

Comment,
ALTERNATIVE DISPUTE RESOLUTION

I. Introduction

Arbitration and mediation began as simple, yet progressive, methods of alternative dispute resolution that enable parties to resolve disputes without litigation.¹ While each is a distinct model on a continuum,² both systems function as vehicles providing an often more direct route to justice and finality. Critically important to its participants is the promise of fewer delays, lower costs, and less formality.³ Confined to a conference room rather than a courtroom, would-be litigants also presumptively gain a greater sense of confidentiality, privacy, and psychological peace-of-mind—particularly important in family disputes—while in a less adversarial setting.⁴ Another distinct advantage of implementing alternative dispute resolution in the domestic arena is the parties may benefit from the expertise of board certified family law specialists as arbitrators and mediators. These professionals are often more accessible, flexible, and experienced than district court judges when it comes to resolving family law disputes.⁵

In general, arbitration of family matters involves a neutral third party authorized by the disputing parties to render a binding decision on the issues submitted to the arbitrator.⁶ The process begins with the parties consenting to an arbitration agreement which is a contract governing the terms and process of the arbitration. It will typically set forth, among other things, which issues will be submitted for arbitration, when and where the arbitration will take place, who will pay the arbitrator, and

¹ See generally Lynn P. Burlison, *Family Law Arbitration: Third Party Alternative Dispute Resolution*, 30 CAMPBELL L. REV. 297 (2008).

² *Id.* at 297.

³ *Id.* at 312.

⁴ *Id.*

⁵ See, e.g., MICH. COMP. LAWS SERV. § 600.5073 (2010) (stating that arbitrators in family law disputes must be attorneys in good standing with the Michigan state bar, have practiced as a lawyer for at least five years, demonstrate expertise in domestic relations law, and undergo training).

⁶ See generally Stephen W. Schlissel, *A Proposal for Final and Binding Arbitration of Initial Custody Determinations*, 26 FAM. L.Q. 71 (1992).

the governing arbitration rules and evidentiary procedures. Thus, arbitration does in fact involve an adjudicator cloaked with judicial-like authority; his or her decision is typically submitted to a judge for confirmation.⁷ While disputes may be submitted to non-binding arbitration, these decisions are merely advisory and give the parties insight into the probable outcome of a trial to encourage settlement.⁸

In contrast, while arbitration resembles a trial, mediation is a party-driven process best characterized as an assisted negotiation.⁹ Frequently in divorce cases, parties are court-ordered to participate in mediation before turning to litigation.¹⁰ Many parties may also attempt to mediate before turning to arbitration. Importantly, mediators have no power to impose solutions or make ultimate decisions but rather employ a variety of techniques and strategies to assist the parties in reaching an agreement.¹¹ Some mediators help ease tension and rephrase positions in a manner that will make opposing sides more receptive. Unlike arbitration, parties are free to end the mediation at any time, and there is no obligation to reach an agreement.¹² The mediation itself is never “binding” even though the parties may sign agreements reached in the mediation that become enforceable.¹³ Generally after a dispute has been mediated, the parties determine whether to submit the settlement for entry as a judgment or simply dismiss the pending litigation. However, in family disputes, the agreement is not enforceable unless it is approved by the court; thus, the parties’ counsel must submit the mediated settlement agreement to the court for enforcement.¹⁴

For at least two decades, the American Academy of Matrimonial Lawyers (AAML) has engaged in a dramatic push for mediation and arbitration in the domestic relations area.¹⁵ The

⁷ *Id.*

⁸ See Brief of Appellant, *Olds v. Dykes*, No. 2820, 2009 WL 2033260 (Md. Ct. Spec. App. June 1, 2009).

⁹ See *Radford v. Shehorn*, 114 Cal. Rptr. 3d 499 (Cal. Ct. App. 2010).

¹⁰ See *Black v. Black*, 927 N.E.2d 430 (Ind. Ct. App. 2010).

¹¹ See *Miller v. Miller*, No. 282997, 2009 WL 763826 (Mich. Ct. App. March 24, 2009).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See Schlissel, *supra* note 6.

proliferation of such settlement agreements—whether arbitrated or mediated—has generated increasing questions related to the judicial reviewability of such agreements. The severance of family ties and the resolution of marital disputes have long been viewed by courts as unique arrangements outside the realm of ordinary contractual relations and therefore, subject to necessary court supervision.¹⁶ Nonetheless, at odds with the courts' supervisory duties are the individual right to contract and, in cases involving children, the fundamental right of parental autonomy.¹⁷ Mediated settlement agreements, when it comes to their review, additionally present the challenges of enforcing a good faith requirement and considerations of the mediation privilege.¹⁸

This article will first examine the development of arbitration statutes in the family law context in the United States. Part III will discuss issues related to the scope of the reviewability of arbitrated agreements. Part IV will address the development of mediation statutes and good faith requirements. Part V will follow with a discussion of reviewability of the agreements as they relate to the mediation privilege.

