

MEMO TO ACCOMPANY FAMILY LAW ARBITRATION ACT DRAFT

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The March draft of the FLAA reflects the comments from the November drafting committee meeting, comments from two members of Style Committee, and our conference call. Chair Barbara Atwood and I have tweaked sections as we thought appropriate.

We have continued on the path of incorporating the state's current law on arbitration – be it the RUAA or UAA. We have tried to include only those provisions that make family law different, i.e. best interests of the children, awareness of domestic violence, etc. A still existing concern is that the UAA does not have many of the provisions that the RUAA has, such as an immunity section and provisional remedies section. We have included certain of these provisions that seem essential to the family law arbitration system. State law would not be uniform if this family law arbitration act does not contain such core provisions.

Specific areas of concern for the committee to consider:

SECTION 2. DEFINITIONS.

We have deleted the definitions of “award” and “confirmation.” These terms are given substantive meaning in later sections of the Act. Neither the RUAA nor the UAA defines these terms.

- The definition of “arbitrator” was amended to include one or more individuals selected to make an award that is subject to arbitration. We still have not defined “arbitration organization.” Do we need to?
- “Court” - The definition not the same as other ULC acts. Is this a problem?

Court in other acts is:

UDPCVA (4) “Court” means a tribunal [, including an administrative agency,] authorized under law of this state other than this [act] to make, enforce, or modify a decision regarding custodial responsibility.

UCAPA - “Court” means an entity authorized under the law of a state to establish, enforce, or modify a child-custody determination.

- Child-related dispute is a new definition that includes child custody, parenting time, parental responsibility or authority or support of a child. Should we leave in child support? Should we go back to custodial responsibility definition used in other acts?

UCPCVA - “Custodial responsibility” includes all powers and duties relating to caretaking authority and decision-making authority for a child. The term includes physical custody, legal custody, parenting time, right to access, visitation, and authority to grant limited contact with a child.

(6) “Decision-making authority” means the power to make important decisions regarding a child, including decisions regarding the child’s education, religious training, health care, extracurricular activities, and travel. The term does not include

the power to make decisions that necessarily accompany a grant of caretaking authority.

- Party – do we really need a definition of a party?
- Person – We added it back because of the notice section which uses the word “person” as does the immunity section. This is standard ULC definition.
- Do we need to define “order of protection” when it is used in only one section?

We do not define “knowledge” which RUAA and AAML do. The word is used only in one section – the section on arbitrator disclosure.

SECTION 3. NOTICE

This is taken from the RUAA. Because we require parties to take action after receiving notice, it seems that we need to define it. Following the approach of the RUAA, we provide a separate section rather than including it in a definition.

SECTION 4. SCOPE. We have simplified this section and the alternatives of opting in or out of the arbitration of child-related disputes. One of our goals was to not have the draft tilt negatively away from arbitration.

Examples of family law disputes will remain in the comments –characterization, classification, valuation, possession, and division of real and personal property; determination and allocation of debt; maintenance, alimony, or spousal support; custodial responsibility; child support; interpretation and enforcement of a premarital, marital, or separation, property or marital settlement agreement; and costs, expenses, and attorney’s fees.

Please consider whether the granting of a divorce or separation belongs in that list of exclusions. Since the arbitrator’s award is ineffective until it is confirmed, consider whether we need to permit the arbitrator to find the grounds for divorce in his or her award. This apparently is the practice in Texas and other states. The arbitrator will find that the grounds for divorce exist. If the court affirms the award, the decree then also grants the divorce.

SECTION 5. APPLICABLE LAW. This remains a tough section.

