

D R A F T
FOR DISCUSSION ONLY

FAMILY LAW ARBITRATION ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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ON UNIFORM STATE LAWS

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October 6, 2015

FAMILY LAW ARBITRATION ACT

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Prefatory Note

Arbitration, while used extensively in labor law and contracts, has only recently become an option in family law cases. Arbitration is a process in which the parties, usually spouses, agree to submit one or more issues arising from the dissolution of their relationship to a neutral third party for resolution. Arbitration resembles litigation in that a third person makes a decision based on the facts presented. The major difference is that the parties choose and pay for the arbitrator. The parties can choose a family law specialist who has represented both fathers and mothers or a retired domestic relations judge to arbitrate part, or all, of a case.

The move toward alternative dispute resolution developed in response to increasing number of contested family law cases on court dockets and to social science literature about the harm to children from prolonged adversarial disputes. Mediation, once voluntary, has become mandatory in many jurisdictions before parties can seek a court date. Mediators cannot advise on or recommend an outcome if the parties cannot reach agreement. Arbitration offers an alternative for those who want a faster, more confidential, potentially less adversarial proceeding with an experienced decision-maker. The arbitrator decides the dispute rather than making recommendations or helping the parties resolve their own dispute.

Arbitration clauses have begun to appear in premarital, separation and mediated settlement agreements. The American Arbitration Association has developed a family dispute service and offers mediation services, as well as arbitration. As early as 1990, the American Academy of Matrimonial Lawyers (AAML) adopted Rules for Arbitration of Financial Issues. In 2005, the AAML adopted a Model Family Law Arbitration Act. Although no state has adopted its act, the AAML conducts training to certify family law arbitrators. Several states have statutes authorizing arbitration of property and support issues; others allow custody. Other states use existing arbitration law for family law disputes.

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 a free-standing 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's the original Uniform Arbitration Act or the 2000 Revised Uniform Arbitration Act. In 2013 the Uniform Law Commission approved a drafting committee to write a Family Law Arbitration Act. The Committee originally agreed that 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, would be preferable because it would provide a single statutory scheme for family law attorneys and arbitrators to consult when engaging in family law arbitration. It would avoid ambiguity that might arise through an “incorporation by reference” approach. In

1 particular, if family law arbitrators were to be governed in part by existing commercial
2 arbitration statutes, the judicial interpretations of those laws might not be appropriate for family
3 law arbitration. The applicability of those precedents, in other words, would be an ongoing
4 question. Drafting a free standing act proved to be difficult because there are some parts of
5 existing arbitration law, especially those relating to procedures and general arbitration practice
6 that seem equally applicable to family law.

1 **FAMILY LAW ARBITRATION ACT**

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

4 **SECTION 2. DEFINITIONS.** In this [act]:

5 (1) “Arbitration under this [act]” means the determination of a family law dispute by an
6 arbitrator.

7 (2) “Arbitration agreement” means a voluntary agreement signed by the parties
8 submitting a family law dispute to binding arbitration under this [act].

9 (3) “Arbitrator” means one or more neutral individuals selected or appointed to make an
10 award in a family law dispute that is subject to an arbitration agreement

11 (4) “Award” means a written decision by an arbitrator.

12 (5) “Confirmation” means a court order affirming an arbitration award or incorporating it
13 in a judgment.

14 (6) “Court” means [the family court] [insert name of a tribunal authorized by law of this
15 state other than this [act] to hear a family law dispute].

16 (7) “Custodial responsibility” means a power or duty relating to caretaking authority or
17 decision-making authority for a child. The term includes physical custody, legal custody,
18 parenting time, right to access, and visitation.

19 (8) “Family law dispute” means a contested issue arising under the family or domestic
20 relations law of this state regarding characterization, valuation, or division of property or debt;
21 [spousal maintenance] [alimony] [spousal support]; [separate maintenance]; child support;
22 [custodial responsibility;] rights or obligations arising from a premarital, marital, or
23 [separation][property settlement][marital settlement][,] [or [cohabitation] agreement; [rights or

obligations arising from [cohabitation][,] [or] [domestic partnership][,] or civil union;] [a marital tort;] or attorney's fees, costs, and expenses.

(9) "Protection order" means an injunction or other order, issued by a tribunal under the domestic-violence, family-violence, or anti-stalking laws of the issuing State, to prevent an individual from engaging in a violent or threatening act against, harassment of, contact or communication with, or physical proximity to, another individual who is a party or a child under the custodial responsibility of a party.

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

(11) "Person" means an individual, estate, business or nonprofit entity, [public corporation, government or governmental subdivision, agency, or instrumentality,] or other legal entity. [The term does not include a public corporation or government or governmental subdivision, agency, or instrumentality.]

(12) "Record" 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.

(13) "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.

(14) "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.

1 **Comment**

2 Most of the definitions follow other uniform laws except to the extent this act needs
3 different or additional definitions.

4
5 The RUAA defines “court” as a court of competent jurisdiction in this state. Because this
6 Act authorizes arbitration of family law disputes, the definition of court means a family court or
7 the court authorized to hear family law cases. Some states use a court of general jurisdiction such
8 as a district or circuit court, others have a uniform family court, and others have a division or
9 department of the court of general jurisdiction that hears family law cases only.

