

**FAMILY LAW
ARBITRATION**

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Continuum of ADR

• Negotiation — Mediation ---- Arbitration -- Trial

- Expert Evaluation

• Less formality	More formality
• More self-determination	More 3 rd party power
• More privacy	Less privacy

Factors in Choice of ADR option

- Statutes
- Court rules
- Nature of conflict
- Safety
- Speed
- Privacy
- Cost
- Timing of ADR options
- Need for closure
- Competence of parties

What is arbitration?

- Adversary adjudicative process analogous to court
- “Binding” – more difficult to overturn than court judgments
- Parties select the expert decision maker - “judge”
- Parties select procedure to use

Arbitration vs. Mediation

• Arbitrator	Mediator
• Makes decision	Facilitates solutions
• Enforces process	Facilitates process
• Formal process	Informal process
• Assesses facts	Parties assess facts
• Focus on rights	Focus on interests
• Impartial	Impartial

ADR Concerns Generally

- Quality of neutrals
- Lack of disclosure to same extent as in court
- Confidentiality
- Safety – domestic violence
- Waiver of legal rights
- Power imbalances
- Self-represented litigants

Brief History

- King Solomon
- Phoenician & Greek grain traders used it
- Mythology
- Adjunct to Roman law
- English judicial system as early as 1281
- Marco Polo
- Native American Tribes
- Merchants
- George Washington, arbitrator

Commercial Roots

- Court Problems
 - Slow and cumbersome
 - Expensive
 - Too much time
 - Inflexible in remedy-making
 - Lacking familiarity with business practices

Reasons to use Arbitration

- Expertise of decision maker – custom and usage
- Finality of the decision
- Privacy of proceedings – escape publicity
- Procedural informality - forego extensive discovery
- Achieve more satisfactory or durable resolution
- Speed
- Lower Cost
- Avoid publication of legal precedent

Federal Arbitration Act
9 U.S.C. § 1-16 (1925)

- Provided for specific enforcement of pre dispute arbitration provisions in all contracts affecting commerce
- “Written contracts to arbitrate are valid, irrevocable and enforceable...except on such grounds as exist at law or equity for revocation of any contract.” *AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 (2011)* (can use generally applicable contract defenses such as fraud, duress, unconscionability but federal law preempted California law that found class action waivers in adhesive arbitration agreements unconscionable).

FAA

- Enforcement of arbitration under FAA preempts contrary state law *Volt Info. Sciences, Inc. v. Stanford U., 489 U.S. 468 (1989)*.
- “It is difficult to overstate the strong federal policy in favor of arbitration . . .” *Araniaga v. Gen. Motors Corp., 460 F.3d 231, 234 (2d Cir. 2006)*.
- Key is “interstate commerce”

FAA and Family Law

- Does FAA apply to family law cases?
 - Vacation home in another state(s)?
 - Family business in multiple states?
- Spousal support, child support, or child custody should not fall under interstate commerce
 - UIFSA?

FAA Preemption?

- Marital property in two states
- Arbitration clause
- Freeman v. Freeman, 2005 WL 1838971 (Tex. App. Aug. 4, 2005) (Texas couple owned property in Arizona)
- Verlander Fam. Ltd. Partnership v. Verlander, 2003 WL 304098 (Tex. App. Feb. 13, 2003) (property in Texas and New Mexico)

FAA does not preempt

- In re Provine, 312 S.W.3d 824 (Tex. App. 2009)
 - nothing in the agreement involves interstate commerce
 - the property at issue is within Texas
- Nothing in the Texas Arbitration Act would subvert enforcement of the agreement when FAA would enforce it
- FAA does not preempt

Other Arbitration Laws

- 1958 – New York Convention
- Uniform Arbitration Act (1955) – 30-32 states [once in 49]
- Alternative Dispute Resolution Act of 1998 (federal district courts must have ADR program)
- Revised Uniform Arbitration Act (2000) – 18 states

Revised UAA (RUAA)(2000)

- Provisional remedies
- Attorneys fees
- Pre hearing conferences
- Consolidation of cases
- Detailed procedures for initiating, determining arbitrability, selecting arbitrators and conducting arbitration proceedings

RUAA States

- Alaska, Arizona, Arkansas, Colorado, District of Columbia, Florida, Hawaii, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, Washington

Arbitration Groups

- American Arbitration Association (AAA)
- Center for Public Resources (CPR)
- Federal Mediation and Conciliation Service (FMCS)
- National Academy of Arbitrators
- Code of Ethics for Arbitrators in Commercial Disputes (2004) – promulgated by AAA and ABA
- Code Prof. Resp. for Arbitrators of Labor Management Disputes (2007)

Family Law Arbitration

- How different/same from issues arbitrated under UAA or RUAAs?
 - Relationship of parties
 - Subject matter
 - Safety
 - Public policy
- Is it possible to include UAA/RUAAs with this?
 - Unless displaced by a provision of this [act], the conduct of arbitration should proceed according to the law and procedural rules of this state other than this [act] governing arbitration.