II. Development of Family Law Arbitration

A. *The Uniform Arbitration Act and the Revised Uniform Arbitration Act*

Through the past century, arbitration has been used extensively in labor and commercial law. Its increasing use is largely attributed to the Uniform Arbitration Act (UAA).¹⁹ Promulgated by the Uniform Law Commissioners in 1955, it is the fundamental substance of the law governing arbitration agreements. Thirty-five jurisdictions have adopted the UAA while fourteen

¹⁶ *Id.* at 74.

¹⁷ See *In re Marriage of Popack*, 998 P.2d 464, 469 (Colo. App. 2000) (holding parents are empowered to submit child-custody and parenting-time issues to arbitration in the exercise of parental autonomy); see also *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (characterizing the right of parents to bring up their children “as essential to the orderly pursuit of happiness by free men”).

¹⁸ See generally Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 35 U.C. DAVIS L. REV. 33 (2001).

¹⁹ UNIF. ARBITRATION ACT (1956) (hereinafter UAA).

have adopted substantially similar legislation.²⁰ In 2000, the Uniform Law Commissioners promulgated the Revised Uniform Arbitration Act (RUAA). Currently adopted by thirteen states, the RUAA expands procedural provisions of the original act to meet modern needs.²¹

The UAA and RUAA provide that parties may agree in writing to submit to arbitration “any controversy” then existing between them or include in any written contract a provision for settlement by arbitration of “any controversy” arising between them relating to the contract or nonperformance thereof. Such agreement or provision is valid, enforceable and irrevocable except with consent of the parties without regard to the justiciable character of the controversy.²² Notably, the legislature did not exempt family law disputes from either acts’ coverage, and there is no legislative expression that arbitration of such disputes is against public policy.²³

Of course, to the family law practitioner, glaringly absent from these pieces of legislation is any mention of the use of arbitration in the domestic arena. For instance, the preamble to the RUAA states that the “primary purpose of the act is to advance arbitration as a desirable alternative to litigation. A revision is necessary at this time in light of the ever-increasing use of arbitration and the developments of the law in this area.”²⁴ One critic noted, “If this is a desirable alternative to litigation in other areas of law, why were we, as family lawyers, being left behind in its ‘ever increasing use. . .?’”²⁵ Nevertheless, in the past thirty years, arbitration clauses have appeared in separation and settlement agreements.²⁶ In addition, the American Arbitration Asso-

²⁰ UNIF. ARBITRATION ACT *Prefatory Note* (2000) (commonly referred to as the Revised Uniform Arbitration Act) (hereinafter RUAA).

²¹ *Id.* For instance, to accommodate modern trends, the RUAA allows consolidation of claims to be arbitrated.

²² RUAA § 6.

²³ *See generally* RUAA.

²⁴ Burleson, *supra* note 1, at 297.

²⁵ *Id.*

²⁶ *See* Crutchley v. Crutchley, 293 S.E.2d 793 (N.C. 1982) (holding that all family law matters are subject to arbitration but parents cannot by agreement deprive the court of its inherent statutory authority to protect the interest of their children).

ciation has developed family dispute services and offers mediation in addition to arbitration.²⁷

B. State Statutory Development

On October 1, 1999, North Carolina became the first state to adopt an arbitration statute specifically designed for family law cases.²⁸ In the mid-1990s, the Family Law Section of the North Carolina Bar Association, as did other state bars, permitted arbitration of certain family law issues under general commercial litigation statutes. One main objective of the statute was to resolve the ambiguity that resulted after *Crutchley v. Crutchley*.²⁹ However, after the Family Law Section consulted with commercial and arbitration expert and AAML Fellow, Professor George K. Walker, the Section, under Walker's leadership, decided to expand its objective to the development of a comprehensive family law statute complete with ancillary rules and forms.³⁰ The statute was amended in 2003 and again in 2005 after North Carolina adopted the RUAA for general commercial arbitrations. The North Carolina statute became the basis for the national 2005 Model Family Law Arbitration Act of the American Academy of Matrimonial Lawyers (Model Act) principally drafted by Professor Walker.³¹

The Model Act generally follows the RUAA but includes significant differences to adhere to policies unique to family law. Critically, under the Model Act, there are no opportunities for parties to waive procedures such as vacating, correcting, and modifying awards as there are under the RUAA.³² Moreover, the Model Act contains optional provisions for court review and

²⁷ American Arbitration Association, http://www.adr.org/arb_med (last visited Oct. 18, 2010).

²⁸ N.C. GEN. STAT. §§ 50-41 to -62 (2010).

²⁹ Burleson, *supra* note 1, at 297.

³⁰ GEORGE K. WALKER, 2006 REVISED HANDBOOK: ARBITRATING FAMILY LAW CASES UNDER THE NORTH CAROLINA FAMILY LAW ARBITRATION ACT AS AMENDED IN 2005 (2006), available at familylaw.ncbar.org/media/1633058/2006familyLawHandbookVol1.pdf.

