

Date: Nov. 1, 2013

To: Family Law Arbitration Drafting Committee

From: Barbara Atwood, Chair

Re: Summary of Drafting Committee Meeting, October 25-26, 2013

Introduction

We had a very productive drafting committee meeting in Chicago, and I appreciated everyone's attendance and active participation. This memo summarizes the discussion and tentative decisions reached by the group. Please let me know if I've misremembered or omitted important matters. If you have comments, corrections, or additions, please send those to Linda Elrod at linda.elrod@washburn.edu or to me at batwood@email.arizona.edu.

Attendance

In attendance were Commissioners Barbara Atwood, Lorie Fowlke, Elizabeth Kent, Debra Lehrmann, Mary Quaid, Harry Tindall, Cam Ward, and David Zvenyach; Reporter Linda Elrod; ABA Advisor Phyllis Bossin; Observers Kay Farley, Roy Moore, Kit Peterson, Nancy Ver Steegh, and Linda Lea Viken. Division Chair Gail Hagerty was able to join us for all of Saturday's meeting. President Harriet Lansing, Executive Committee Chair Richard Cassidy, Commissioner Kay Kindred, Executive Director John Sebert, and Legislative Counsel Casey Gillece also sat in for portions of the meeting.

We agreed that representation from the ABA Litigation Section will be extremely helpful, since that group has a natural interest in any act that proposes an alternative to litigation. Section Advisors from the Litigation Section have been appointed but were not in attendance. Division Chair Gail Hagerty also suggested that inviting an observer with traditional commercial arbitration expertise would be useful. Professor George Walker, an active observer who was the reporter for the AAML Model Act, does have expertise in commercial arbitration, but he was unable to attend this meeting. I recommend that we try to get a representative from the AAA, JAMS, or other similar professional organization for the future.

Matters Covered

During the meeting, we focused our discussion on the Issues Memo of October 22, 2013, and on the circulated Draft. The memo raised a series of key questions for the act, and we referred to the Draft as a way of grounding the discussion in actual statutory language. This seemed to work well.

Issues and tentative decisions:

1. We agreed that we should draft a free-standing act that will address family law arbitration in full, rather than a partial act with references that incorporate other arbitration law in the state. This

approach seems preferable, on balance, for several reasons. While the act will necessarily be longer, it will provide a single place for family law attorneys and arbitrators to consult when taking on a family law arbitration. It will also avoid ambiguity that might arise in determining whether particular interpretations of the UAA or the RUAA carry over to family law arbitration. We will draw from the RUAA and the UAA in selecting procedural guidelines for family law arbitration and will alter the approach where necessary. The AAML Model Act will continue to be a great source, but we're departing from it in certain key respects.

2. We discussed at length whether the Act should include pre-dispute arbitration agreements in the form of premarital agreements or marital agreements entered into long before the divorce or separation. Ultimately, a consensus developed to exclude such agreements. We arrived at this position because of our desire to ensure that family law arbitration remains a fully voluntary choice to the extent feasible. Parties are free to include arbitration clauses in their premarital agreements, but our act will require enforcement only if the agreement is affirmed contemporaneously by the parties. To further that goal, we tentatively decided to impose a 6-month timeline on agreements to arbitrate: they will expire after 6 months if arbitration has not commenced. Parties can reaffirm the agreement at any point, but the 6-month expiration would allow a party to avoid arbitration for "expired" agreements.

Although we didn't discuss this explicitly, an exception to the 6-month expiration rule will be necessary for agreements entered into at the conclusion of a divorce in which parties agree to arbitrate disputes that might arise in the future about the marital settlement agreement. These are becoming more common, according to the experienced practitioners in our group. It makes sense for such agreements to be treated as binding for an indefinite period unless a party can challenge it for lack of informed consent or other basis for challenge under the act.

