

**Date:** May 20, 2015  
**To:** Uniform Law Commissioners  
**From:** Barbara Atwood, Chair, and Linda Elrod, Reporter,  
Family Law Arbitration Act Drafting Committee  
**Re:** Interim reading of Family Law Arbitration Act Draft at 2015 Annual  
Meeting of Uniform Law Commission

This memo updates you on the family law arbitration drafting project. In addition to explaining some of the key provisions, the memo highlights areas that have provoked some degree of debate among members of the Drafting Committee. We look forward to receiving your feedback on this important project in Williamsburg.

## **I. Background**

Family law arbitration, a dispute resolution process that is growing in popularity, is one of several voluntary alternative dispute resolution (ADR) methods that are prominent across the United States. All ADR methods are, by definition, alternatives to litigation, but unlike mediation and collaborative law, family law arbitration entails an adversarial process in which parties advocate their positions to a third-party decision-maker selected by the parties. In most states, family law arbitration occurs under the state's existing arbitration law (either the Uniform Arbitration Act or the Revised Uniform Arbitration Act), but a few jurisdictions have enacted separate legislation to address the unique concerns of parties engaged in family law disputes. In 2005, the American Academy of Matrimonial Lawyers promulgated the AAML Model Family Law Arbitration Act, using a structure similar to that of the Revised Uniform Arbitration Act. The AAML Model Act has not been adopted in any jurisdiction. In light of the increasing tendency of divorcing couples to turn to ADR methods in general, and to arbitration in particular, this drafting project is timely and should be of widespread interest.

Although the Drafting Committee originally planned to draft a free-standing act that would address family law arbitration in full procedural detail, we have decided that approach would produce unnecessary redundancies in state law. Our revised goal is to produce a simplified act that will address the concerns unique to family law and incorporate by reference a state's existing law on binding arbitration for more generic provisions. We believe this approach will produce an act that will build on existing law and, ultimately, will be more enactable. We look forward to receiving your comments at the Annual Meeting.

## **II. Brief explanation of selected sections**

**Section 2. Definitions:** The definitions section now includes certain terms that were not defined in last year's draft, including "arbitration under this [act]," "award," "party," and "confirmation."

**Section 3. Scope:** This "Scope" section clarifies what the Act covers. It also identifies the determinations that are effectively off-limits in arbitration agreements. In other words, parties cannot authorize arbitrators to take the identified actions.

**Section 4. Applicable Law:** This section incorporates by reference a state’s existing arbitration law, unless it is inconsistent with the Act – and it applies the law of the forum state to the family law dispute being arbitrated. In this regard, the Committee decided to follow the approach of many family law arbitration statutes and mandate that the law to be applied by the arbitrator should be the law of “this state” relating to family law disputes, including its choice of law principles, rather than permitting parties to select the law of another jurisdiction. If a state already permits flexibility in choice of law, however, such flexibility would be permissible for arbitration as well. This avoids the need for the Act to draw lines between acceptable and unacceptable law selected by parties.

**Section 5. Protection of Party or Child:** This section provides safeguards to protect parties or children from domestic violence or other harassment and gives the arbitrator the power to issue temporary awards for such protection. Based on comments received at last year’s reading, we have strengthened the protections available under this section.

**Section 6. Arbitration Agreement:** This section establishes requirements for enforceable arbitration agreements. It makes clear that a family law arbitration agreement that does not comply with the Act is unenforceable. After considerable debate, the Committee by a strong majority has opted to limit the Act to agreements to arbitrate *existing* disputes, with the exception of arbitration agreements within divorce settlements, parenting agreements, and similar agreements entered into at the time of separation or divorce. The general exclusion of pre-dispute arbitration agreements is based on the Committee’s desire to ensure that these agreements are the result of parties’ voluntary and informed consent to arbitrate at the time of the dispute. A minority of the Committee continue to believe that the Act should permit the use of arbitration clauses in premarital agreements, both as a matter of enactability and as a matter of policy. We welcome input on this question from Commissioners. Section 6 also provides a set of mandatory disclosures or caveats about the nature of arbitration. The list of caveats is largely patterned after a similar requirement for informed notice in Michigan law. See MICH. COMP. L. ANN. § 600.5072.

