFICATION AND SELECTION OF ARBITRATOR.

(a) Except as otherwise provided in subsection (b), unless waived in a record by the parties, an arbitrator must be:

(1) an attorney in good standing admitted to practice or on inactive status [or a judge on retired status] in a state; and

(2) trained in identifying domestic violence and child abuse [according to standards established under law of this state other than this [act] for a judicial officer assigned to

hear a family law proceeding].

(b) The identification in the arbitration agreement of an arbitrator, arbitration organization, or method of selection of the arbitrator controls.

(c) If an arbitrator is unable or unwilling to act or if the agreed-on method of selecting an arbitrator fails, on motion of a party, the court shall select an arbitrator.

Legislative Note: *If a state has judicial education requirements on the topics of domestic violence and child abuse, the state should enact the bracketed language in subsection (a)(2). A state that does not have such requirements should delete the bracketed language.*

Comment

The default qualifications for an arbitrator under this section are that he or she be a lawyer in good standing admitted to practice or on inactive status or a judge on retired status and have training in recognizing intimate partner violence and child abuse. The default requirements reflect the importance of the decisions that family law arbitrators make and the need for arbitrators to be sensitive to the presence of family violence.

Nevertheless, parties may choose to waive the requirements in selecting a particular individual. Because parties may want an arbitrator with unique expertise, experience, or reputation, this section authorizes parties to select whomever they please. An arbitrator selected by the parties in the agreement or in a later written designation does not have to meet the default requirements. The parties may want an arbitrator for only one part of a case, such as to resolve a dispute about competing values on a rare collection, or to unravel a complex multi-state business entity.

The parties' agreed-on selection of an arbitrator may sometimes fail. When an arbitrator cannot serve due to unforeseen circumstances or resigns, subsection (c) directs the court to choose the arbitrator. This subsection tracks Revised Uniform Arbitration Act §11.

SECTION 9. DISCLOSURE BY ARBITRATOR; DISQUALIFICATION.

(a) Before agreeing to serve as an arbitrator, an individual, after making reasonable inquiry, shall disclose to all parties any known fact a reasonable person would believe is likely to affect:

(1) the impartiality of the arbitrator in the arbitration, including bias, a financial or personal interest in the outcome of the arbitration, or an existing or past relationship with a party,

attorney representing a party, or witness; or

(2) the arbitrator's ability to make a timely award.

(b) An arbitrator, the parties, and the attorneys representing the parties have a continuing obligation to disclose to all parties any known fact a reasonable person would believe is likely to affect the impartiality of the arbitrator or the arbitrator's ability to make a timely award.

(c) An objection to the selection or continued service of an arbitrator and a motion for a stay of arbitration and disqualification of the arbitrator must be made under the law and procedural rules of this state other than this [act] governing arbitrator disqualification.

(d) If a disclosure required by subsection (a)(1) or (b) is not made, the court may:

(1) on motion of a party not later than [30] days after the failure to disclose is known or by the exercise of reasonable care should have been known to the party, suspend the arbitration;

(2) on timely motion of a party, vacate an award under Section 19(a)(2); or

(3) if an award has been confirmed, grant other appropriate relief under law of this state other than this [act].

(e) If the parties agree to discharge an arbitrator or the arbitrator is disqualified, the parties by agreement may select a new arbitrator or request the court to select another arbitrator as provided in Section 8.

Comment

The disclosure section is taken mainly from Section 12 of the Revised Uniform Arbitration Act and requires arbitrators to reveal any fact or relationship that might affect the arbitrator's impartiality. The parties may agree to higher standards of disclosure.

An ongoing duty of disclosure rests on the arbitrator as well as the parties and their attorneys. One addition here to the disclosures listed in the RUAA is the requirement to reveal facts bearing on the arbitrator's "ability to make a timely award." The relative speed of the arbitration process is one of its advantages, particularly within the family law context.

The failure to make a required disclosure can result in suspension of the arbitration, the vacating of an award, or other relief. See Section 19(a)(2). If nondisclosure does not result in evident partiality or other prejudice, the court may refuse relief.

SECTION 10. PARTY PARTICIPATION.

(a) A party may:

(1) be represented in an arbitration by an attorney;

(2) be accompanied by an individual who will not be called as a witness or act as an advocate; and

(3) participate in the arbitration to the full extent permitted under the law and procedural rules of this state other than this [act] governing a party's participation in contractual arbitration.