10
11 The definition of “arbitrator” includes one or more neutral individuals. Because most
12 family law cases will have only one arbitrator, the term arbitration organization was not
13 included.

14
15 The term “custodial responsibility,” taken from the 2012 Uniform Deployed Parents
16 Custody and Visitation Act, is broad enough to cover the myriad terms now used across the
17 country. Some states still refer to custody and visitation while others use the term “parenting
18 time.” Texas uses managing conservators. The broader term includes all issues relating to
19 custody, including legal custody, physical custody or residency and visitation.

20
21 The definition of family law dispute tries to cover the wide range of topics that fall under
22 the jurisdiction of the family court in most states – issues relating to defining, valuing and
23 dividing the property of the parties; awards of spousal support; awards of child support, and
24 attorney’s fees. “Custodial responsibility” is bracketed because some states do not allow anyone
25 other than a judge to determine “best interests of the child.” Other items that may fall within the
26 jurisdiction of the family court are the rights or obligations arising out of various types of
27 agreements, separate maintenance actions that allow for support for parties legally living
28 separate and apart. The brackets allow states to incorporate the terminology used in the state.
29 The items of marital tort and rights arising from cohabitation are bracketed because not all states
30 allow these actions.

31
32 “Order of Protection” tracks the definition of “Protection order” in the Uniform Interstate
33 Enforcement of Domestic Violence Protection Orders Act but adds an order protecting a child of
34 the parties.

35
36 The terms “person” “record,” “sign,” and “state” comport with the definitions used in
37 other uniform laws.

38
39 **SECTION 3. SCOPE.**

40 (a) This [act] governs the arbitration of a family law dispute pursuant to an arbitration
41 agreement.

42 (b) Parties may agree to submit to arbitration an existing family law dispute or, to the

1 extent permitted under subsection (c) or the Federal Arbitration Act, 9 U.S.C. Section 2[, as
2 amended], a family law dispute that may arise in the future.

3 (c) Parties may agree to submit to arbitration a family law dispute that may arise after the
4 parties have entered into a [parenting][,] [separation] [property settlement] [marital settlement][,]
5 [or] [domestic partnership] [civil union][,] [or] cohabitation] agreement that provides for
6 arbitration of future disputes relating to the subject matter of the agreement, including a family
7 law dispute submitted to arbitration under Section 21 or 22.

8 **Comment**

9 Whether parties can enforce pre-dispute arbitration agreements in the form of premarital
10 agreements or marital agreements entered into long before the divorce or separation has been a
11 contentious issue. In labor and contract cases, predispute arbitration clauses are common. The
12 committee consensus was to exclude predispute agreements because of the policy that arbitration
13 should be a voluntary choice made at the time the dispute arises. Parties are free to include
14 arbitration clauses in their premarital agreements, but the act would require enforcement only if
15 the agreement is affirmed contemporaneously by the parties. Parties who have negotiated a
16 parenting plan, a property settlement agreement, or other agreement in a paternity or divorce
17 action may insert a provision that any future disputes will go to arbitration rather than to court.
18

19 If the parties live in different states, run a business that operates in more than one state, or
20 own property in two or more states, the Federal Arbitration Act, 9 U.S.C. 1-16, could apply.
21 There is a long line of cases enforcing arbitration agreements reached by the parties either before
22 or after the dispute arises. In those cases, predispute agreements would probably be upheld.
23

24 **SECTION 4. APPLICABLE LAW.**

25 (a) Unless otherwise provided in this [act], the law applicable to arbitration under this
26 [act] is [the law and procedural rules of this state governing binding arbitration] [insert state law
27 on binding arbitration].

28 (b) The law of this state other than this [act], including this state's choice-of-law rules,
29 governs a family law dispute subject to arbitration under this [act].

30 **Comment**

31 This Act recognizes the differences in family law disputes and commercial arbitration.

1 Many lawyers are familiar with the basic arbitration law of their state. Part (a) incorporates by
2 reference to retain the main part of procedure applicable to arbitration. In nineteen states, the
3 arbitration law is the Revised Uniform Arbitration Act. In the majority of states, the Uniform
4 Arbitration Act is still used.

5
6 Part (b) provides that the law of this state, including choice of law principles, govern. In
7 most cases, parties can consent to personal jurisdiction but not subject matter jurisdiction. The
8 parties may choose to use the law of another state to apply to their dispute. However, the state
9 which is the home state of a child is the one which has jurisdiction to hear a custody
10 determination.

11 12 **SECTION 5. MOTION FOR JUDICIAL RELIEF.**

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

16 (b) A motion for judicial relief under this [act] must be made and heard in the manner
17 provided by law of this state other than this [act] or rule of court for making and hearing a
18 motion.

19 (c) If a civil action is pending involving the family law dispute subject to arbitration
20 under this [act], notice of a motion for judicial relief under this [act] must be given in the manner
21 provided by law or rule of court for serving a motion in a pending case. If no civil action is
22 pending, notice of an initial motion under this [act] must be served in the manner provided by
23 law for service of a summons in a civil action.