Family Law Arbitration Policy Qs

- Should family cases be arbitrated at all?
- Can there be a final and binding arbitration of custody disputes?
 - Initial
 - Post judgment
- See Robert Coulson, *Family Arbitration – An Exercise in Sensitivity*, 3 FAM. L. Q. 22 (1969); Stephen W. Schlissel, *A Proposal for Final and Binding Arbitration of Initial Custody Determinations*, 26 FAM. L. Q. 71 (1992)

Defining Family Law Arbitration

- Family law arbitration is a process by which a divorcing husband and wife [or cohabiting couple] agree to submit one or more issues arising out of their relationship as spouses or parents of the same child to a neutral third party or parties for resolution.

Family Law Arbitration

- 14 states have no law on family arbitration
- Other states have varied approaches
- 1999 - North Carolina – first specific statute
 - N.C. Gen. Stat. § 50-41 – 50-62 – allows arbitration of all issues except divorce itself; allows modification of terms relating to alimony, child custody and child support.
- 2005 AAML Model Family Law Arbitration Act (no adoptions)

Use General Arbitration Statute

- Az. R. Fam. L. Pro. R. 67(c)
- Cal. Civ. Proc. Code § 1280–1288 – no child issues
- Del. Fam. Ct. R. of C.P.R.16.1(a) – all issues
- D.C.
- Illinois
- Louisiana
- Minn. St. Gen. Prac. R. 310.01
- Oregon – property division or other disposition

States allowing all family matters

- Ind. Code Ann. § 34-57-5-1 through 34-57-5-13
- Mich. Comp. L. § 600.5070 et seq.
- N.H. Rev. Stat. § 542.11
- N.J. Stat. Ann. § 2A:24-1 – 2A:24-11; *Fawzy v. Fawzy*, 973 A.2d 347 (N.J. 2009)
- N.M. Stat. Ann. § 40-4-7.2
- N.C. Gen. Stat. § 50-41 et seq.
- Tex. Civ. Prac. & Rem. Code § 154.001 – 154.073

States allow all – but BIOC

- Colo. Rev. Stat. § 14-10-128.5(1) (de novo review)
- Ga. Code Ann. § 19-9-1.1 (BIOC review)
- Mo. Rev. Stat. § 435.405(5) (de novo review)
- 42 Pa. Consol. Stat. § 7301-7320 (BIOC challenge)
- S.C. Code § 15-48-10 -15-48-24 (BIOC review)

States Excluding Custody

- Conn. Gen. Stat. § 46b-66(c)
- Fla. Stat. Ann. § 44-104(14)
- Del. Fam. Ct. R. of C. P. R. 16.1 (excludes protection from abuse, custody and visitation)
- New York – Goldberg v. Goldberg, 1 N.Y.S.3d 360 (App. Div. 2015)
- Ohio – Kelm v. Kelm, 749 N.E.2d 299 (Ohio 2001)

State laws on Family Law Arbitration

- No arbitration of family law issues
 - Kentucky
 - Rhode Island

**Uniform Law Commission
Process**

- Joint Editorial Board recommended study (Dec. 2011)
- Study Committee formed (April 2012)
- Positive Report of Study Committee (Dec. 15, 2012)
- Drafting committee established July 2013 – Barbara Atwood, Chair; Linda Elrod, Reporter
- Meetings Oct. 2013; Feb. 2014; Nov. 2014; Mar. 2015; Nov. 2015; Mar. 2016
- Readings at Annual Meeting: July, 2014; July, 2015
- Final Reading and Vote – July 2016

Starting Points

- What needs defining?
- What subjects are arbitrable?
- Commit the parties to arbitration
- Pick a set of rules
- Applicable law
- Provide for judicial confirmation – entry of J
- Determine standard of review

Big Policy Questions

- Pre dispute arbitration or only at time of conflict
- Categories of disputes that can be arbitrated
- Children's issues
- Intimate Partner violence
- Scope of judicial review
- Post arbitration modifications