(b) A party or representative of a party may not communicate ex parte with the arbitrator except to the extent allowed in a family law proceeding for communication with a judge.

Comment

Section 10 (a)(1) recognizes that a party may be represented by an attorney throughout the arbitration process and is patterned after Uniform Arbitration Act§ 6 and Revised Uniform Arbitration Act § 16. Some states may require that the attorney be licensed in the state.

Section 10(a)(2) gives a party an absolute right to be accompanied by an individual who will not be called as a witness nor act as an advocate. This provision was, in part, a response to concerns expressed by groups who wanted to ensure that a victim of domestic violence could be accompanied by a support person during the arbitration. The accompanying person, however, does not have the right to take the place of the lawyer or advocate for the party.

Section 10(b) provides that as in family law court proceedings, there should be no ex parte communications with the decision-maker except under limited circumstances defined by other law.

SECTION 11. TEMPORARY ORDER OR AWARD.

(a) Before an arbitrator is selected and able to act, on motion of a party, the court may enter a temporary order under [insert reference to this state's statutes or rules governing issuance

of a temporary order in a family law proceeding].

(b) After an arbitrator is selected:

(1) the arbitrator may make a temporary award under [insert reference to this state's statutes or rules governing issuance of a temporary order in a family law proceeding]; and

(2) if the matter is urgent and the arbitrator is not able to act in a timely manner or provide an adequate remedy, on motion of a party, the court may enter a temporary order.

(c) On motion of a party, before the court confirms a final award, the court under Section 16, 18, or 19 may confirm, correct, vacate, or amend a temporary award made under subsection (b)(1).

(d) On motion of a party, the court may enforce a subpoena or interim award issued by an arbitrator for the fair and expeditious disposition of the arbitration.

Comment

Parties in family law cases often seek temporary orders to maintain the status quo or provide interim remedies pending resolution of the case. Temporary restraining orders, both personal and economic, are common. The parties may have already obtained some temporary orders before submitting the case to arbitration or may decide to seek such orders after arbitration has begun. The court retains the authority to issue temporary orders before arbitration starts. Once arbitration begins, the arbitrator can issue temporary awards, subject to the court's power to confirm, correct, amend, or vacate under subsection (c).

Typical orders are for temporary child support, maintenance, residency of the child, restraints on the selling of real and personal property, access to bank accounts, and attorney fees. If for some reason the arbitrator is unavailable to act on an urgent request or cannot provide an adequate remedy, a party can file a motion for the court to provide appropriate relief. Revised Uniform Arbitration Act § 8 addresses the court's ability to grant provisional remedies before the arbitrator is appointed and authorized to act or if there is an urgent matter that the arbitrator cannot act in a timely manner to protect the effectiveness of the arbitration proceeding. UFLAA provisions are broader.

A party may move under subsection (d) for a court to enforce temporary awards entered under this section or other sections of the act.

SECTION 12. PROTECTION OF PARTY OR CHILD.

(a) In this section, "protection order" means an injunction or other order, issued under the

domestic-violence, family-violence, or stalking laws of the issuing jurisdiction, to prevent an individual from engaging in a violent or threatening act against, harassment of, contact or communication with, or being in physical proximity to another individual who is a party or a child under the custodial responsibility of a party.

(b) If a party is subject to a protection order or an arbitrator determines there is a reasonable basis to believe a party's safety or ability to participate effectively in arbitration is at risk, the arbitrator shall stay the arbitration and refer the parties to court. The arbitration may not proceed unless the party at risk affirms the arbitration agreement in a record and the court determines:

(1) the affirmation is informed and voluntary;

(2) arbitration is not inconsistent with the protection order; and

(3) reasonable procedures are in place to protect the party from risk of harm, harassment, or intimidation.

(c) If an arbitrator determines that there is a reasonable basis to believe a child who is the subject of a child-related dispute is abused or neglected, the arbitrator shall terminate the arbitration of the child-related dispute and report the abuse or neglect to the [state child protection authority].

(d) An arbitrator may make a temporary award to protect a party or child from harm, harassment, or intimidation.

(e) On motion of a party, the court may stay arbitration and review a determination or temporary award under this section.

(f) This section supplements remedies available under law of this state other than this [act] for the protection of victims of domestic violence, family violence, stalking, harassment, or

similar abuse.