3. We will exclude from arbitration certain issues that have been assigned to particular courts other than divorce court, including questions of child abuse and neglect sufficient to trigger state intervention, the issuance of adoption decrees, and the imposition of criminal sanctions. The literal granting of a divorce will remain the province of the court, not the arbitrator, but issues of marital fault can be arbitrated since fault in many states has a bearing on property distribution and spousal support. The exclusions will be spelled out in a revised Scope section in the new draft.
4. There was no support for excluding child custody (referred to as "custodial responsibility" under the draft) and child support altogether from arbitration. Instead, the Act will include child custody and child support in the scope of issues subject to arbitration but will permit greater judicial review of such terms than that permitted for other terms. Again after extended discussion, a consensus developed for a "harm to the child" standard of judicial review for child custody/visitation terms included in an arbitration award. Although the AAML Model Act and most states with law on this question employ a "best interests of the child" standard for child custody terms, the New Jersey Supreme Court adopted a harm to the child standard in *Fawzy v.*

Fawzy, 973 A.2d 347 (2009). The committee was persuaded that the harm to the child standard is preferable. This standard seems to provide necessary judicial oversight without inviting prolonged litigation and continued uncertainty for children. The act will also provide that the reviewing court should conduct the review based on the record of the arbitration proceeding but may conduct an independent evidentiary hearing if the court finds it necessary.

The standard for child support awards, on the other hand, will be whether the award complies with the established child support guidelines under the law of the state. This incursion on arbitration finality is justified because child support today is an area for which little judicial discretion remains.

In reviewing either a child custody or a child support award, a court will be authorized to vacate *or modify* the award accordingly.

For other terms included in a family law arbitration award (e.g., property division, spousal support, attorneys fees), we agreed to limit courts to traditional grounds for review of arbitration awards and to not permit parties to expand judicial review to include errors of law. In other words, we adopted the approach of the RUAA and rejected the approach of the AAML Model Act and that of a few states. Several judges among the group supported this move, explaining that reviewing awards for errors of law is challenging and that they are more comfortable adhering to the traditional grounds for review. The approach we adopted is more consistent with the unique nature of arbitration (limited judicial review) as a dispute resolution method. Although this approach may discourage some people from turning to family law arbitration, it sharpens the distinction between litigation and arbitration in general.

5. The preliminary draft contains various protections for victims of domestic violence. We'll retain the provision that no arbitration should proceed if a party is subject to an outstanding order of protection involving the parties to the proposed arbitration, unless waived after advice of counsel. A provision will be added that the arbitrator should stay arbitration if there are allegations of domestic violence and the arbitrator reasonably believes that a party's agreement to arbitrate was not voluntary or that a party will not be able to effectively participate in the arbitration.
6. The provision on agreements will require parties to indicate their choice of arbitrator or a method of selection. If a method fails, a court will appoint the arbitrator. Agreements will also have to include required warnings. Rather than placing the responsibility on courts to deliver warnings to parties prior to arbitration, as suggested in the Draft (modeled after Michigan law), we decided that the arbitration agreement itself should contain conspicuous warnings in plain language. We tweaked the substance and wording of the warnings as well. Also, the act will provide that parties may provide for choice of law in the agreement, with the default being the application of forum law.

7. Additional procedural provisions will need to be added to the draft in order to create a complete arbitration framework. These include, among others, provisions for interlocutory judicial review and a procedure for replacing an arbitrator upon mutual consent of the parties. If the arbitrator was selected by the court, replacement of the arbitrator must have the court's approval. The act will also add to the list of arbitrator's powers, including among others the power to appoint GAL's or attorneys for children, the power to appoint expert witnesses and appraisers, and the power to impose sanctions for noncompliance with discovery orders.
8. The act needs a provision on arbitrator's qualifications. We tentatively decided that the arbitrator must be a licensed attorney in good standing with appropriate training on the topics of domestic violence and child abuse and neglect. Parties may mutually agree to a non-lawyer arbitrator, but the court must approve of any arbitrator who lacks the DV/child abuse/neglect training.
9. We decided that we did not need to include provisions on other ADR methods, in particular mediation and collaborative law. The use of arbitration in conjunction with other forms of ADR is not foreclosed by the act, but there was reluctance to put anything explicit about these ADR forms into black letter law. One particular concern was the role conflict that can arise if a neutral mediator switches into the role of decision-maker as an arbitrator.

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As most of you know, our next Drafting Committee meeting is scheduled for **February 21-22, 2014**, location TBA. The Reporter and I will circulate a draft well before then for your consideration. Looking further ahead, we are expected to have a draft suitable for a first reading at the ULC annual meeting this summer. The annual meeting will be in Seattle, Washington, from July 11-17, 2014. In the meantime, if you come across recent legislative activity or new court opinions relevant to family law arbitration, please send them to me or to Linda Elrod. Thanks to Casey Gillece, we have a comprehensive set of materials in our Dropbox, and we'll continue to update it.

I hope everyone has a safe and joyful holiday season!