24 **Comment**

25 Motion practice follows existing state law.

26 **SECTION 6. PROTECTION OF PARTY OR CHILD.**

27 (a) If a party is subject to a protection order entered before or during arbitration under
28 this [act], the arbitration may not proceed unless each party in a record affirms the agreement to
29 arbitrate and the court finds:

1 (1) the affirmance is informed and voluntary; and

2 (2) arbitration is not inconsistent with an outstanding protection order.

3 (b) If an arbitrator determines there is a reasonable basis to believe that a party's
4 safety or ability to participate effectively in the arbitration is at risk, the arbitration may not
5 proceed unless each party in a record affirms the agreement to arbitrate and the arbitrator finds:

6 (1) the affirmance is informed and voluntary; and

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

9 (c) If an arbitrator determines there is a reasonable basis under law of this state other
10 than this [act] to believe that a child under the custodial responsibility of a party is abused or
11 neglected, the arbitrator shall suspend the arbitration and report the abuse or neglect to the [state
12 child protection authority]. The arbitration may not proceed unless each party in a record affirms
13 the agreement to arbitrate and the arbitrator determines:

14 (1) the affirmance is informed and voluntary; and

15 (2) reasonable procedures are in place to protect the child from risk of harm.

16 (d) An arbitrator may make a temporary award pursuant to Section 11 to protect a party
17 or child from harm, harassment, or intimidation.

18 (e) A party may make a motion to the court for a stay of arbitration or review of any
19 determination or award made by an arbitrator under this section.

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

1 **Comment**

2 The presence of domestic or intimate partner violence can vitiate the voluntariness of the
3 consent to arbitrate. Most family lawyers routinely screen for domestic violence. An arbitrator
4 needs to be sensitive to the potential for violence that could adversely affect a party's ability to
5 participate freely and voluntarily in the process. If there is a protective order in place or the
6 arbitrator suspects abuse that would impair a party's ability to participate in the arbitration, the
7 arbitrator needs to make sure both parties can proceed. For example, if the protective order bars
8 the parties from being in the same room with each other, arbitration could not proceed unless it
9 were shuttle or caucus type of arbitration. If the protective order can be modified to allow the
10 parties to be in the same room for purposes of the arbitration proceeding, arbitration could
11 proceed if the parties want it to and the arbitrator believes it is "safe."

12
13 Nothing precludes a party at any time from seeking a protection from abuse order from
14 the appropriate court.

15
16 This Act makes an arbitrator a mandatory reporter if he or she suspects that a child of the
17 parties is being abused or neglected. Nothing in this Act is meant to replace the state standards
18 for finding abuse and neglect.
19

20 **SECTION 7. ARBITRATION AGREEMENT.**

21 (a) An arbitration agreement may not authorize an arbitrator to:

- 22 (1) grant a [divorce] [dissolution of marriage];
23 (2) terminate parental rights;
24 (3) grant an adoption or guardianship of a minor or incapacitated individual; [or]
25 (4) determine the status of [dependency] [a child in need of protection][;or
26 (5) [insert other status determination to be excluded from arbitration]].

27 (b) An arbitration agreement must:

- 28 (1) be in a record signed by the parties;
29 (2) identify the arbitrator or a method of selecting an arbitrator;
30 (3) identify the family law dispute the parties intend to arbitrate; and
31 (4) include an acknowledgment by each party that disclosures substantially

32 equivalent to the following have been made in plain language:

1 (A) Once the parties voluntarily sign a valid agreement to arbitrate, the
2 agreement is binding.

3 (B) Arbitration may not be appropriate for a dispute involving domestic
4 violence because arbitration does not offer the same protections as the judicial system.

5 (C) A party may hire an attorney before or after agreeing to arbitrate and
6 may be represented by an attorney throughout the arbitration.

7 (D) Parties are responsible for all the costs of arbitration, including the
8 fees of the arbitrator.

9 (E) An arbitration award is enforceable as a judgment if the court
10 confirms the award.

11 (F) A party may challenge an arbitration award in court only for limited
12 reasons.

13 (c) If there is a dispute whether an enforceable agreement to arbitrate under this [act]
14 exists, the court shall decide the issue.

15 **Comment**

16 The agreement to arbitrate is the foundational document that governs the arbitration. To
17 ensure the parties voluntarily enter an arbitration agreement, the agreement must be in a record
18 which identifies the arbitrator or method of selecting the arbitrator and the family law dispute
19 they want to arbitrate. In addition, the record contains an acknowledgement that each party has
20 been advised in plain English about key aspects of arbitration – that once they sign the
21 agreement, the parties have given up their right to go to court on the same issues; that arbitration
22 may not protect a victim of violence as well as a court process; that parties have the right to an
23 attorney at all times; that parties must pay for the costs of arbitration, including the arbitrator;
24 that the award is enforceable as a judgment if it is confirmed by a court; and there are relatively
25 few bases on which to attack an arbitration award. The disclosures emphasize that arbitration is a
26 voluntary choice of the parties, not something one is forced to do.