Comment

Section 12 provides that if a party is subject to an order of protection or if the arbitrator otherwise finds that a party's safety or ability to participate effectively in the arbitration is at risk, the arbitration must be suspended unless the party who is at risk reaffirms the desire to arbitrate and a court allows it. The presence of domestic or intimate partner violence can vitiate the voluntariness of the consent to arbitrate. Most family lawyers routinely screen for domestic violence. An arbitrator needs to be sensitive to the potential for violence that could adversely affect a party's ability to participate freely and voluntarily in the process.

If there is a protective order in place or the arbitrator suspects abuse that would impair a party's ability to participate in the arbitration, the arbitrator must refer the parties to the court. The court, in turn, must ensure that the requirements of subsection (b) are met before authorizing the arbitration to continue. Nothing precludes a party at any time from seeking a protection order from the appropriate court.

Subsection (c) reflects the principle that where a child's safety is at risk, judicial oversight is essential and arbitration of a child-related dispute is no longer appropriate. Thus, if the arbitration involves a child-related dispute and the arbitrator has a reasonable basis to suspect abuse or neglect of a child, the arbitrator must terminate the arbitration and report the abuse and neglect to the appropriate authorities. Many states impose a similar duty on mediators. See Hinshaw, *Mediators as Mandatory Reporters of Child Abuse: Preserving Mediation's Core Values*, 34 FLA. ST. U.L.REV. 271 (2007).

Where the parties' circumstances require immediate attention, subsection (d) recognizes that the arbitrator has the power to enter a temporary award. Any interim award or determination by the arbitrator under this section can be reviewed by the court.

Subsection (e) allows a court to protect vulnerable parties by staying the arbitration pending review of any determination or award made under this section. If an arbitrator refused to terminate arbitration after a party alleged violence or child abuse, for example, the party could file a motion with the court for a de novo review.

Subsection (f) makes clear that nothing in this Act is meant to replace the state remedies for protecting victims of domestic or family violence, stalking, harassment or abuse and neglect.

SECTION 13. POWERS AND DUTIES OF ARBITRATOR.

(a) An arbitrator shall conduct an arbitration in a manner the arbitrator considers appropriate for a fair and expeditious disposition of the dispute.

(b) An arbitrator shall provide each party a right to be heard, to present evidence material

to the family law dispute, and to cross-examine witnesses.

(c) Unless the parties otherwise agree in a record, an arbitrator's powers include the power to:

(1) select the rules for conducting the arbitration;

(2) hold conferences with the parties before a hearing;

(3) determine the date, time, and place of a hearing;

(4) require a party to provide:

(A) a copy of a relevant court order;

(B) information required to be disclosed in a family law proceeding under law of this state other than this [act]; and

(C) a proposed award that addresses each issue in arbitration;

(5) meet with or interview a child who is the subject of a child-related dispute;

(6) appoint a private expert at the expense of the parties;

(7) administer an oath or affirmation and issue a subpoena for the attendance of a witness or the production of documents and other evidence at a hearing;

(8) compel discovery concerning the family law dispute and determine the date, time, and place of discovery;

(9) determine the admissibility and weight of evidence;

(10) permit deposition of a witness for use as evidence at a hearing;

(11) for good cause, prohibit a party from disclosing information;

(12) appoint an attorney, guardian ad litem, or other representative for a child at the expense of the parties;

(13) impose a procedure to protect a party or child from risk of harm, harassment,

or intimidation;

(14) allocate arbitration fees, attorney's fees, expert-witness fees, and other costs to the parties; and

(15) impose a sanction on a party for bad faith or misconduct during the arbitration according to standards governing imposition of a sanction for litigant misconduct in a family law proceeding.

(d) An arbitrator may not allow ex parte communication except to the extent allowed in a family law proceeding for communication with a judge.

Comment

The powers of an arbitrator, which may be set by the arbitration agreement, depend to a large extent on what the parties agree the arbitrator is to decide. This section draws on the Revised Uniform Arbitration Act §§ 15, 17, and 21 to recognize broad powers of an arbitrator, unless the parties agree otherwise. These powers include to select the rules for the arbitration; conduct the prehearing conferences and the hearing; administer oaths to parties and witnesses; allow any party to conduct prehearing discovery by interrogatories, deposition, requests for production of documents, or other means; determine the admissibility of evidence; and subpoena witnesses or documents upon the arbitrator's own initiative or request of a party. In addition, this section recognizes powers that may be uniquely necessary in the family law context, such as the power to meet with a child, appoint a representative for the child, and impose procedures to protect a party or child from risk of harm. Also, this section authorizes the arbitrator to sanction bad faith conduct according to state law governing misconduct in family law proceedings.

