

**Date:** October 22, 2013  
**To:** Family Law Arbitration Drafting Committee, ABA Advisors, and Observers  
**From:** Barbara Atwood, Chair, and Linda Elrod, Reporter  
**Re:** FAMILY LAW ARBITRATION ACT – QUESTIONS FOR CONSIDERATION

We are very much looking forward to the drafting committee meeting this week. You should have already received a brief agenda. This document identifies some key questions that we'll discuss when we begin our review of the preliminary draft. We talked about many of these issues in our conference call, but we didn't have the benefit of statutory language in front of us. We think this will make the most productive use of our time in Chicago. Safe travels!

1. How should the FLAA address agreements to arbitrate entered into long before separation or divorce (e.g., in premarital agreements)? See Section 4(b) (patterned after AAML Model Act and North Carolina Act).
  - a. Should parties be able to enter a premarital or postmarital agreement "requiring" arbitration of any future dispute? Some states (Indiana, New Mexico, and Michigan) limit binding arbitration to agreements entered into by parties to family law proceedings.
  - b. If we do permit pre-dispute arbitration agreements, should property and spousal support issues be treated differently from issues relating to children, for purposes of pre-dispute agreements to arbitrate?

2. What subjects, if any, should be categorically excluded from arbitration? See Sections 2(5); 3(b); and 10(e). If we explicitly exclude certain issues (such as child abuse and neglect), do we need to also exclude adoption, juvenile proceedings, paternity determinations, etc.?

Note: A proposed South Carolina Family Law Arbitration Act also excludes: adoptions; termination of parental rights; allegations of child abuse and neglect; allegations of spousal abuse; criminal contempt or imposition of sanctions related thereto; and imposition of statutory civil contempt sanctions.

3. What should be our standard for judicial review of arbitrated terms regarding custodial decision making and child support? See Sections 13(d) and 15(b). Most statutes use the best interests standard for judicial review of such terms, but the New Jersey Supreme Court has endorsed a "harm to the child" standard. See *Fawzy v. Fawzy*, 973 A.2d 347 (2009).
4. What safeguards for domestic violence should be included? See Section 3(b)(2) and Section 5(a)(3), (b) & (c). The provisions in the preliminary draft are patterned after Michigan family law arbitration statutes.

5. Does the FLAA need to include “procedural” provisions that are not unique to family law arbitration, such as the provisions in Sections 6, 7, and 11?
6. Should we permit parties to agree to broader judicial review (i.e. for errors of law) than that provided under the Act? See Section 15(c). Permitting party autonomy in this respect poses a potential conflict with some judicial interpretations of the Federal Arbitration Act, but such party autonomy is recognized in the North Carolina law, the proposed Massachusetts law, and the AAML Model Act.
7. Should there be judicial “warnings” such as appear in Section 5, or does this set a tone of excessive caution? The warnings are drawn from the existing Michigan laws.
8. What key provisions are missing?
  - a. Qualifications for arbitrators and references to arbitrator organizations
  - b. Provisions that explain the relationship between with other ADR methods (primarily mediation and collaborative law)
  - c. A provision that authorizes a judge to redact or seal portions of an arbitration award to protect the privacy of the parties. See N.C. Gen. Stat 50-57(b).
  - d. Limitations on appeals from judgments confirming/vacating/modifying awards. For example, both under the North Carolina law and the proposed Massachusetts law, parties can’t appeal for errors of law unless they contracted for judicial review on that basis.
9. Which additional terms do we need to define, apart from those already included in the definitions, and which definitions do we need to change? See Section 2.
  - a. “Arbitrator,” “Court,” “Knowledge,” “Record,” and “State” are the same as in the RUA.

As to “court,” it’s possible that the broader definition in the Uniform Deployed Parents Custody and Visitation Act (UDPCVA) would be appropriate. That definition is “a tribunal [, including an administrative agency,] authorized by under law of this state other than this [act] to make, enforce, or modify orders in domestic relations matters.”

- b. “Custodial responsibility” came from the UDPCVA. The UDPCVA also defined caretaking authority and decision-making authority. It did not seem necessary for this act.
- c. “Family law matter” is a new term for this act. Is it broad enough to encompass all we want?
- d. “Notice” - is a definition but possibly should be its own section.
- e. “Order of Protection” definition came from Uniform Interstate Enforcement of Domestic Violence Protection Orders Act except that the word “court” is used instead of “tribunal.”

As to new terms that might need definitions, we should consider:

- a. “Agreement to arbitrate”
- b. “Arbitration organization”