27
28 **There are cases on (c) – will add to comments.**

1 **SECTION 8. QUALIFICATION AND SELECTION OF ARBITRATOR.**

2 (a) If the parties have agreed on an arbitrator or the method of selecting an arbitrator, the
3 agreement controls.

4 (b) If a selected arbitrator is unable to act or if the agreed-upon method of selecting an
5 arbitrator fails, on motion of a party, the court shall appoint an arbitrator.

6 (c) Unless waived by the parties in a signed record, an arbitrator appointed by the court:

7 (1) must be either:

8 (A) an attorney in good standing currently admitted to practice [or an
9 attorney or judge on retired status] in a state; or

10 (B) a licensed professional in a field relevant to the family law dispute that
11 is being arbitrated; and

12 (2) must have training in identifying domestic violence and child abuse
13 [according to standards established under law of this state other than this [act] for a judicial
14 officer assigned to hear a family law dispute].

15 **Comment**

16 Family law cases are unique. The parties can agree to select whomever they please for an
17 arbitrator because of experience, subject matter, or other reason. The arbitrator selected by the
18 parties does not have to be a lawyer or other professional. The parties may want an arbitrator for
19 only one part of a case, such as to determine between competing values on a rare collection.
20

21 If the court is appointing the arbitrator, the arbitrator should be a lawyer or a licensed
22 professional in a field relevant to the family law dispute that is being arbitrated and have training
23 in recognizing intimate partner violence and child abuse.
24

25 **SECTION 9. DISCLOSURE BY ARBITRATOR; DISQUALIFICATION.**

26 (a) Before accepting selection or appointment, an individual who is requested to serve as
27 an arbitrator, after making reasonable inquiry, shall disclose to all parties any known fact a
28 reasonable individual would believe is likely to affect:

1 (1) the impartiality of the arbitrator in the arbitration proceeding, including bias,
2 a financial or personal interest in the outcome of the arbitration, or an existing or past
3 relationship with a party, party's attorney, witness, or another arbitrator; or

4 (2) the arbitrator's ability to make a timely award.
5

6 (b) An arbitrator, the parties, and the parties' attorneys have a continuing obligation to
7 disclose to parties any fact a reasonable individual would believe is likely to affect the
8 impartiality of the arbitrator.

9 (c) An objection to the selection, appointment, or continued service of an arbitrator, and
10 a motion in court for a stay of arbitration and disqualification of the arbitrator must be made
11 according to the law of this state other than this [act] and procedural rules governing binding
12 arbitration.

13 (d) If the parties agree to discharge an arbitrator or the arbitrator is disqualified, the
14 parties by agreement shall select a new arbitrator or may request the court to appoint another
15 arbitrator.

16 **Comment**

17 If the state has the Uniform Arbitration Act, it may want to adopt the more detailed
18 provisions of the Revised Uniform Arbitration Act on disclosure and disqualification.
19

20 **SECTION 10. IMMUNITY OF ARBITRATOR.**

21 (a) An arbitrator, or an arbitrator's employer, partnership, or organization acting in that
22 capacity, is immune from civil liability according to the law of this state other than this [act] and
23 procedural rules governing arbitrator immunity in binding arbitration.

24 (b) Immunity under this section supplements immunity under law of this state other than
25 this [act].

1 **Comment**

2 Immunity for arbitrators is essential if arbitration is to serve the purpose of helping
3 parties resolve disputes and declogging courts. If a state does not have the Revised Uniform
4 Arbitration Act (which is incorporated by reference in Section 4 (a), the state may want to add to
5 this section the language of section 14 of RUAA:
6

7 (c) An arbitrator's failure to make a disclosure required by Section 8 does not
8 cause the arbitrator to lose immunity under this section.

9 (d) An arbitrator is not competent to testify, and may not be required to produce
10 records, in a judicial, administrative, or similar proceeding about a statement, conduct,
11 decision, or ruling occurring during the arbitration, to the same extent as a judge of a
12 court acting in a judicial capacity. This subsection does not apply:

13 (1) to the extent disclosure is necessary to determine a claim by the
14 arbitrator against a party to the arbitration; and

15 (2) to a hearing on a motion under Section 19(a)(2) or (3) to vacate an award
16 if there is prima facie evidence that a ground for vacating the award exists.

17 (e) If a person commences a civil action against an arbitrator arising from the
18 services of the arbitrator or if a person seeks to compel the arbitrator to testify or produce
19 records in violation of subsection (d), and the court decides that the arbitrator is immune
20 from civil liability or is not competent to testify, the court shall award the arbitrator
21 reasonable attorney's fees, costs, and reasonable expenses of litigation.
22

23 **SECTION 11. TEMPORARY OR PROVISIONAL ORDER OR AWARD.**

24 (a) Before an arbitrator is selected or appointed and authorized and able to act, the court,
25 on motion of a party, may enter a temporary order under [insert this state's statutes or rules
26 governing issuance of a temporary order in a family law dispute] and any other provisional
27 remedy necessary to protect the effectiveness of the arbitration to the same extent as in a civil
28 action.