The arbitrator does not have power to alter the terms of the arbitration agreement or to award a remedy other than in accordance with the law. Ex parte communications between a party and the arbitrator are prohibited except to the extent permitted under other law.

SECTION 14. RECORDING OF HEARING.

(a) Except as otherwise provided in subsection (b) or required by law of this state other than this [act], an arbitration hearing need not be recorded unless required by the arbitrator, provided by the arbitration agreement, or requested by a party.

(b) An arbitrator shall request a verbatim recording be made of any part of an arbitration hearing concerning a child-related dispute.

Comment

The general default rule established by this section is that an arbitration hearing need not be recorded. That rule, however, is subject to various exceptions. The hearing must be recorded if the arbitrator requires it, the arbitration agreement so provides, or any party requests it. Importantly, because of the *parens patriae* responsibility of the court to protect children, this section requires that a verbatim record be made of any part of an arbitration hearing concerning a child-related dispute. That mandate is not waivable by the parties. The goal is to ensure that there is a sufficient record for the trial court to review to determine whether the arbitrator applied the relevant law and whether the award furthers the child's best interest.

SECTION 15. AWARD.

(a) An arbitrator shall make an award in a record, dated and signed by the arbitrator. The arbitrator shall give notice of the award to each party by a method agreed on by the parties or, if the parties have not agreed on a method, under the law and procedural rules of this state other than this [act] governing notice in contractual arbitration.

(b) Except as otherwise provided in subsection (c), the award under this [act] must state the reasons on which it is based unless otherwise agreed by the parties.

(c) An award determining a child-related dispute must state the reasons on which it is based as required by law of this state other than this [act] for a court order in a family law proceeding.

(d) An award under this [act] is not enforceable as a judgment until confirmed under Section 16.

Comment

Section (a) is patterned after Uniform Arbitration Act § 8 and Revised Uniform Arbitration Act § 19 which both require the award to be in writing and signed by the arbitrator. The UFLAA allows parties to determine the manner of giving notice of the award or leave it to the state's arbitration law. Under the UAA, the arbitrator must deliver a copy to each party personally or by registered mail, or as provided in the agreement. Under the RUAA, the arbitrator must give notice (defined in RUAA § 2) of the award including a copy of the award to each party to the arbitration proceeding.

Although the RUAA does not create a default requirement for a "reasoned award," the

UFLAA in this section does establish such a default, subject to the parties' agreeing otherwise. The default is based on the state's interest in ensuring that arbitrators follow the law and act fairly and carefully in resolving family law disputes. Most statutes contain descriptions for classifying property as marital or nonmarital and list factors for distribution. If the parties choose to forego a reasoned award, they can do so with respect to monetary disputes between themselves.

Section (c) recognizes that child-related awards are subject to a rigorous standard of review. Therefore, the award must state the reasons on which it is based in the same manner that is required of a family court under state law. The parties cannot waive this requirement. Most states require findings of fact and conclusions of law, sometimes on all statutory factors. A sufficient record is necessary in order for a court to determine whether the arbitrator complied with state law. See Fawzy v. Fawzy, 973 A.2d 347 (N.J. 2009). On the issue of child support, federal law requires that all state guidelines establish a presumptive award. 42 U.S.C. § 667(b)(2). There must be written findings of fact as to why deviation from the state guidelines is in the best interests of the child. See 45 C.F.R. § 302.56(f).

Subsection (d) makes clear that an award is not enforceable as a judgment until confirmed. Similarly, a decree of divorce, separation, or annulment requires judicial action. If a party fails to comply with an award before it is confirmed, that non-compliance is not punishable by contempt. Non-compliance, however, might give rise to sanctions once the award is confirmed, if the award provided for the imposition of sanctions. A failure to pay child support as required by an award, for example, might give rise to liability for interest on the unpaid amounts once the award is confirmed.

SECTION 16. CONFIRMATION OF AWARD.

(a) After an arbitrator gives notice under Section 15(a) of an award, including an award corrected under Section 17, a party may move the court for an order confirming the award.