³¹ 2004 American Academy of Matrimonial Lawyers Arbitration Committee, MODEL FAMILY LAW ARBITRATION ACT (Mar. 12, 2005) (hereinafter MODEL ACT), available at <http://www.aaml.org/go/library/publications/model-family-law-arbitration-act/>.

³² RUAA §§ 20(a)-20(c).

appeal of errors of law in arbitral awards if parties contract for this review. The Model Act also has a special provision for redacting and sealing awards that become part of a judgment.³³ While at the present, the Model Act is not adopted in any state, the comprehensive act, ancillary rules and forms continue to provide impetus toward formulating a national model statute and state legislation specially related to family disputes.³⁴ Since publication of the Model Act in 2005, Connecticut, Georgia, Indiana, and New Mexico have passed legislation governing family law arbitration.³⁵

Six states, including Colorado, Connecticut, Indiana, Michigan, New Hampshire, and New Mexico, in addition to North Carolina, have enacted specific statutes for family law arbitration.³⁶ However, none of these statutes are as comprehensive as the statutes of North Carolina. Other states that allow family law arbitration do so under the general authority of the uniform acts, frequently cross-referencing matrimonial statutes to the general arbitration statutes.³⁷ However, due to the unique characteristics of family law cases, general commercial arbitration statutes often provide insufficient authority to address all relevant issues. Also, it is difficult to accurately assess the methodology in each state because most family law arbitrations are conducted in private and confidentiality is paramount.³⁸

These state statutes that do specifically address family law arbitration differ from general commercial arbitration statutes in critical ways. For instance, generally, there is no need for modifiability in traditional commercial arbitration. If a contractor and subcontractor are in a dispute, the arbitrator submits a number that does not need to be modified in the future as the

³³ MODEL ACT § 125(d).

³⁴ George K. Walker, *Family Law Arbitration: Legislation and Trends*, 21 J. AM. ACAD. MATRIM. LAW. 521, 524 (2008).

³⁵ *Id.* at 631.

³⁶ COLO. REV. STAT. §§ 14-10-128.1, -128.3, -128.5 (2010); CONN. GEN. STAT. §§ 46b-66(c) (2010); IND. CODE ANN. §§ 34-57-5-1 to -13 (LexisNexis 2010); MICH. COMP. LAWS SERV. §§ 600.5070-600.5081 (LexisNexis 2010); N.H. REV. STAT. ANN. § 542:11 (2010); N.M. STAT. ANN. § 40-4-7.2 (LexisNexis 2010).

³⁷ See, e.g., ARIZ. FAM. L. PROC. R. 67(c), incorporating by reference ARIZ. REV. STAT. ANN. §§ 12-1501 to -1518 (2010).

³⁸ Burlison, *supra* note 1, at 301.

parties go their separate ways. On the other hand, due to the continuing family relationship dynamic, family law cases often involve a need for modifiability. If all arbitration awards involving children and spousal support could never be modified, the cases would be precluded from arbitration in the first instance. Thus, the North Carolina Family Law Arbitration Act, and other state statutes modeling it, enables the family law arbitrator to step in and function much like a judge in this respect.³⁹ Likewise, after the award is confirmed, matters can be modified in the same way that court orders are modified.⁴⁰

Also, in commercial arbitration under the UAA and the RUAA, rulings on substantive law are not permitted.⁴¹ In contrast, under family law arbitration statutes, the arbitrator *must* make written findings of fact to support the award.⁴² Thus, if a party has preserved the right to appeal or if findings of fact concern child issues or spousal support, findings of fact and conclusions of law may be critical during a court hearing on the appeal or when addressing modification.

C. Various Approaches to Child-related Issues

Among states engaging in family law arbitration, one distinguishing feature is the treatment of child-related issues—namely support and custody. (Child abuse and neglect matters are excluded from arbitration).⁴³ For example, under California's family law statutes, arbitration can be used to resolve property division if the marital estate is more than \$50,000, but parents cannot submit child support disputes to binding arbitration.⁴⁴ The agreement to arbitrate such issues will be void to the extent it deprives the trial court of modification jurisdiction.⁴⁵ In Delaware, in contrast, binding arbitration is permitted for child support but not for custody and visitation issues.⁴⁶ Connecticut's

³⁹ N.C. GEN. STAT. § 50-56 (2010).

⁴⁰ *Id.*

⁴¹ *See* UAA; *see also* RUAA.

⁴² MICH. COMP. LAWS. SERV. § 600.5077 (LexisNexis 2010).

⁴³ *E.g. id.* § 600.5071.

⁴⁴ CAL. FAM. CODE § 2554 (Deering 2010).

⁴⁵ *In re Marriage of Berezna*, 2 Cal. Rptr. 3d 351, 356-57 (Cal. Ct. App. 2003).