29 (b) After an arbitrator is selected or appointed and is authorized and able to act:

30 (1) on motion of a party, the arbitrator may make a temporary award under [insert
31 this state's statutes or rules governing a temporary order in a family law dispute] to the same
32 extent as a court in a family law dispute and any other provisional award necessary to protect the
33 effectiveness of the arbitration to the same extent as in a civil action;

34 (2) if the matter is urgent and the arbitrator is not able to act in a timely manner or

1 provide an adequate remedy, a party may move the court for a temporary order or provisional
2 remedy.

3 (b) At any time before the court confirms the final award, on motion of a party, the court
4 may confirm, correct, or vacate under Section 18, 19, or 20 a temporary award made under
5 subsection (b).

6 **Comment**

7 Parties in family law cases often seek temporary orders to maintain the status quo
8 pending resolution of the case. Temporary restraining orders, both personal and economic, are
9 common. The parties may have already obtained some temporary orders before submitting the
10 case to arbitration or may decide to seek some after. The arbitrator can issue these orders in an
11 arbitration case. Typical orders are for temporary child support, maintenance, residency of the
12 child, and orders restraining the selling of real and personal property, attorney fees.

13 14 **SECTION 12. PARTY PARTICIPATION.**

15 (a) A party may:

16 (1) be represented in an arbitration under this [act] by an attorney;

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

18 (3) participate in the arbitration to the full extent permitted under the law of this
19 state other than this[act] and procedural rules governing binding arbitration.

20 (b) A party may not communicate ex parte with an arbitrator except to the extent allowed
21 in a family law dispute for communication with a judge.

22 **Comment**

23 The parties have the right to be represented throughout an arbitration. In addition, the
24 party may bring a support person.

25 26 **SECTION 13. CONFIDENTIALITY AND SEALING.**

27 (a) Unless otherwise required by law of this state other than this [act], parties may agree
28 that the arbitration is confidential.

(b) On motion of a party, the court may order under law of this state other than this [act] that an arbitration record or award be sealed or redacted.

Comment

One of the main reasons parties choose arbitration is to prevent their dirty laundry from becoming public record. The parties may agree to keep the arbitration proceeding confidential and to seek to keep the award sealed or redacted.

SECTION 14. POWERS OF ARBITRATOR.

(a) An arbitrator may conduct an arbitration in a manner the arbitrator considers appropriate for a fair and expeditious disposition and, unless otherwise agreed by the parties, select the rules for conducting the arbitration.

(b) Unless otherwise provided in an arbitration agreement, the arbitrator's powers are the same as a court in a family law dispute under law of this state other than this [act] and include the power to:

- (1) hold conferences with the parties;
- (2) determine the date, time, and location of a hearing;
- (3) appoint an expert;
- (4) 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;
- (5) compel discovery concerning an issue being arbitrated and determine the date, time, and place of discovery;
- (6) determine the admissibility, relevance, materiality, and weight of evidence;
- (7) permit a deposition of a witness for use as evidence at the hearing;
- (8) prohibit a party from disclosing trade secrets and privileged, confidential, or other information protected from disclosure;

(9) appoint an attorney, guardian ad litem, or other representative for a child;

(10) impose procedures to protect a party or a child under the custodial

responsibility of a party from risk of harm, harassment, or intimidation;

(11) allocate arbitration fees, attorney's fees, expert witness fees, and other costs

between the parties or to one party; and

(12) require each party to provide:

(A) a copy of any relevant court order;

(B) information required to be disclosed in a family law dispute under law

of this state other than this [act]; and

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

(c) On motion of a party, the court may enforce a subpoena or other interim award issued

by the arbitrator for the production of evidence during the arbitration and the fair and expeditious

disposition of the family law dispute.

Comment

The powers of an arbitrators may be set by the arbitration agreement. The usual broad powers given an arbitrator include the power to conduct the hearing; administer oaths to parties and witnesses; to allow any party to conduct prehearing discovery by interrogatories, deposition, requests for production of documents, or other means; to determine the admissibility of evidence; to subpoena witnesses or documents upon his own initiative or request of a party. In addition to those given in the Revised Uniform Arbitration Act, the arbitrator has the power to appoint a representative for the child.

The arbitrator does not have power to alter the terms of the arbitration agreement or to award damages otherwise than in accordance with the law. The powers of an arbitrators depend to a large extent on what the parties agree the arbitrator is to decide. Generally, under the Revised Uniform Arbitration Act, the arbitrator has several enumerated powers. This act adds the power to appoint a representative for the child. Will add some state family law arbitration power sections.

RUAA Section 15 provides:

(a) An arbitrator may conduct an arbitration in such manner as the arbitrator

1 considers appropriate for a fair and expeditious disposition of the proceeding. The
2 authority conferred upon the arbitrator includes the power to hold conferences with the
3 parties to the arbitration proceeding before the hearing and, among other matters,
4 determine the admissibility, relevance, materiality and weight of any evidence.

5 (b) An arbitrator may decide a request for summary disposition of a claim or
6 particular issue:

7 (1) if all interested parties agree; or

8 (2) upon request of one party to the arbitration proceeding if that party
9 gives notice to all other parties to the proceeding, and the other parties have a reasonable
10 opportunity to respond.