(b) Except as otherwise provided in subsection (c), the court shall confirm an award under this [act] if:

(1) the parties agree in a record to confirmation; or

(2) the time has expired for making a motion, and no motion is pending, under Section 18 or 19.

(c) If an award determines a child-related dispute, the court shall confirm the award under subsection (b) if the court finds, after a review of the record if necessary, that the award on its face:

(1) complies with Section 15 and law of this state other than this [act] governing a child-related dispute; and

(2) is in the best interests of the child.

(d) On confirmation, an award under this [act] is enforceable as a judgment.

Comment

On motion of a party, a court has a duty to confirm an award if no party is challenging it. That duty to confirm is consistent with general arbitration law. See Revised Uniform Arbitration Act § 22. For a child-related award, however, even when no party has raised a challenge, the court may not confirm unless it finds that the award complies with state law and is in the best interests of the child. The court may make that determination on the face of the award or, if necessary, by reviewing the record.

The need for judicial oversight to determine that the award complies with state law and is in the best interest of the child rests on the state's *parens patriae* responsibility. The approach in this section subjects the arbitration award to a standard of judicial review similar to the review typically given to a parenting agreement achieved through negotiation or mediation. Just as parties cannot make a binding agreement as to child custody without judicial approval, an arbitration award of child custody requires some additional scrutiny by the court, even when both parties accept the award, to ensure the award complies with the law of the state. In some states, the law requires a judge to make a finding on the factors listed in the statute. If no factors are listed, the judge would not confirm the award. See Zupan v. Zupan, 230 P.3d 329 (Wyo. 2010).

Similarly, by federal mandate all states require the use of child support guidelines. If there is no child support worksheet as required by state law and the amount of child support is not the amount on the tables, the judge would not confirm the award.

SECTION 17. CORRECTION BY ARBITRATOR OF UNCONFIRMED AWARD. On motion of a party made not later than [30] days after an arbitrator gives notice under Section 15(a) of an award, the arbitrator may correct the award:

(1) if the award has an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property;

(2) if the award is imperfect in a matter of form not affecting the merits on the issues submitted; or

(3) to clarify the award.

Comment

This section is based on Revised Uniform Arbitration Act § 20. A party by motion to the arbitrator may seek a correction of an award for mathematical or descriptive mistakes, for errors of form not going to the merits, or to clarify the award. If the award is corrected, the arbitrator has a duty to give notice of the changed award.

SECTION 18. CORRECTION BY COURT OF UNCONFIRMED AWARD.

(a) On motion of a party made not later than [90] days after an arbitrator gives notice under Section 15(a) of an award, including an award corrected under Section 17, the court shall correct the award if:

(1) the award has an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property;

(2) the award is imperfect in a matter of form not affecting the merits of the issues submitted; or

(3) the arbitrator made an award on a dispute not submitted to the arbitrator and the award may be corrected without affecting the merits of the issues submitted.

(b) A motion under this section to correct an award may be joined with a motion to vacate or amend the award under Section 19.

(c) Unless a motion under Section 19 is pending, the court may confirm a corrected award under Section 16.

Comment

This section tracks the Revised Uniform Arbitration Act § 24 for the most part. It allows a party to file a motion with the court to correct the award for mathematical or descriptive mistakes, errors of form not affecting the merits, and mistake in deciding an issue not submitted to the arbitrator. In general, UFLAA Sections 17 and 18 together give parties a choice as to seeking a correction from the arbitrator or from the court in the first instance, but a motion to the arbitrator has a shorter timeline. In addition, as long as the motion is timely, a party may seek a correction from the court of an award that has already been corrected by the arbitrator.

SECTION 19. VACATION OR AMENDMENT BY COURT OF UNCONFIRMED AWARD.

(a) On motion of a party, the court shall vacate an unconfirmed award if the moving party establishes that:

(1) the award was procured by corruption, fraud, or other undue means;

(2) there was:

(A) evident partiality by the arbitrator;

(B) corruption by the arbitrator; or

(C) misconduct by the arbitrator substantially prejudicing the rights of a party;

(3) the arbitrator refused to postpone a hearing on showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 13, so as to prejudice substantially the rights of a party;

(4) the arbitrator exceeded the arbitrator's powers;

(5) no arbitration agreement exists, unless the moving party participated in the arbitration without making a motion under Section 7 not later than the beginning of the first arbitration hearing; [or]

(6) the arbitration was conducted without proper notice under Section 6 of the initiation of arbitration, so as to prejudice substantially the rights of a party[; or

(7) a ground exists for vacating the award under law of this state other than this [act]].

