

To: Uniform Law Commission
From: Barbara Atwood, Chair, and Linda Elrod, Reporter
Family Law Arbitration Act Drafting Committee
Re: Family Law Arbitration Act

Commissioners, the Family Law Arbitration Act is scheduled for a final reading on Monday, July 11, 2016, at 1:30 p.m. This memo summarizes the major changes in the draft since last year's annual meeting. The Drafting Committee has worked hard to incorporate your suggestions and to address the concerns you and others have raised during the drafting process. After three years of drafting, we remain enthusiastic about this project. Arbitration is clearly on the rise as a means of dispute resolution at divorce, but few states have enacted comprehensive statutory guidelines. We believe the Act is timely and is likely to fill a need across the states.

Three primary concerns emerged during the reading at the 2015 Annual Meeting: the failure of the draft to track the Revised Uniform Arbitration Act in various procedural sections, the resistance in several states to arbitration of child custody and child support disputes, and the potential preemptive effect of the Federal Arbitration Act. Over the past year, we have tried to address these concerns while also working to generally improve the draft.

The Act now more closely tracks the RUAA but Section 4 also incorporates by reference the state's existing law on contractual arbitration. In other words, the default is to look to the state's existing law -- the RUAA or the UAA -- unless the family law act provides otherwise. The Act diverges from the RUAA on key points that distinguish family law arbitration from commercial arbitration. These include standards for arbitration of child custody and child support, arbitrator qualifications and powers, protections for victims of family violence, provisions for temporary awards, and provisions relating to post-decree modifications.

In response to concerns, the Committee has strengthened the role of the courts in disputes involving children and in those in which domestic violence is present. Under Section 12, if domestic violence is evident, a court -- not the arbitrator -- must decide whether arbitration may proceed. Section 13 lists powers of the arbitrator particularly relevant to the family law realm, such as the power to appoint a representative for a child.

To facilitate judicial review of child-related awards, Section 14 requires a verbatim record of any part of an arbitration hearing involving a child-related dispute. The arbitrator, under Section 15, must give a statement of reasons for a child-related award. Section 16 clarifies that a court may not confirm a child-related award, even when no party objects, unless it finds that the award complies with applicable law and is in the best interests of the child. When an award is challenged, a court must vacate if the award does not comply with applicable law or is not in the child's best interests, or if the record or statement of reasons in the award is inadequate. In addition, Section 19 now includes a bracketed provision authorizing discretionary de novo review of awards determining child-related disputes. Finally, a

mechanism exists for excluding child-related issues from arbitration altogether under Section 3 (discussed in more detail below).

The Drafting Committee has also carefully considered the question of preemption under the Federal Arbitration Act. Section 2 of the FAA, the core preemptive section of the Act, provides:

A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. The FAA thus applies to agreements to arbitrate existing disputes as well as future disputes.

In a series of decisions, the United States Supreme Court has interpreted Section 2 to apply to any contract affecting interstate commerce and to broadly preempt state laws that prohibit arbitration clauses altogether or pre-dispute arbitration agreements in certain contexts, or that impose special requirements for arbitration clauses. *See, e.g.,* Marmet Health Care Center v. Brown, ___ U.S. ___, 132 S.Ct. 1201 (2012) (per curiam) (Section 2 preempts state law prohibiting pre-dispute arbitration clauses in nursing home contracts); Doctor's Assoc's., Inc. v. Casarotto, 517 U.S. 681 (1996) (Section 2 preempts state law requiring that arbitration clauses be highlighted in a contract). Since legal contests over marital property or spousal maintenance often have interstate elements, agreements to arbitrate such family law disputes may fall within the scope of the FAA. *See, e.g.,* Freeman v. Freeman, 2005 WL 1838971 (Tex. Ct. App. 2005) (FAA applies to arbitration agreement in divorce settlement involving multi-state assets).

The 2015 draft of the Family Law Arbitration Act included a lengthy list of special requirements and caveats that had to be included in a family law arbitration agreement. Because it was unclear whether the omission of a single caveat would doom the entire agreement and the real risk of preemption, we deleted the list. In addition, the 2015 draft barred pre-dispute arbitration agreements in most circumstances. In practice, however, the use of pre-dispute clauses in premarital agreements is fairly common and courts generally accept them. Section 5 now tracks the language of the FAA regarding the general validity of arbitration agreements. Importantly, except for child-related disputes, the Act no longer contains a blanket prohibition of pre-dispute arbitration agreements. Consistent with the FAA, ordinary contract defenses (lack of voluntariness, fraud, duress, etc.) remain available as bases to challenge the validity of an arbitration agreement at the time of enforcement.