11 (c) If an arbitrator orders a hearing, the arbitrator shall set a time and place and
12 give notice of the hearing not less than five days before the hearing begins. Unless a
13 party to the arbitration proceeding makes an objection to lack or insufficiency of notice
14 not later than the beginning of the hearing, the party's appearance at the hearing waives
15 the objection. Upon request of a party to the arbitration proceeding and for good cause
16 shown, or upon the arbitrator's own initiative, the arbitrator may adjourn the hearing
17 from time to time as necessary but may not postpone the hearing to a time later than that
18 fixed by the agreement to arbitrate for making the award unless the parties to the
19 arbitration proceeding consent to a later date. The arbitrator may hear and decide the
20 controversy upon the evidence produced although a party who was duly notified of the
21 arbitration proceeding did not appear. The court, on request, may direct the arbitrator to
22 conduct the hearing promptly and render a timely decision.

23 (d) At a hearing under subsection (c), a party to the arbitration proceeding has a
24 right to be heard, to present evidence material to the controversy, and to cross-examine
25 witnesses appearing at the hearing.

26 (e) If an arbitrator ceases or is unable to act during the arbitration proceeding, a
27 replacement arbitrator must be appointed in accordance with Section 11 to continue the
28 proceeding and to resolve the controversy.

29
30 The RUAA Section 17 provides the following powers for an arbitrator on
31 discovery:

32
33 (a) An arbitrator may issue a subpoena for the attendance of a witness and for
34 the production of records and other evidence at any hearing and may administer oaths. A
35 subpoena must be served in the manner for service of subpoenas in a civil action and,
36 upon [motion] to the court by a party to the arbitration proceeding or the arbitrator,
37 enforced in the manner for enforcement of subpoenas in a civil action.

38 (b) In order to make the proceedings fair, expeditious, and cost effective, upon
39 request of a party to or a witness in an arbitration proceeding, an arbitrator may permit a
40 deposition of any witness to be taken for use as evidence at the hearing, including a
41 witness who cannot be subpoenaed for or is unable to attend a hearing. The arbitrator
42 shall determine the conditions under which the deposition is taken.

43 (c) An arbitrator may permit such discovery as the arbitrator decides is
44 appropriate in the circumstances, taking into account the needs of the parties to the
45 arbitration proceeding and other affected persons and the desirability of making the
46 proceeding fair, expeditious, and cost effective.

1 (d) If an arbitrator permits discovery under subsection (c), the arbitrator may
2 order a party to the arbitration proceeding to comply with the arbitrator's discovery-
3 related orders, issue subpoenas for the attendance of a witness and for the production of
4 records and other evidence at a discovery proceeding, and take action against a
5 noncomplying party to the extent a court could if the controversy were the subject of a
6 civil action in this State.

7 (e) An arbitrator may issue a protective order to prevent the disclosure of
8 privileged information, confidential information, trade secrets, and other information
9 protected from disclosure to the extent a court could if the controversy were the subject
10 of a civil action in this State.

11 (f) All laws compelling a person under subpoena to testify and all fees for
12 attending a judicial proceeding, a deposition, or a discovery proceeding as a witness
13 apply to an arbitration proceeding as if the controversy were the subject of a civil action
14 in this State.

15 (g) The court may enforce a subpoena or discovery-related order for the
16 attendance of a witness within this State and for the production of records and other
17 evidence issued by an arbitrator in connection with an arbitration proceeding in another
18 State upon conditions determined by the court so as to make the arbitration proceeding
19 fair, expeditious, and cost effective. A subpoena or discovery-related order issued by an
20 arbitrator in another State must be served in the manner provided by law for service of
21 subpoenas in a civil action in this State and, upon [motion] to the court by a party to the
22 arbitration proceeding or the arbitrator, enforced in the manner provided by law for
23 enforcement of subpoenas in a civil action in this State.
24

25 **SECTION 15. RECORD OF HEARING.**

26 (a) Except as otherwise provided by the arbitration agreement [or subsection (b)], an
27 arbitration hearing need not be recorded or transcribed unless ordered by the arbitrator or
28 requested by a party.

29 (b) The arbitrator shall make a recording, transcript, or other verbatim record of any part
30 of an arbitration hearing concerning [custodial responsibility or] child support in the manner
31 required by law of this state other than this [act] for a court in a family law dispute.

32 **Comment**

33 Traditional arbitration law requires a reasoned award. Because of the *parens patriae*
34 power of the court to protect children, even if the parents agree, this section requires an arbitrator
35 to provide a sufficient record for the trial court to review to determine if the arbitrator considered
36 the proper law and to see if the agreement furthers the child's best interest or at least does not
37 harm the child. In cases involving property division or spousal support the parties can agree to
38 not have a recording or transcript.

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(c) An award determining [custodial responsibility or] child support 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 dispute.