(b) Except as otherwise provided in subsection (c), on motion of a party, the court shall

vacate an unconfirmed award that determines a child-related dispute if the moving party establishes that:

(1) the award does not comply with Section 15 or law of this state other than this [act] governing a child-related dispute or is contrary to the best interests of the child;

(2) the record of the hearing or the statement of reasons in the award is inadequate for the court to review the award; or

(3) a ground for vacating the award under subsection (a) exists.

(c) If an award is subject to vacation under subsection (b)(1), on motion of a party, the court may amend the award if amending rather than vacating is in the best interests of the child.

(d) The court [shall][may] determine a motion under subsection (b) or (c) based on the record of the arbitration hearing and facts occurring after the hearing [or may exercise de novo review].

(e) A motion under this section to vacate or amend an award must be filed not later than [90] days:

(1) after an arbitrator gives the party filing the motion notice of the award or a corrected award; or

(2) for a motion under subsection (a)(1), after the ground of corruption, fraud, or other undue means is known or by the exercise of reasonable care should have been known to the party filing the motion.

(f) If the court under this section vacates an award for a reason other than the absence of an enforceable arbitration agreement, the court may order a rehearing before an arbitrator. If the reason for vacating the award is that the award was procured by corruption, fraud, or other undue means or there was evident partiality, corruption, or misconduct by the arbitrator, the rehearing

must be before another arbitrator.

(g) If the court under this section denies a motion to vacate or amend an award, the court may confirm the award under Section 16 unless a motion is pending under Section 18.

Legislative Note: *If state law permits an arbitration award to be vacated on grounds other than those listed in subsection (a)(1) – (6), the state may enact bracketed subsection (a)(7) to make those grounds equally available under this act.*

If a state wishes to authorize discretionary de novo review of an arbitration award in a child-related dispute, it should enact the "may" in subsection (d) and the bracketed language at the end of the subsection. If a state does not want to authorize de novo review, it should enact the "shall" in subsection (d) and omit the bracketed reference to de novo review at the end of the subsection.

Comment

The language in subsection (a) tracks the traditional narrow grounds for vacating an arbitration award found in both the Uniform Arbitration Act § 12 and the Revised Uniform Arbitration Act § 23. To avoid frustrating the purpose of arbitration, courts must give appropriate deference to arbitration awards. The court does not consider the sufficiency or weight of the evidence or otherwise consider an attack on the merits. See Brinckerhoff v. Brinckeroff, 889 A.2d 701 (Vt. 2005).

Under section (a)(2)(A), the evident partiality standard requires "clear evidence of impropriety" and the "evidence of bias or interest of an arbitrator must be direct, definite and capable of demonstration rather than remote, uncertain or speculative." Ormsbee Development Co. v. Grace, 668 F.2d 1140, 1147 (10th Cir. 1982). See also In re Marriage of Shults, 2015 WL 9459743 (Kan. App. Dec. 23, 2015) (unpublished) (fact that arbitrator represented the attorney for one party seventeen years earlier did not amount to evident partiality). Under subsection (a)(4), to show an arbitrator exceeded his or her powers, the party must show the arbitrator either acted beyond the terms of the arbitration agreement or acted in complete disregard of the law. See Giraldi v. Morrell, 892 P.2d 422 (Colo. App. 1994); Washington v. Washington, 770 N.W.2d 908 (Mich. App. 2009).

Some states go beyond the RUAA in authorizing additional grounds for vacating arbitration awards. The bracketed subsection (a)(7) authorizes a court to vacate family law arbitration awards on the basis of those additional grounds. If state law, for example, permits parties to agree that an award can be challenged for errors of law, the bracketed language would authorize a court to review an award for errors of law if the parties have so agreed.

Child-related awards are reviewed under a separate mandatory standard. Under subsection (b), the award must comply with applicable law and must be in the child's best interests. Moreover, the record and statement of reasons in the award itself must be adequate for the court to exercise its review. Subsection (c) permits a court to amend an award rather than

vacate if amendment would be in the child's best interests. Amendment might be an appropriate option, for example, if the arbitrator has misapplied the state's child support guidelines and the child support determination can be easily corrected without a further evidentiary hearing.