In contrast, disputes concerning child custody and child support do not pose the same risk of preemption. To our knowledge, no court has extended the FAA to child-related disputes. We believe a state's *parens patriae* responsibility justifies special limitations on the arbitration

of child-related disputes. Thus, Section 5 bars pre-dispute arbitration agreements for child-related awards unless the parties reaffirm the agreement at the time of the dispute or the agreement was incorporated in a court decree – such as a marital settlement agreement.

Additional changes:

SECTION 3. SCOPE. This section establishes the general coverage of the act and lists particular determinations that are beyond an arbitrator’s powers. Subsection (b)(5) is a bracketed provision permitting states to carve out additional categories of disputes from arbitration. A 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 trend appears to be in the direction of permitting arbitration of child-related disputes as long as the judicial role is protected. By our research, fewer than a dozen states now prohibit the submission of child-related disputes to arbitration. Moreover, at least one state supreme court has held that a decision by parents to submit their custody dispute to arbitration is constitutionally protected. See *Fawzy v. Fawzy*, 973 A.2d 347, 360 (N.J. 2009). As a matter of policy, the Committee supports inclusion of child-related disputes, so long as courts retain their essential role in overseeing awards affecting children. As noted, the Act has strengthened the judicial role in reviewing child-related awards.

SECTION 4. APPLICABLE LAW. The draft now includes a directive that the arbitrator must apply the law of the forum state, including its choice of law rules, in determining the merits of a family law dispute. This is in line with the approach of existing state family law arbitration statutes.

SECTION 5. ARBITRATION AGREEMENT. The new draft makes clear that pre-dispute agreements to arbitrate child-related disputes must be affirmed at the time of enforcement unless the agreement has been incorporated in a prior court decree. This change permits a common form of pre-dispute agreement that appears in divorce settlements through which parties agree to arbitrate future disputes concerning the settlement.

SECTION 7. MOTION FOR JUDICIAL RELIEF. This section is in response to concerns raised in 2015 of the need for a section providing a framework for motions for judicial relief.

SECTION 8. QUALIFICATION AND SELECTION OF ARBITRATOR. The standards governing arbitrator qualifications apply to all arbitrators, whether selected by the parties or the court. The parties, however, may waive these standards.

SECTION 10. PARTY PARTICIPATION. The Act now gives a party an absolute right to be accompanied by an individual who will not be called as a witness. This was, in part, in response to concerns expressed by groups who wanted to ensure that an arbitrator would not exclude a domestic violence advocate.

SECTION 11. TEMPORARY AWARDS. The Drafting Committee believes the power to grant temporary awards and remedies is an important dimension of family law arbitration. Interim support and custody awards as well as restraining orders are often necessary. A temporary award can be confirmed.

SECTION 12. PROTECTION OF PARTY OR CHILD. Section 12(a) now gives the court exclusive authority to decide whether to proceed with arbitration in cases involving domestic violence. In addition, Section 12(b) now requires termination of any arbitration of a child-related dispute if the arbitrator has a reasonable basis for believing that a child is subject to abuse or neglect.

SECTION 13. POWERS AND DUTIES OF ARBITRATOR. The arbitrator's powers were revised to include the power to meet with or interview a child who is the subject of a child-related dispute. The arbitrator may also appoint a representative for a child.

SECTION 16. CONFIRMATION. On motion of a party, a court has a duty to confirm an award if no party is challenging it. For a child-related award, however, even when no party is challenging it, the court may not confirm unless it finds that the award on its face complies with state law and is in the best interests of the child. The Drafting Committee believes this makes the draft consistent with the approach in many states toward parenting agreements.

SECTION 17. CHANGE OF UNCONFIRMED AWARD BY ARBITRATOR. The arbitrator's duty to provide notice of a changed award has been clarified.

SECTION 19. VACATION OR AMENDMENT OF UNCONFIRMED AWARD. In response to several comments during last year's reading, the act now tracks the RUAA in providing traditional grounds for vacating an arbitration award, except for review of child-related awards.

The provisions governing review of child-related awards have been restructured and clarified. A discretionary de novo review option has been added. 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. The bracketed provision accommodates these competing approaches.

The bracketed 90-day time period for filing a motion to vacate is the time frame most often found in family law arbitration statutes. The draft, as written, 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, 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 21. JUDGMENT ON AWARD. A new section has been added to direct courts to enter judgment after confirming or vacating an award.

SECTION 22. MODIFICATION OF CONFIRMED AWARD OR JUDGMENT. The post-decree modification section has been revised to clarify the options facing the parties. The parties should follow the dispute resolution method specified in the decree. If no method is specified, then the parties can agree to arbitrate or, in the absence of agreement, proceed under other law.

SECTION 25. IMMUNITY. The arbitrator immunity section now includes a provision recognizing that the act supplements any immunity under other law. It also tracks the RUAA by including a reference to “arbitration organization” as protected by the immunity.