⁴⁶ DEL. FAM. CT. CIV. R. 16.1(a); *see also* Walker, *supra* note 34, at 593.

statute takes a broader prohibitory approach related to children's issues and states that arbitration agreements shall not include issues related to child support, visitation and custody.⁴⁷ Similarly, the District of Columbia has allowed arbitration of family law cases as a matter of contract, but courts have denied finality to arbitral awards determining child custody and child support issues.⁴⁸ Appellate courts in Pennsylvania and South Carolina have taken similar positions asserting that all issues other than child custody and support may be arbitrated.⁴⁹

While some states parse child-related issues and limit the scope of arbitration, others state that all matters, even those related to children, are allowed to be arbitrated. For instance, Colorado, which has special family law arbitration law, has decided that child custody, visitation, child support and other matters related to children are arbitrable.⁵⁰ Nevertheless, the court retains jurisdiction over the issues to review them *de novo* upon either party's request.⁵¹ In Indiana, a state that has also passed special family law arbitration statutes, the arbitrator has broad powers; he or she can determine child support, custody, parenting time, and "any other matter over which a trial court would have jurisdiction."⁵² This broad power includes being able to dissolve the marriage itself, which is reserved for the court under the Model Act and other state's special legislation.⁵³ Michigan's comprehensive Domestic Relations Arbitration Act also covers issues related to child custody, child support, and parenting time.⁵⁴ An arbitrator may render decisions on these disputes "subject to the restrictions and requirements in other law and court rules as provided in this act."⁵⁵ New Mexico's comprehensive family law arbitration statute is similar to Michigan's legislation in that the

⁴⁷ CONN. GEN. STAT. § 46(b)-66(c).

⁴⁸ *Spencer v. Spencer*, 494 A.2d 1279, 1284-85 (D.C. 1985).

⁴⁹ *See, e.g., Miller v. Miller*, 620 A.2d 1161, 1163-64 (Pa. Super. Ct. 1993) (holding that arbitration cannot take away from the court its right to oversee the best interests of a child or children in a custody award); *see also Swentor v. Swentor*, 520 S.E.2d 330, 334-38 (S.C. Ct. App. 1999).

⁵⁰ *In re Marriage of Popack*, 998 P.2d at 468-69.

⁵¹ *Id.*

⁵² IND. CODE ANN. § 34-57-5-2 (LexisNexis 2010).

⁵³ *Compare* MODEL ACT § 101(a), *with* N.C. GEN. STAT. § 50-41(a).

⁵⁴ MICH. COMP. LAWS SERV. § 600.5071.

⁵⁵ *Id.*

scope of issues is vast. Moreover, New Mexico permits agreements to arbitrate to “set forth any standards on which an award should be based, including the law to be applied.”⁵⁶ When it comes to child support issues, however, the agreement must provide that New Mexico law will apply.⁵⁷

At the opposite end of the continuum, the Kentucky Court of Appeals recently rejected the use of arbitration for all issues exclusively preserved for the family court.⁵⁸ After the family court dissolved the marriage by decree, the court entered an order vesting the arbitrator with absolute authority to resolve all remaining issues between the parties. The court requires the arbitrator to hold a hearing on those issues and to render written findings of fact, conclusions of law, and a judgment.⁵⁹ The order also required the family court to enter the arbitrator’s judgment as a judgment of the court without independent judicial review or without an opportunity for either party to submit objections to the court. After the arbitrator made detailed findings of fact and conclusions of law, the family court judge signed the judgment without the benefit of independent review.⁶⁰ Both parties appealed, but neither argued under any of the enumerated statutory grounds.⁶¹ Nevertheless, the appellate court reversed and remanded the lower court’s judgment because it held that the family court judge had improperly delegated his power to enter findings and conclusions in the family court to the arbitrator and thus was in contravention of the Kentucky Constitution and in circumvention of the legislative intent regarding the duties of family court judges.⁶² However, the court noted that pursuant to the provisions of the Uniform Arbitration Act, an arbitration award generally may be confirmed and enforced as a judgment by the court.⁶³ Importantly, the distinction here lay with the case being in family court and the court’s finding that the General

⁵⁶ N.M. STAT. ANN. § 40-4-7.2(N) (LexisNexis 2010).

⁵⁷ *Id.*

⁵⁸ *Campbell v. Campbell*, Nos. 2006-CA-001803-MR, 2006-CA-001827-MR, 2010 WL 391841 (Ky. Ct. App. Feb. 5, 2010) (review granted June 9, 2010).

⁵⁹ *Id.* at *2.

⁶⁰ *Id.*

⁶¹ *Id.* at *4.

⁶² *Id.* at *8.

⁶³ *Id.* at 9 n.3.

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Assembly did not intend for family court judges to delegate their duties to third parties outside the court system.