Subsection (d) contains a discretionary de novo review option. While some states authorize discretionary de novo review as a way of ensuring that children's interests are protected, others limit judicial review of child-related awards to the record in the arbitration proceeding and later-occurring facts. *Compare* Harvey v. Harvey, 680 N.W.2d 835 (Mich. 2004) (requiring de novo review of arbitration award determining child custody), *with* N. MEX. STAT. ANN. § 40-4-7.2(T) (providing that review of arbitration award must be based on arbitration record and any facts arising after arbitration hearing). The bracketed provision allows states to choose between these competing approaches. See Vanderborgh v. Krauth, 370 P.3d 661 (Colo. App. 2016) (finding no violation of the father's due process rights or of child's rights when the trial court used its discretion to decline to exercise de novo review of arbitration award; the court had the power to order a de novo hearing if found necessary).

The bracketed 90-day time period for filing a motion to vacate is the time frame most often found in family law arbitration statutes. A state may insert a different time period if it wants. The act provides two alternative measures of time: no later than 90 days after notice of the award, or, when an award is challenged on the ground of "corruption, fraud, or other undue means," no later than 90 days after the corruption, fraud, or undue means is known or should have been known. If the fraud is not discovered until after the award has been confirmed, then a party's recourse would be to challenge the confirmed award under other law governing challenges to judgments. For example, if fraud were discovered 30 days after notice of an award and the award remains unconfirmed, a party would have 90 days from the time of discovery in which to bring the challenge. If fraud were discovered after the award has been confirmed, however, then any challenge would be governed by the state's rules for vacating judgments.

SECTION 20. CLARIFICATION OF CONFIRMED AWARD. If the meaning or effect of an award confirmed under Section 16 is in dispute, the parties may:

(1) agree to arbitrate the dispute before the original arbitrator or another arbitrator; or

(2) proceed in court under law of this state other than this [act] governing clarification of a judgment in a family law proceeding.

Comment

A confirmed award may be so ambiguous that clarification is required. Under this section, the parties may agree to arbitrate any dispute arising from the ambiguity, or they may proceed according to state law in clarifying a judgment.

SECTION 21. JUDGMENT ON AWARD.

(a) On granting an order confirming, vacating without directing a rehearing, or amending an award under this [act], the court shall enter judgment in conformity with the order.

(b) On motion of a party, the court may order that a document or part of the arbitration record be sealed or redacted to prevent public disclosure of all or part of the record or award to the extent permitted under law of this state other than this [act].

Comment

Subsection (a) follows Revised Uniform Arbitration Act §25(a) and requires the court to enter judgment after confirming, vacating, or amending an award. The entry of judgment is an important judicial act that may be necessary to give rise to enforceable legal obligations under the award.

The opportunity for privacy is often a key attraction of arbitration for couples at the point of marriage dissolution. Subsection (b) recognizes that the court may seal or redact documents or records to prevent public disclosure to the extent allowed under applicable law. This is important to prevent bank account and other numbers, private business information, and other items from being public record. In addition, parties are free as a matter of contract to agree that evidence disclosed during the arbitration should remain confidential. If a party were to breach such a confidentiality agreement, the remedy for the aggrieved party would be contractual.

SECTION 22. MODIFICATION OF CONFIRMED AWARD OR JUDGMENT. If a party requests under law of this state other than this [act] a modification of an award confirmed under Section 16 or judgment on the award based on a fact occurring after confirmation:

(1) the parties shall proceed under the dispute-resolution method specified in the award or judgment; or

(2) if the award or judgment does not specify a dispute-resolution method, the parties may:

(A) agree to arbitrate the modification before the original arbitrator or another arbitrator; or

(B) absent agreement proceed under law of this state other than this [act]

governing modification of a judgment in a family law proceeding.

Comment

Post-decree modifications of court orders are well-known in family law**.** Family law decrees involving spousal support, custodial responsibility, or child support may be subject to modification under state law based on material and continuing changes in circumstances. Child-related issues are generally modifiable throughout a child's minority, subject to varying limitations under state law.

This section provides that parties may proceed on requests for modification of a confirmed award by various routes. If a dispute-resolution method for modification is specified in the award or judgment, that method should be followed. If no method is specified, then the parties can agree to arbitrate or, in the absence of agreement, proceed in court under state law governing modifications of family court decrees. If the parties do opt for arbitration, they may return to arbitration with the same arbitrator, or they may choose a different arbitrator.

SECTION 23. ENFORCEMENT OF CONFIRMED AWARD.