**Section 7. Qualification and Selection of Arbitrator:** The Committee revised the qualifications for arbitrator by giving priority to an arbitrator agreed to by the parties, and by adding, in the absence of agreement, a “licensed professional” in a relevant field as an option, rather than limiting the choice to attorneys or retired judges. The arbitrator qualifications section has triggered comments from observers who have asked us to build in more flexibility. Please note that the arbitrator qualifications, including a requirement for training in identifying domestic violence, can be waived by the parties.

**Section 10. Temporary Award or Court Order:** Under this section, the arbitrator may make temporary awards in the same manner as a court in a family law dispute, and the section likewise permits parties to move a court to confirm, correct, or vacate. Temporary orders in family court are very common on such matters as child custody, child support, and access to property. Arbitrators must have the same capability to meet the ongoing needs of the parties before a final award is reached.

**Section 12. Confidentiality and Sealing:** This is a new section providing a method of sealing or redacting arbitration records. Comments from observers have emphasized that parties often choose arbitration because of the private nature of the process. It is loosely patterned after a provision in the North Carolina family law arbitration act. See N.CAR. GEN. STAT. ANN § 50-57(b).

**Section 14. Record of Hearing:** This section recognizes that a record of an arbitration hearing concerning custodial responsibility or child support is required to the same extent that state law requires a record in a family court, but arbitrations involving purely financial issues between the parties need not be recorded.

**Section 15. Award:** Under this section, the general rule is that an arbitrator must give reasons for the award, but parties may waive that requirement – except for awards regarding custodial responsibility or child support. A statement of reasons in child-related awards is necessary to effectuate the closer judicial review of such awards under Section 19. This section also provides that an award is “effective” when received. Section 17, in turn, states that an award is “enforceable” as a judgment when confirmed. This will be of particular importance, for example, for awards ordering a party to pay support as of a certain date. Although a party could not be forced to comply with the award before it is confirmed, a party might be liable for interest or other penalties from the date set by the award that would be enforceable after confirmation.

**Section 16. Change of Award by Arbitrator:** An arbitrator under this section may make minor non-substantive changes to the award on motion.

**Section 17. Confirmation of Award:** This section requires confirmation of an award, on motion, if the time for objecting to the award has passed and no motion is pending. As to an award involving child custody or child support, however, this section requires the court to determine that the award on its face complies with other law before it can confirm the award. In other words, where neither party has filed an objection to an award concerning children, a court nevertheless must review the award to ensure that it complies with applicable law. As mentioned above, this section also makes clear that an award is enforceable once it is confirmed.

**Section 19. Vacation of Award:** We hope to get your feedback on this important section. After discussing the standard of judicial review at length and taking into account the comments from Commissioners last summer, the Committee has arrived at a formulation of “clearly erroneous” for arbitration awards relating to custodial responsibility or child support. The court’s review of such awards is limited to the record and any facts arising after the award was entered. The goal is to create a standard that gives some deference to the arbitration process while still preserving a meaningful role for the court in reviewing awards affecting children. Apart from child-related awards, the bases for vacating an arbitration award in the Act parallel those in RUAA, except that Section (a)(8) sweeps in any other basis for vacating an award under the state’s existing arbitration law.

**Section 21. Modification Based on Change in Circumstance:** This section governs modification of awards based on a change in circumstance. Post-decree modifications are a uniquely common proceeding in family law (primarily relating to modifications of child custody,

child support, and spousal support decrees). The section provides that parties can agree to arbitrate these disputes, either before the original arbitrator or a new arbitrator, or they can opt for ordinary court procedures.

**Section 23. Enforcement of Confirmed Award:** This section authorizes a court to enforce a confirmed award, whether from the forum state or another state. Because family law cases often involve multi-state jurisdictional dimensions, interstate recognition is necessary.