III. Reviewability of Arbitrated Settlement Agreements

A. *Distinction Between Property Issues and Child-related Matters*

Arbitrated settlement agreements in divorce proceedings are often enforceable. Generally, once the arbitration is completed, the agreement is submitted to the judge for confirmation. The arbitrated agreement on matters other than those affecting the children is typically enforceable as a regular contract.⁶⁴ Courts have routinely determined that public policy supports the use of arbitration awards of property and the arbitrator's award will be binding with limited review rights.⁶⁵ In *Brinckerhoff v. Brinckerhoff*, for example, the court concluded that "if courts were accorded a broad scope of review, 'then arbitration would become merely another expensive and time consuming layer to the already complex litigation process.'"⁶⁶ Furthermore, the appellate court may "not reweigh the evidence presented to the arbitrator or subject the merits of the controversy to judicial review."⁶⁷ The "court must confirm the award unless 'there exist statutory grounds for vacating or modifying it' or the parties were denied due process."⁶⁸ Still, while agreements to arbitrate child custody and support disputes have been upheld, the arbitration award involving child-related issues will often not be binding

⁶⁴ *Crutchley*, 293 S.E.2d 793.

⁶⁵ *See, e.g., Krist v. Krist*, 631 N.W.2d 53 (Mich. Ct. App. 2001) (the arbitrator's decision to award alimony was a property award within the scope of the agreement to arbitrate and was not reviewable in that there were no errors of law discernible on the face of the very award itself); *see also Washington v. Washington*, 770 N.W.2d 908, 914 (Mich. Ct. App. 2009) (holding that neither the trial court nor the appellate court is required or authorized to review the arbitrator's findings of fact).

⁶⁶ *Brinckerhoff*, 889 A.2d 701 at 704 (Vt. 2005) (internal citations omitted).

⁶⁷ *Id.*

⁶⁸ *Id.* (internal citation omitted).

on a court if the award is challenged as not being in the best interests of the child.⁶⁹

The Model Act includes nine grounds for vacating arbitral awards upon motion to the court by a party to the arbitration.⁷⁰ The first six grounds mirror the grounds of the RUAA, addressing fraud, corruption, an impartial arbitrator, arbitrator misconduct, an arbitrator exceeding his or her powers, an arbitrator's refusal to hear evidence or postponement, lack of notice to parties, and no agreement to arbitrate.⁷¹ The additional three grounds, provided in the Model Act, unique to family disputes, include:

- (7) The court determines that an award for child support or custody is not in the best interests of the child. The burden of proof at the hearing under this subsection is on the party seeking to vacate the award.
- (8) The award included punitive damages, and the court determines that the award for punitive damages is clearly erroneous; or
- (9) If the parties contracted for judicial review of errors of law in the award, the court must vacate the award if the arbitrators have committed error of law prejudicing a party's rights.⁷²

Clearly, the Model Act reinforces what courts have traditionally held: Parents cannot by agreement or arbitration deprive the courts of their duty to promote the best interests of children.⁷³ Thus, matters related to children are not binding and are always subject to review by the court because of the *parens patriae* power of the court to protect the interests of minor children.⁷⁴ With regard to custody particularly, courts fiercely guard their supervisory powers recognizing that the need to protect the welfare of children outweighs the advantages of arbitration.⁷⁵ (Indeed, concern about the arbitration of child issues has prevented some states from adopting family law statutes.)⁷⁶

⁶⁹ See *Lieberman v. Lieberman*, 566 N.Y.S.2d 490, 495 (N.Y. Sup. Ct. 1991); see also *Biel v. Biel*, 336 N.W.2d 404, 406 (Wis. Ct. App. 1983).

⁷⁰ MODEL ACT § 123(a).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Crutchley*, 293 S.E.2d 793.

⁷⁴ *Spencer*, 494 A.2d at 1285.

⁷⁵ *Williams v. Williams*, 134 S.E.2d 227 (N.C. 1964).

⁷⁶ *Burleson*, *supra* note 1, at 311.

B. *Scope of Review for Child-related Matters*

While the best interests standard remains critical in every case, courts disagree regarding the scope of the review. For example, in 2004 in *Harvey v. Harvey*, the Michigan Supreme Court held that regardless of the type of alternative resolution that the parties use, the Child Custody Act requires the court to determine independently what custodial placement is in the best interests of the child.⁷⁷ Neither the state's Friend of the Court Act nor the Domestic Relations Arbitration Act relieves the court of its duty to review a custody arrangement once the issue of the child's custody reaches the bench. The Friend of the Court Act requires that the circuit court shall hold a hearing *de novo* to review a friend of the court recommendation if either party objects to that recommendation in writing within twenty-one days, and the arbitration act authorizes a circuit court to modify or vacate an arbitration award if it is not in the best interests of the child.⁷⁸ Additionally, the parties may not waive an evidentiary hearing if the court determines a hearing is necessary to exercise its independent duty to determine what custodial placement is in the best interests of the child.⁷⁹ In *Faherty v. Faherty*, a child support case, a New Jersey court indicated that it would have to have a *de novo* review of an arbitrator's award of child support "unless it is clear on the face of the award that the award could not adversely affect the substantial best interests of the child."⁸⁰ If the arbitrator adheres to child support guidelines, the determination of a child support award that matches those guidelines will most likely be approved by the court with limited review.⁸¹

In contrast, in *Lieberman v. Lieberman*, a New York trial court gave significant weight to the parties' agreement to arbitrate custody before a religious court and to the arbitrator's ultimate award.⁸² The court explained that since it retained supervisory power over the agreement, it would intervene upon a "showing that a provision of an award might be *adverse* to the

⁷⁷ *Harvey v. Harvey*, 680 N.W.2d 835, 838 (Mich. 2004).