(a) The court shall enforce an award confirmed under Section 16, including a temporary award, in the manner and to the same extent as any other order or judgment of a court.

(b) The court shall enforce an arbitration award in a family law dispute confirmed by a court in another state in the manner and to the same extent as any other order or judgment from another state.

Comment

This section clarifies that a confirmed award is a judgment of the court and can be enforced as any other judgment, including the use of contempt, fines, and other enforcement remedies. Awards confirmed by a court in another state will be entitled to the same full faith and credit as any court judgment from a sister state. If there is a confirmation of an award from another state, full faith and credit requires that it be honored as a judgment.

SECTION 24. APPEAL.

(a) An appeal may be taken under this [act] from:

(1) an order [granting or] denying a motion to compel arbitration;

(2) an order granting [or denying] a motion to stay arbitration;

(3) an order confirming or denying confirmation of an award;

(4) an order correcting an award;

(5) an order vacating an award without directing a rehearing; or

(6) a final judgment.

(b) An appeal under this section may be taken as from an order or a judgment in a civil action.

Legislative Note: *If a state wants to authorize an immediate appeal from an order granting a motion to compel arbitration, it should enact the bracketed language in subsection (a)(1). If a state wants to authorize an immediate appeal from an order denying a motion to stay arbitration, it should enact the bracketed language in subsection (a)(2).*

Comment

The appeals section tracks the Revised Uniform Arbitration Act § 28 and Uniform Arbitration Act § 18, with the exception of the bracketed terms in subsection (a)(1) and (a)(2). The bracketed terms would, in effect, level the playing field in determining appealability of trial court rulings on motions to compel arbitration and to stay arbitration. Under the RUAA and UAA, trial court rulings that delay arbitration—orders that refuse to compel arbitration or orders that stay arbitration—are immediately appealable, but trial court orders compelling arbitration or refusing to stay arbitration are not immediately appealable. The bracketed terms in this section give states the option of expanding appealability in the family law context.

SECTION 25. IMMUNITY OF ARBITRATOR.

(a) An arbitrator or arbitration organization acting in that capacity in a family law dispute is immune from civil liability to the same extent as a judge of a court of this state acting in a judicial capacity.

(b) The immunity provided by this section supplements any immunity under law of this state other than this [act].

(c) An arbitrator's failure to make a disclosure required by Section 9 does not cause the arbitrator to lose immunity under this section.

(d) An arbitrator is not competent to testify, and may not be required to produce records, in a judicial, administrative, or similar proceeding about a statement, conduct, decision, or ruling

occurring during an arbitration, to the same extent as a judge of a court of this state acting in a judicial capacity. This subsection does not apply:

(1) to the extent disclosure is necessary to determine a claim by the arbitrator or arbitration organization against a party to the arbitration; or

(2) to a hearing on a motion under Section 19(a)(1) or (2) to vacate an award, if there is prima facie evidence that a ground for vacating the award exists.

(e) If a person commences a civil action against an arbitrator arising from the services of the arbitrator or seeks to compel the arbitrator to testify or produce records in violation of subsection (d) and the court determines that the arbitrator is immune from civil liability or is not competent to testify or required to produce the records, the court shall award the arbitrator reasonable attorney's fees, costs, and reasonable expenses of litigation.

Comment

Immunity for arbitrators is essential if arbitration is to serve the purpose of helping parties resolve disputes and alleviating crowded court dockets. Without the cloak of immunity, individuals will be unwilling to serve in the important and demanding role of family law arbitrator. This section tracks Revised Uniform Arbitration Act § 14. Likewise, the bar against arbitrator testimony parallels the approach of the RUAA and protects the integrity of the arbitration process. In the interest of child protection, the family law arbitrator nevertheless has a duty to report child abuse or neglect under Section 12.

Immunity for other professionals engaged in the arbitration process, such as guardians ad litem, would be determined according to other law. See, e.g., Vlastelica v. Brend, 954 N.E.2d 874 (Ill. App. 2011).

SECTION 26. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 27. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the 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 28. TRANSITIONAL PROVISION. This [act] applies to arbitration of a family law dispute under an arbitration agreement made on or after [the effective date of this [act]]. If an arbitration agreement was made before [the effective date of this [act]], the parties may agree in a record that this [act] applies to the arbitration.

SECTION 29. EFFECTIVE DATE. This [act] takes effect . . . .