

Date: March 6, 2015

To: Family Law Arbitration Act Drafting Committee

From: Barbara Atwood, Chair

Re: Overview of draft for March 20-21 Drafting Committee meeting

Hello, everyone. I'm looking forward to seeing you at our upcoming meeting in Chicago. This memo briefly highlights the major changes you'll find in the current draft. The draft reflects decisions the Committee reached at the last meeting and the input of our Style liaison, Diane Boyer. In general, our excellent Reporter and I have tried to streamline the draft so that it contains provisions that are essential to family law arbitration and incorporates by reference the state's existing law on binding arbitration (either the UAA or RUAA) for more generic arbitration procedure.

In Section 2 (Definitions) you'll find new definitions of "award" and "party," and we've added in the standard ULC definition of "person" for clarification. The new definition of "party," in particular, allows us to avoid some repetition in later provisions.

In Section 3 (Scope) the language is intended to make clear that the Act governs all efforts to arbitrate family law disputes. In other words, arbitration agreements that don't comply with the Act are unenforceable. The list of proceedings/determinations excluded from arbitration allows states to add additional exclusions. A state, for example, might want to exclude paternity determinations.

Section 4 now contains the definition of "order of protection," since that is the only section that references that term. The section now allows either an arbitrator or a court to decide whether to continue the arbitration if a party is deemed to be at risk. If there is a reasonable basis to believe that a child is abused or neglected, in contrast, only a court may decide whether to resume arbitration.

Based on our discussion at the last drafting committee meeting, Section 5 (Arbitration Agreement) presents two alternatives: (A) pre-dispute arbitration agreements in general are unenforceable except those that are part of a parenting agreement, marital settlement agreement, or cohabitation agreement, or (B) pre-dispute agreements in general are enforceable, except agreements to arbitrate child-related issues, with the residual exception spelled out above. Please consider whether we have effectively captured these distinctions.

You'll see that the sections on selection of arbitrator, disclosure, and immunity have now been grouped together [Sections 7 (Selection of Arbitrator), 8 (Disclosure), and 9 (Immunity)] for a more logical ordering.

Section 10 (Applicable Law) is important and needs careful consideration. It attempts to incorporate by reference the backdrop of arbitration law, except where it conflicts with the Act. Harry Tindall (who will not be at the meeting) recommends that Section 10(a) reference the Uniform Arbitration Act or the Revised Uniform Arbitration Act (rather than “law and rules of this state relating to voluntary binding arbitration”). That might add needed clarity. Subsection (b) takes the position that the law of the state with jurisdiction under the UCCJEA and UIFSA should govern issues of custodial responsibility or child support. In other words, parties would not be permitted to choose the law of a different state for arbitration of those disputes. As to non-child-related financial issues, however, subsection (c) provides broad latitude. Keep in mind that most family law arbitration statutes across the United States rest on the assumption that the arbitrator will apply local law.

Section 12 now enumerates what you might consider rights and restrictions regarding party participation. Consistent with the Committee’s discussion, the question of confidentiality is left up to the parties. Professor George Walker has suggested that we look carefully at the North Carolina family law arbitration act’s provisions on confidentiality and sealing, since the privacy of arbitration is often one of its main draws. Are there other rights or limitations on party participation that should be included?

Section 14 requires a record of an arbitration hearing only if child-related issues are being arbitrated. Similarly, Section 15 now clarifies that the default rule is that the arbitrator must give a statement of reasons for an award. Parties can agree that a statement of reasons is not required, however, except as to child-related issues.

In Section 17 (Confirmation), the general approach is that an award should be confirmed unless there’s a motion to vacate or correct the award. Even without such a motion, however, an award regarding child-related issues can’t be confirmed unless the arbitrator finds that the award complies with otherwise applicable state law. Please think about this and consider whether we’ve effectively captured the right policy.

Section 19 (Vacation of Award) is important, of course, since it spells out the standards for judicial review. It’s been rewritten to incorporate all the provision of RUAA and to recast the standards for child-related issues. In Section 19(a)(1)(B), line 19, p. 12, the bracketed phrases are for the Committee to consider and discuss – since they pose differing levels of deference to the arbitrator’s award affecting children (contrary to best interests vs. harm to child). That subsection also limits the court’s review to the record of the hearing and any facts that have arisen since the hearing. This will undoubtedly be a focus of attention at the Annual Meeting.

Note that Section 19(a)(8) allows a state to include an additional basis for vacating the award under its fall-back arbitration procedures. Some states allow parties to agree to broader judicial review than the default rules. This subsection would permit that latitude in the context of family law arbitration.

Section 20 (Modification) may need reworking. The post-decree modification question frequently arises in family court, and we need to address it carefully in this Act. Section 20 is intended to provide that parties can agree to arbitrate these modification questions, or they can follow existing state law. Is that all we need to say?

Safe travels, everyone. Let's hope for sunny weather in Chicago!