⁷⁸ *Id.* at 837-38.

⁷⁹ *Miller v. Miller*, 620 A.2d 1161, 1165 (Pa. Super. Ct. 1993).

⁸⁰ *Faherty*, 477 A.2d 1257 at 1263 (N.J. 1984).

⁸¹ *Id.*

⁸² *Lieberman*, 566 N.Y.S.2d at 490.

best interests of a child.”⁸³ The court, however, limited the scope of its review and did not permit a *de novo* hearing or trial. The court explained that it should not intervene merely because the award “affects” the child.⁸⁴ The North Carolina Family Law Arbitration Act, like the Model Act, similarly allows review by the district court of child custody and child support arbitration awards on the motion of a party. If a moving party carries the burden of showing that the award is not in the best interests of the child, the court may vacate the award. This provision was copied from a Texas statute that was declared constitutional by the Texas Court of Appeals.⁸⁵ On the other hand, Colorado, which has special family law arbitration legislation, allows courts to more easily review child custody, visitation, child support, and other matters related to children. While children issues are arbitrable, the court must review the awards *de novo* upon either party’s request.⁸⁶

Notably, in 2009, the New Jersey Supreme Court, in *Fawzy v. Fawzy* directly addressed the issue of standard of review for arbitral awards of custody and parenting time.⁸⁷ The court held that the best interests, as applied in *Faherty* and many other courts across the nation, is not the standard for judicial review of an arbitration award. Justice Long, who delivered the opinion of the court, stated “Only the threat of harm will justify judicial infringement on the fundamental right of parents to decide how to resolve disputes over their children’s upbringing.”⁸⁸ Likewise, choosing the forum in which their disputes over child custody and child rearing will be resolved, including arbitration, is a right that falls “within the constitutionally protected sphere of parental autonomy.”⁸⁹ In the absence of a claim of harm, the parties are limited to the remedies provided in New Jersey’s version of the Arbitration Act.⁹⁰ Where harm is claimed and a *prima facie* case is established, the court will determine the harm issue. If

⁸³ *Id.* at 495 (emphasis in original).

⁸⁴ *Id.*

⁸⁵ Burlison, *supra* note 1, at 311 (citing *In re C.A.K.*, 155 S.W.3d 554 (Tex. App. 2004)).

⁸⁶ COLO. REV. STAT. §§ 13-22-201 to -230.

⁸⁷ *Fawzy*, 973 A.2d at 347 (N.J. 2009).

⁸⁸ *Id.* at 350.

⁸⁹ *Id.*

⁹⁰ *Id.* at 362.

the court finds harm, the presumption of the parents' choice of arbitration will be overcome and it will fall to the court to decide what is in the best interests of the child.⁹¹ The court further explained that this "hybrid model" at once advances the underlying purpose of arbitration by providing a final and faster resolution; it affords deference to parental autonomy; and it leaves open the availability of court intervention where necessary to prevent harm to the child.⁹²

Among other issues, the court in *Fawzy* also established that while child custody and parenting time arbitration should be conducted in accordance with the principles established in the Arbitration Act, some additional considerations must be made. Specifically, because the Arbitration Act does not require the recording of testimony or a statement of findings and conclusions by the arbitrator, the court departed from the act and mandated that a record of all documentary evidence and testimony adduced during the arbitration proceedings be kept. Also, the court ordered that the arbitrator issue findings of fact and conclusions of law in respect of the award of custody and parenting time. Such a record is necessary so courts will be able to effectively evaluate a challenge to the award.⁹³ Clearly, the court in *Fawzy* underscores the notion that family law arbitration cannot be neatly applied to arbitration law that was designed for commercial disputes. While enacting family law arbitration legislation would synthesize procedure, tension remains among the competing principles of *parens patriae*, parental autonomy, and the underlying purpose of arbitration. Thus, selecting the standard of review is still a vexing question.

C. *Scope of Review for Property Issues*

Distinct from issues related to children, property rights, such as spousal support and division of marital property, are subjected to the traditionally very narrow grounds for review.⁹⁴ Since property rights can be released by contract, many states recognize these agreements for binding arbitration under the provi-

⁹¹ *Id.* at 361.

⁹² *Id.* at 362.