- (a) Incorporates state law governing the arbitration process in a given state (RUAA and UAA). There is also the question of jurisdiction – we covered in Scope 4(a)“within the subject matter and personal jurisdiction” of the court. Do we need any reference here or in comments to UCCJEA? Also, should we include a reference to Section 2 of the Federal Arbitration Act?
- (b) This section raises a couple of issues. It allows the parties to designate the law of a state in general, with a default back to the law that a court of the state would apply. But, with respect to child-related issues, choice of law by the parties is not available. The arbitrator must apply the law that a court of “this state” would apply with respect to child-related issues. That reference brings in the UCCJEA by implication. In other words, if Arizona is the home state, the parties would not be permitted to designate Kansas to determine child-related issues.
- (c) But if the parties in a premarital agreement designate a certain state to interpret the

agreement, I think that is valid (*Delorean* case). The section also raises the problem of “religious” law. Limiting choices to law of a “state” should preclude designation of a foreign country’s law or religious law that would be contrary to public policy. Are we clear enough?

SECTION 6. MOTION FOR JUDICIAL RELIEF

This section has been simplified and a couple of sections removed. It more closely tracks RUAA. Since we do not have the RUAA sections for consolidation, or staying and compelling arbitration, they are included here. Is this enough?

SECTION 7. ARBITRATION AGREEMENT.

Section (a) is the same.

Section (b) We have put back the RUAA language that an arbitration agreement is enforceable except on grounds for revocation of contract at law and equity. RUAA, in turn, drew the language from the Federal Arbitration Act, where the language was intended to signal that arbitration contracts should no longer be refused enforcement solely because of hostility to arbitration. The AAML Sec. 106(a) includes it, saying “an Agreement to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable except on a ground that exists at law or in equity for revocation of a contract.” Even though the language provoked some questions at the first reading, we think it is necessary because of FAA and the rich body of case law that is out there on the issue.

As to child-related disputes, however, the bracketed language indicates that future dispute provision must be reaffirmed at the time of the dispute. This was the consensus at our last few meetings. One point for consideration is whether the reaffirmation requirement should apply even to agreements to arbitrate future child-related disputes that are part of parenting settlement agreements – an idea we had incorporated in the past. In many states parents may agree to arbitrate future disputes in a parenting plan or marital settlement agreement. One of the main uses for family law arbitration is to help parties resolve quickly future disputes that arise as to the custodial responsibility.

(e) Do we need this section? If we have (b) – law or equity – doesn’t that cover it? We did drop all of those caveats from the black letter and put them into commentary. Putting them in the body made it look as if those were the only reasons why the agreement might be invalid. There still may be an FAA problem.

SECTION 8. PROTECTION OF PARTY OR CHILD.

This has not changed since last draft. If there is a protection order in existence, the court must decide whether to allow the parties to go to arbitration.

(b) This section is basically same – if arbitrator has reasonable basis to believe a party’s safety or ability to participate is at risk, the parties must reaffirm.

(c) Not sure we need to have “under the law of this state other than this [act]” language... This section does make an arbitrator a reporter for child abuse and neglect.

SECTION 9. QUALIFICATIONS.

No real change here but there are still a few questions we might want to clarify.

1. Should all court appointed arbitrators have to have DV training? Some states do not have it for judicial officers. If the judge thinks the best arbitrator for a particular case is an evaluator, i.e. how much is a car collection worth, does that person really DV training?
2. Why shouldn't a lawyer or judge (retired) appointed by a court to arbitrate have so many years practicing law or training about business valuation? Child development? The child support guidelines?

SECTION 10. DISCLOSURE BY ARBITRATOR AND DISQUALIFICATION.

This is the same as before. It is the RUAA and we added (a)(2) "ability to make a timely award." Are we missing any other disclosures that might be relevant in family law?

(d) Says if a party does not object in a timely manner – what do we mean? Do we need to spell out what a timely manner is?

SECTION 11. IMMUNITY OF ARBITRATOR.

This section is similar to AAML Section 114 which sets out the same bases (also RUAA). Do we need it or can we refer to state arbitration law?

SECTION 12. TEMPORARY OR PROVISIONAL ORDER OR AWARD.

This is same as before. A couple of questions - before parties enter into arbitration, the court can make orders. This would seem obvious. Do we need the first part of 12(a) in the FLAA?

(b) After the arbitrator is appointed, the arbitrator may make temporary or interlocutory awards needed to be made to preserve the status quo or otherwise support one or more parties during the arbitration.