Family Law Dispute

- A contested issue arising under the family or domestic relations law of a state. Most states include:
 - characterization, valuation, and division of real/personal property
 - determination and allocation of debt
 - alimony/ spousal support
 - parenting time/custody/visitation/residency
 - child support
 - interpretation/enforcement of agreements – premarital, postmarital, separation, other
 - costs, expenses, and attorney's fees

Child-related Dispute

- A family law dispute regarding child custody, parenting time, visitation, parental responsibility or authority or support of a child.
- Whether a child-related dispute is subject to arbitration will be determined by state – optional. Section 3 (c) is in brackets.

Court Handles Status

- Court with personal and subject matter jurisdiction can:
 - Grant a divorce
 - Terminate parental rights
 - Grant adoption or guardianship
 - Determine status of dependency
 - Determine other status relationships

Applicable Law

- Section 4 ties in to state arbitration law
- Except as otherwise provided in this [act], the law applicable to the arbitration process is the law and procedural rules of this state other than this [act] governing binding arbitration.
- If children involved, court must have UCCJEA jurisdiction

Special Concerns for Family Law

- Informed decision to arbitrate -signed agreement
- Disclosure of any conflicts
- Confidentiality
- How arbitration will be conducted
- Fees
- Safety issues

Motions for Judicial Relief

- Court with pending proceeding or jurisdiction
- Heard under law and procedural rules of state other than FLAA
- Notice and service – same as in family law case
- Motion for consolidation allowed
- Motion to compel or stay arbitration
- Sec. 5

Arbitration Agreement

- Valid and enforceable contract = prerequisite to arbitrator's jurisdiction
- Record signed by the parties
- Identify arbitrator or how to select the arbitrator
- Identify the family law dispute(s) to be arbitrated
- Sec. 6

Existing/Future Dispute Issue

- FAA – an agreement to submit an existing or subsequent claim is valid as any other contract, irrevocable except on the ground that exists at law or equity for revoking a contract.
- Family Law – should it be the same? Preemption issues?
- (c) Child related dispute - options
 - Submit existing child-related dispute OR
 - Child-related dispute agreement not enforceable under FLAA

Valid Agreement

- Court decides if valid agreement exists and whether a family law dispute is subject to an arbitration agreement. Sec. 6 (d)
- Arbitrator determines if a condition precedent to arbitrability has been fulfilled. Sec. 6 (e)

Challenge as involuntary or unconscionable

- Totality of circumstances – knowing waiver of judge OR
- Extent to which the agreement makes clear
- Arbitration is binding
- Limited protection against domestic violence
- Right to retain attorney
- Parties have to pay the costs, including fee of arbitrator
- Limited bases to appeal
- Confirmed award is enforceable as a judgment Sec. 6 (f)

Safety - Protecting Victims

- If a party is subject to order of protection, STOP.
 - Each party affirms agreement
 - Court determines voluntary affirmance AND
 - Arbitration is not inconsistent with order
 - Sec. 7 (a)

Protection during Arbitration

- If no order, but arbitrator finds a **reasonable basis** to believe that a party's safety or ability to participate effectively in the arbitration is at risk, STOP
 - each party must affirm the agreement to arbitrate, and
 - arbitrator must find the agreement is informed and voluntary, and reasonable procedures are in place to protect a party
 - Sec 7(b)

Protection of child(ren)

- If arbitrator has reasonable basis to believe that a child of a party is abused or neglected,
 - Suspend arbitration
 - Report the abuse or neglect as required by law
 - To proceed, each party must affirm agreement and arbitrator must find the agreement is informed and voluntary, and reasonable procedures are in place to protect the child
 - Sec. 7 (c)

The IPV Problem

- Is this a free pass for someone who alleges domestic violence when arbitration not going their way?
- Is this less of a problem if there is not a pre dispute arbitration clause?
- Should there be a blanket prohibition?

Key = Choice of arbitrator

- The arbitrator is the process
- Arbitrator has primary control over the arbitration proceedings
- Arbitrator's decision on the merits is unlikely to be disturbed because in traditional arbitration, judicial review of arbitral awards is extremely limited

Qualities of Arbitrator

- Expertise in subject matter
 - Family law, legal or technical knowledge
- Fair
- Open-minded
- Strong case management skills
- Training in domestic violence?