⁹³ *Id.*

⁹⁴ See RUA § 23(a)(1)-(6).

sions of the state's UAA or RUAA.⁹⁵ However, neither of these uniform acts allows the parties to preserve the right for judicial review. The Model Act and the North Carolina Family Law Arbitration Act, on the other hand, allow for preservation of this right.⁹⁶ In North Carolina, the default rule is for no judicial review of substantive errors of law. However, if the parties wish to preserve this right, they may agree in writing to judicial review by the district court and then by the appellate courts. Reportedly, in North Carolina, a relatively small number of family cases are appealed to the North Carolina Court of Appeals. Still, if the right has been preserved and the party wishes to appeal, the appeal would first go to the district court where the judge would be bound by the arbitrator's findings of fact. The district court judge would enter an order that could then be appealed to the North Carolina Court of Appeals.⁹⁷

While the number of appellate cases related to family law disputes in arbitration is relatively small, commercial arbitration cases which have been challenged may provide some insight. Petitions to vacate arbitral awards are often unsuccessful. Recognizing that limiting the grounds for judicial review effectuates the parties' intent when entering into an arbitration agreement, a court will not review the sufficiency of evidence supporting the award or the validity of the arbitrator's reasoning.⁹⁸ Moreover, fraud, corruption, or misconduct of either the arbitrator or the proceeding is not common and is usually extremely difficult to prove.⁹⁹ Also, since the boundaries of arbitrator's decisional authority are predetermined by the parties and their attorneys, it is unlikely for the arbitrator to render a decision that exceeds his or her powers.¹⁰⁰ Finally, little incentive exists for arbitrators to not hear evidence or postpone a hearing without sufficient cause.¹⁰¹

⁹⁵ See, e.g., *Kimm v. Blisset, LLC*, 905 A.2d 887, 893 (N.J. Super. Ct. App. Div. 2006) (describing arbitration as "at its heart, a creature of contract").

⁹⁶ Compare MODEL ACT § 123(b); with N.C. GEN. STAT. § 50-60.

⁹⁷ Bursleson, *supra* note 1, at 311.

⁹⁸ *Morris v. Zuckerman*, 446 P.2d 1000, 1004 (Cal. 1968) (holding that the court may not substitute its judgment for that of the arbitrator).

⁹⁹ Marvin D. Rowen, *Correcting a California Contractual Arbitration Award*, VERDICT MAGAZINE, 2nd Quarter, 2003, available at http://www.judicatemagazine.com/files/articles/205_01.pdf.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

Arbitrators are providing a professional service. If the arbitrator wants to stay in business, he or she will probably not violate the rules.¹⁰²

Appealing to correct a mistake may be a more obtainable objective. Nevertheless, a mistake committed by an arbitrator is not itself sufficient grounds to set aside an award.¹⁰³ If an arbitrator makes a mistake, regarding law or fact, no matter how gross, there may be no remedy for it, and the resulting error may fall on the shoulders of the parties.¹⁰⁴ Again, the rationale is that the award is intended to settle the matter in controversy and thus save the expense of litigation. If a mistake was sufficient grounds for setting aside an award, it would open the door to an influx of cases. The objective of arbitration would be defeated and litigation would increase.¹⁰⁵ In California, a court may correct or modify the arbitration award but the application must be made within ninety days after the delivery of the award to the applicant and may only address “evident miscalculations.”¹⁰⁶ The North Carolina Court of Appeals has held that a party waived his right to contend that the arbitrator’s award was incorrect when he failed to file an application to modify or correct the award within ninety days after delivery of a copy of the award.¹⁰⁷ Under the Model Act and RUAA, the applicant only has twenty days from the date of receiving the award. Thus, if an applicant moves quickly all hope is not lost. However, if the winning party files a petition to confirm the arbitrator’s award, the losing party’s window of opportunity to petition to correct may be substantially shorter than the period allotted if the award has not been confirmed.¹⁰⁸

¹⁰² *Id.*

¹⁰³ LLOYD T. KELSO, N.C. FAMILY LAW PRACTICE § 15:9 (2008).

¹⁰⁴ *Moncharsh v. Heily & Blasé*, 832 P.2d 899, 900 (Cal. 1992).

¹⁰⁵ *Id.* (See comment 12)

¹⁰⁶ *Id.* at 905.

¹⁰⁷ *Semon v. Semon*, 587 S.E.2d 460, 463 (N.C. Ct. App. 2003).

¹⁰⁸ *DeMello v. Souza*, 111 Cal. Rptr. 274, 277 (Cal. Ct. App. 1973).

IV. Development of Family Law Mediation

A. *The Uniform Mediation Act*

The Uniform Mediation Act (UMA), in contrast to the UAA and RUAA approach to arbitration, recognizes that the use of mediation as a form of alternative dispute resolution has become an integral growing part of the processes of not only commercial and business communities but also for private parties engaged in conflict.¹⁰⁹ Approved by and recommended for enactment in August 2001 by the National Commissioners on Uniform State Laws, the UMA has been adopted in ten states and substantially reflected in most states' mediation statutes.¹¹⁰ Critically, it grants a legal privilege for those involved in the mediation process. The act consists of fifteen separate sections. Sections four through six provide that anything said by either party in mediation is privileged, and subject to which the mediator cannot testify as a witness, unless the parties explicitly waive the privilege or otherwise in limited circumstances.¹¹¹ Section 7(a) completely prohibits mediators from making reports, assessments, evaluations, recommendations or findings to the court, except in very limited circumstances.¹¹²

B. *The Effect of the Good Faith Requirement*

As court-ordered mediations have become more common, some courts and legislatures have come to require "good-faith" participation in the mediation.¹¹³ The requirement of good-faith mediation is premised on the notion that the court-ordered process should not be a waste of time and resources.¹¹⁴ Thus, advocates of the good-faith requirement view it as a mechanism to ensure the integrity of the court-ordered mediation program. Some proponents of the requirement support the following rule: "Good-faith' does not require the parties to settle the dispute.