If the parties are able to arbitrate child custody or child support, most states require a sufficient record to see if the arbitrator complied with the law of the state. See *Fawzy v. Fawzy*, 973 A.2d 347 (N.J. 2009). On the issue of child custody, some states require findings of fact and conclusions of law. 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 guidelines is in the best interests of the child. See 45 C.F.R.302.56(f). The 2005 AAML’s Family Law Arbitration Act allows a party to ask a court to vacate an award for child support or child custody if not in the best interests of the child or if there is misconduct by the arbitrator.

SECTION 17. CHANGE OF AWARD BY ARBITRATOR. An arbitrator may

Change of award is provided in the Revised Uniform Arbitration Act. Section 20:

(a) On [motion] to an arbitrator by a party to an arbitration proceeding, the arbitrator may modify or correct an award:

- (1) upon a ground stated in Section 24(a)(1) or (3);
- (2) because the arbitrator has not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

- 1 (3) to clarify the award.
- 2 (b) A [motion] under subsection (a) must be made and notice given to all parties
- 3 within 20 days after the movant receives notice of the award.
- 4 (c) A party to the arbitration proceeding must give notice of any objection to the
- 5 [motion] within 10 days after receipt of the notice.
- 6 (d) If a [motion] to the court is pending under Section 22, 23, or 24, the court
- 7 may submit the claim to the arbitrator to consider whether to modify or correct the award:
- 8 (1) upon a ground stated in Section 24(a)(1) or (3);
- 9 (2) because the arbitrator has not made a final and definite award upon a
- 10 claim submitted by the parties to the arbitration proceeding; or
- 11 (3) to clarify the award.
- 12 (e) An award modified or corrected pursuant to this section is subject to Sections
- 13 19(a), 22, 23, and 24.
- 14

15 **SECTION 18. CONFIRMATION OF AWARD.**

- 16 (a) After receiving a copy of an award, including an award changed under Section 17, a
- 17 party may move for confirmation in the court with jurisdiction to enforce the award.
- 18 (b) Except as provided in subsection (c), the court shall issue a confirmation if the time
- 19 for making a motion under Section 19 or 20 to correct or vacate the award has expired and no
- 20 motion to correct or vacate the award is pending.
- 21 (c) The court may not confirm under subsection (b) an award involving [custodial
- 22 responsibility or] child support unless the court determines the award complies with law of this
- 23 state other than this [act].
- 24 (d) The court may confirm an arbitration award from another state if confirmation is
- 25 appropriate under the standards of this [act].
- 26 (e) On confirmation, an award is enforceable as a judgment.

27 **Comment**

28 Confirmation of award is required for a court to enforce the award. If a state does not

29 have the Revised Uniform Arbitration Act (which is incorporated by reference in Section 4 (a),

30 the state may want to add to this section the language of section 22 of RUAA:

31 **CONFIRMATION OF AWARD.** After a party to an arbitration proceeding receives

32 notice of an award, the party may make a [motion] to the court for an order confirming

33

1 the award at which time the court shall issue a confirming order unless the award is
2 modified or corrected pursuant to Section 20 or 24 or is vacated pursuant to Section 23.

3
4 **SECTION 19. CORRECTION OF AWARD BY COURT.**

5 (a) Not later than [30] days after a party receives a copy of an award, including an award
6 changed under Section 17, a party may move to correct the award in the court with jurisdiction to
7 enforce the award.

8 (b) The court shall correct the award if:

9 (1) there was an evident mathematical miscalculation or an evident mistake in the
10 description of a person, thing, or property referred to in the award;

11 (2) the arbitrator has made an award on a claim not submitted to the arbitrator
12 and the award may be corrected without affecting the merits of the decision upon the claims
13 submitted; or

14 (3) the award is imperfect in a matter of form not affecting the merits of the
15 decision on the claims submitted.

16 (c) Unless a motion under Section 20 to vacate the award is pending, the court shall
17 correct and confirm the award as corrected.

18 **Comment**

19 If the state is using the Uniform Arbitration Act, the RUAA Section 24 is more detailed
20 for Modification or Correction of an Award.

21
22 (a) Upon [motion] made within 90 days after the [movant] receives notice of the
23 award pursuant to Section 19 or within 90 days after the [movant] receives notice of a
24 modified or corrected award pursuant to Section 20, the court shall modify or correct the
25 award if:

26 (1) there was an evident mathematical miscalculation or an evident
27 mistake in the description of a person, thing, or property referred to in the award;

28 (2) the arbitrator has made an award on a claim not submitted to the
29 arbitrator and the award may be corrected without affecting the merits of the decision
30 upon the claims submitted; or

31 (3) the award is imperfect in a matter of form not affecting the merits of

1 the decision on the claims submitted.

2 (b) If a [motion] made under subsection (a) is granted, the court shall modify or
3 correct and confirm the award as modified or corrected. Otherwise, unless a motion to
4 vacate is pending, the court shall confirm the award.

5 (c) A [motion] to modify or correct an award pursuant to this section may be
6 joined with a [motion] to vacate the award.