Qualifications of arbitrator

- Agreement controls – Parties can choose anyone
- Sec. 8 (b) (c) If chosen arbitrator cannot serve, on motion, the court can appoint:
 - Lawyer admitted to practice or judge/retired judge
 - Judge or retired judge
 - Licensed professional in relevant field
 - Training – DV, Child abuse

Disclosure & Disqualification

- Before accepting appointment, arbitrator must disclose any fact reasonable person would believe would affect
 - Impartiality
 - Ability to make timely award
- Continuing duty to disclose
- Objections made under state's arbitration law
- Failure to disclose does not affect immunity but does allow for vacation of award
- Sec. 9

Immunity of Arbitrator

- Basically immune from civil liability the same as a judge in family law case
- Cannot be required to testify or produce records
- If civil action commenced against arbitrator and court determines immunity applies, can award attorney fees.
- Sec. 10

Temporary/Provisional Awards

- Court issues orders; arbitrator makes awards
- If before arbitration, court may issue orders
- After arbitration, arbitrator may make awards
- If arbitrator cannot act in timely manner, go to court
- At any time before confirmation of final award, court may confirm, correct or vacate a temporary award
- Court may enforce subpoena or other interim award – Sec. 11

Party Participation

- Party may be represented by attorney
- May be accompanied by individual who will not be called as witness (permission of arbitrator)
- Participate to full extent permitted by law and procedural rules of arbitration
- Sec. 12

Confidentiality

- Unless otherwise required by law, parties may agree that an arbitration is confidential.
- Party may ask court to seal or redact all or part of an arbitration record or award
- Sec. 13

Powers of Arbitrator

- Basically same as judge in family law case
- All allowed under arbitration law PLUS
- Appoint a guardian ad litem or attorney for the child
- Impose procedures to protect a party or a child
- Require a party to provide copy of relevant court order and information required under state law
- Impose sanctions for bad faith
- Allocate fees
- Sec. 14

Record of hearing

- Parties can agree to no record or transcription
- If child-related issues, then must have recording, transcript or other verbatim record on those issues
- FLAA Sec. 15

Award

- Arbitrator shall make a record of an award
- Give notice of award to each party
- Parties may agree that award does not have to have reasons unless child-related dispute Sec. 16
- Arbitrator may correct or clarify an award. Sec. 17

Confirmation of Award

- Party may move for confirmation [Should there be a time limit?]
- Award confirmed if time for moving to correct or vacate award has expired and no motion is pending
- Child-related dispute confirmed unless does not comply with law of state (BIOC?) (harm to child?) See Johnson v. Johnson, 9 A.3d 1003 (N.J. 2010); Child Support Guidelines
- Enforceable as judgment upon confirmation
- Sec. 18

Court Correction of Award

- After notice of award, party has [30] days to move court to correct the award for:
 - Mathematical miscalculation
 - Evident mistake in description of person, thing or property
 - Award includes an issue not submitted to arbitrator and award can be correction without affecting the merits
 - Award is imperfect in form
 - FLAA Sec. 19

Vacation of Award

- Award procured by corruption, fraud or undue means
- Evident partiality or corruption by arbitrator
- Misconduct by arbitrator prejudicing rights of a party
- Arbitrator exceeded his powers
- No arbitration agreement, unless party failed to object and participated
- Arbitration conducted without notice that prejudiced rights of party/child
- Child-related dispute and based on record and facts occurring after hearing, it is not in the best interest of the child or the record or statement of reasons is inadequate for court to review
- FLAA Sec. 20 – Rehearing option

Clarification of Confirmed Award

- Request clarification from the arbitrator
- Agree to arbitrate the dispute before the original arbitrator or a new arbitrator or
- Proceed in court under law governing clarification of a court decree in a family law proceeding
- Section 21

Modification of Award

- Dispute arising after confirmation of award
- Can agree to submit future disputes to arbitration before same or new arbitrator
- Can proceed in court under general family law of state – material change of circumstances
- FLAA Sec. 22

Right of Appeal

- From motions granting or denying motion to compel or stay arbitration
- Confirming or denying confirmation
- Correcting, clarifying or modifying an award
- Vacating an award without ordering a rehearing
- Appeal taken as from a judgment or order in civil action
- Sec. 23

Enforcement

- Enforce confirmed award, including temporary award in same manner as judgment of court
- Enforce arbitration award from other states
- Sec. 24

Conclusion

- Uniform Family Law Arbitration Act is desirable even if state does not want to cover child-related disputes.
- Keep track of current version of FLAA – www.uniformlaws.org