(b)(2) is troublesome. If the arbitrator cannot act in a timely manner, the party may move the court for an order. What is our criteria for an arbitrator not acting in a timely manner? Some parties want everything done yesterday.

(c) At any time before the court confirms a final award, temporary awards can be confirmed, corrected or vacated. So this means there is a right to appeal these? Not sure we have a procedure in place for this.

(e) Do we need more than a subpoena? Motion to produce? Any discovery instrument?

SECTION 13. PARTY PARTICIPATION.

No change.

I still find this one strange.

Do we need all of this or just one sentence that a party has a right to participate and be represented by counsel?

SECTION 14. CONFIDENTIALITY. No change. Query – should we consider combining this confidentiality section with the record of a hearing section?

SECTION 15. POWERS OF ARBITRATOR.

This section sets forth generic powers of the arbitrator, except for subsection (a) (9) specifically mentioning appointment of guardian ad litem or attorney for the child.

Another way to do this would be to say the arbitrator has all of the powers given under the arbitration law of this state other than this act, and in addition, others that we state explicitly. What approach do you prefer?

SECTION 16. RECORDING OF HEARING.

We added a legislative note. This is one of the places where family law arbitration differs from arbitration generally. Child-related disputes are held to a different standard of review as compared to a monetary award. In addition, child support must comply with the state child support guidelines. There must be a record to support the award. Other aspects, such as property division or alimony, however, do not require a record of any kind.

SECTION 17. AWARD.

The changes in this section for notice of the award are what required the addition of the definition of notice.

Section (b) allows parties to agree not to have a “reasoned award.” In other words, the default is for a reasoned award.

Section (c) bracketed requires reasons for a child-related dispute as required under state law. Should we clarify that the arbitrator must use the best interest standard for child custody and the child support guidelines for child support? As a function of federal child support mandates, any deviations from guidelines must be in writing in all states. We need to ensure that this act complies as well.

SECTION 18. CHANGE OF AWARD BY ARBITRATOR.

This section has no time limit and incorporates other arbitration law. I am uneasy with it.

SECTION 19. CONFIRMATION OF AWARD.

(a) First part is generic except for the bracketed part. We need to decide if we want to limit the time within which one can ask to confirm. I actually do not think so. In other words, the bracketed language is for the committee’s consideration.

SECTION 20. CORRECTION OF AWARD BY COURT.

This section allows motion to be made within 30 days after receiving notice of award or of modified or corrected award. The court shall modify or correct if one of the factors exists. I believe AAML has 90 days. Do we have a reason for our times?

SECTION 21. VACATION OF AWARD.

Most of this section is in AAML Sec. 123 Vacating Award. Note AAML uses 90 days. We have 30. Should the time limit be in (a)? Again, the bracketed language is for states that permit arbitration of child-related disputes.

SECTION 23. MODIFICATION OF CONFIRMED AWARD.

The point of this was to allow parties to either go to court or use arbitration to resolve a dispute about a modification based on a change of circumstances. The AAML provision Sec. 124A is titled: Modification of award for alimony, post separation support, child support or child custody based on substantial change in circumstances. A court may modify . . . under conditions stated in [state family law] in accordance with procedures it sets out – [very detailed]. Do we need more detail in our version?

LIMITED RIGHT OF APPEAL.

We have changed this several times . . . and now eliminated it. This section referred to the process of appeal from a trial court to an appellate court. It seems outside of our scope and unnecessary to address it.

One of our earlier comments suggested the following: “An appeal from a judgment entered pursuant to this [act] or from a court order under this [act] must be taken in the same manner and according to the same standard of review as an appeal from an order or judgment in other family law disputes but the grounds for appeal shall be limited to the grounds provided in Section 18.”

The AAML provision has that a party may not appeal on the basis that the arbitrator failed to apply correctly the family law of the state? Do we want this for other than custody and support?

SECTION 24. ENFORCEMENT OF CONFIRMED AWARD. No change.