7
8 **SECTION 20. VACATION OF AWARD.**

9 (a) On motion of a party, the court shall vacate an award if:

10 (1) the award determines [custodial responsibility or] child support and:

11 (A) based on the record of the arbitration hearing and any facts that have
12 arisen since the hearing, [the award is clearly erroneous under law of this state other than this
13 [act]] [the award is contrary to the best interests of the child]; or

14 (B) the record of the hearing or the statement of reasons in the award is
15 inadequate for the court to decide if there was clear error;

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

17 (3) there was evident partiality or corruption by the arbitrator;

18 (4) there was misconduct by the arbitrator prejudicing the rights of a party or a
19 child under the custodial responsibility of party;

20 (5) the arbitrator refused to postpone the hearing on a showing of sufficient cause
21 for postponement, refused to consider evidence material to the controversy, or otherwise
22 conducted the hearing so as to prejudice substantially the rights of a party or a child under the
23 custodial responsibility of a party;

24 (6) the arbitrator exceeded the arbitrator's powers;

25 (7) there was no agreement to arbitrate, unless the challenging party participated
26 in the arbitration proceeding and did not raise the objection before the beginning of the
27 arbitration hearing;

1 (8) the arbitration was conducted without proper notice of the initiation of the
2 arbitration so as to prejudice substantially the rights of a party or a child under the custodial
3 responsibility of a party; or

4 (9) the court finds any other basis for vacating the award under the law of this
5 state other than this [act] and procedural rules governing binding arbitration][insert state
6 statutory reference to state law on binding arbitration].

7 (b) A motion under this section must be filed not later than:

8 (1) [30] days after the party filing the motion receives a copy of the award or a
9 changed or corrected award, or

10 (2) [30] days after the ground of corruption, fraud, or undue means is known or
11 by the exercise of reasonable care could have been known to the party filing the motion.

12 (c) If the court vacates an award for any reason other than the absence of an enforceable
13 agreement to arbitrate, the court may order a rehearing before an arbitrator. If the reason for
14 vacating the award is that the award was procured by corruption, fraud, or other undue means or
15 there was evident partiality, corruption, or misconduct by the arbitrator, the rehearing must be
16 before a new arbitrator.

17 (d) If the court denies a motion to vacate an award, the court shall confirm the award
18 under Section 18 unless a motion under Section 19 to correct the award is pending.

19 **Comment**

20 This language is taken mainly from RUAA Section 23. This act includes additional bases
21 for vacation if the arbitration was conducted without proper notice of the initiation of the
22 arbitration so as to prejudice substantially the rights of a party *or a child under the custodial*
23 *responsibility of a party*; or the court finds any other basis for vacating the award under the law
24 of this state other than this [act] and procedural rules governing binding arbitration][insert state
25 statutory reference to state law on binding arbitration].
26

SECTION 21. CLARIFICATION OF CONFIRMED AWARD. If the meaning or effect of an award confirmed under Section 18 is in dispute, the parties may:

(1) request clarification from the arbitrator;

(2) agree to arbitrate the dispute before the original arbitrator or a new arbitrator; or

(3) proceed in court under law of this state other than this [act] regarding clarification of a court decree in a family law dispute.

Comment

The court may seek clarification of a confirmed award from the arbitrator or in court as in other family law cases.

SECTION 22. MODIFICATION BASED ON CHANGE IN CIRCUMSTANCE. If a dispute arises whether an award confirmed under Section 18 should be modified prospectively based on a change in circumstance occurring after confirmation which affects a party or a child under the custodial responsibility of a party, the parties may:

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

(2) proceed in court under law of this state other than this [act] regarding modification of a court decree in a family law dispute based on a change in circumstance.

Comment

While property divisions are final when made, issues of custodial responsibility and child support are modifiable based on a change of circumstances throughout the child's minority. Spousal support is modifiable throughout the duration of the award unless otherwise limited by agreement of the parties. The parties may choose to return to the arbitrator for further modifications or proceed in court. The fact that the parties arbitrated the original arrangements does not preclude going to court for modification.

1 **SECTION 23. RIGHT OF APPEAL.**

2 (a) A party may appeal a final judgment entered under this [act] or a court order under
3 this [act]:

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

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

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

7 (4) revising the award; or

8 (5) vacating the award without ordering a rehearing.

9 (b) An appeal under this section must be taken in the same manner as from a judgment or
10 order in a civil action.

11 **Comment**

12 A party may appeal an award. This act follows the Revised Uniform Arbitration Act.
13

14 **SECTION 24. ENFORCEMENT OF CONFIRMED AWARD.**

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

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

20 **Comment**

21
22 Once an arbitration award has been confirmed, it can be enforced as any judgment of the
23 court.
24

25 **SECTION 25. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

26 applying and construing this uniform act, consideration must be given to the need to promote
27 uniformity of the law with respect to its subject matter among states that enact it.

1 **SECTION 26. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**
2 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the Electronic
3 Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not
4 modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize
5 electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C.
6 Section 7003(b).

7 **SECTION 27. APPLICABILITY.** This [act] applies to an arbitration of a family law
8 dispute pursuant to an arbitration agreement made on or after [the effective date of this [act]]. If
9 the agreement was made before [the effective date of this [act]], the parties may agree in a record
10 that this [act] applies to the arbitration.

11 **SECTION 28. EFFECTIVE DATE.** This [act] takes effect