¹⁰⁹ UNIF. MEDIATION ACT (2003) (hereinafter UMA).

¹¹⁰ See, e.g., 710 ILL. COMP. STAT. 35/1 (2010).

¹¹¹ UMA §§ 4-6.

¹¹² UMA § 7(a).

¹¹³ See, e.g., Noah v. Noah, No. E2005-02511-COA-R3-CV, 2006 WL 1679607 (Tenn. Ct. App. June 19, 2006).

¹¹⁴ Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 622-23 (1997).

The proposals made at mediation, monetary or otherwise, in and of themselves do not constitute the presence or absence of good-faith.”¹¹⁵ Moreover, a determination of good-faith, some advocates suggest, can be made using the following suggested statutory guideline:

- a. In court-annexed cases, the court shall make the final determination of whether good faith was present in the mediation.
- b. Where a lawsuit has not been filed, the responsibility for finding a violation of the good faith rests upon the mediator, who shall use the elements of this statute and context of any contract between the parties as a basis for deliberation and decision-making.¹¹⁶

Proposed consequences for failure to mediate in good faith include imposing fees, costs, and reasonable expenses incurred by the other participants, paying the cost of another mediation, attending, at their own cost, a seminar on mediation for a minimum of eight hours, and being fined up to \$5,000.00.¹¹⁷

On the other side of the debate, however, some find the good faith requirement and provisions to enforce it very troublesome for many reasons. First, many critics focus on the difficulty of defining “good faith.” While failing to attend mediation would clearly fall into the category of bad faith, much of the participation—such as a party’s attitude and demeanor—is subject to a range of interpretation. Also, there are strong concerns about whether placing such a requirement on the parties undermines the facilitative and cooperative nature of mediation.¹¹⁸ Put another way, will a party be capable of engaging in a meaningful open discussion when he or she knows that the discussion will be subjected to such scrutiny and could include rather serious consequences? One author notes:

Actively enforcing a good faith requirement would subject all participants to uncertainty about the impartiality and confidentiality of the process and could heighten adversarial tensions and inappropriate pressures to settle cases. Although such a requirement could deter

¹¹⁵ *Id.* at 623.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 *UCLA L. REV.* 69, 72-77 (2002).

and punish truly egregious behavior. . . , it would do so at the expense of overall confidence in the system of mediation.¹¹⁹

Indeed, the requirements are premised on the notion that mediation participants will readily understand the required behavior and comply accordingly.¹²⁰

Also worrisome to many practitioners is any requirement calling upon the mediator to evaluate good faith. Specifically, some practitioners report problematic implementation of the good faith requirement in that some parties' mediation agreements related to joint parenting disputes may explicitly empower the mediator to report to the courts each party's level of participation. The "agreements . . . provide for the mediator to *investigate* and *decide* whether a party has breached the agreement and, if so, to determine what sort of punishment, including *economic sanctions*, should apply for that breach."¹²¹ Aside from contradicting the theory of fostering cooperation critical to joint parenting, the provisions transform the mediator into a judge, even investigator, and reduce his or her role as a facilitator. Importantly, such provisions also violate the UMA, making the agreements potentially unenforceable. Section 7 of the UMA not only prohibits mediators from conducting "investigations" but also prevents courts from considering any assessment made by the mediator.¹²² Thus, no profitable objective is achieved. Some agreements may allow a mediator to determine whether someone has committed a violation. Although that finding should be unenforceable under section 7 of the UMA, a court may find that the party has violated the underlying joint parenting agreement for not complying with the mediator's decision. However, since no provision of the UMA authorizes courts to delegate their fact-finding and sanctioning powers to mediators, these types of agreements may be void.¹²³

¹¹⁹ *Id.* at 139-40.

¹²⁰ *Id.* at 73.

¹²¹ Alison G. Turoff, *The Misuse of Mediation in Joint Parenting Agreements*, 94 ILL. B.J. 546, 548 (2006) (emphasis in original).

¹²² *Id.*

¹²³ *Id.* at 563.

V. Additional Mediation Privilege Considerations

The existence of the mediation privilege not only poses problems for the enforcement of the good faith requirement, but may also complicate the enforcement of the mediated agreement itself. When a party attempts to enforce a mediated settlement agreement, and the other party raises a defense, such as unconscionability, for instance, both parties may face the obstacle of not being able to introduce confidential mediation communications to either support or deny a settlement agreement. In a Florida trial court, for instance, the wife introduced a document signed by the mediator to establish an oral agreement in mediation. The court of appeals reversed, holding that the admission of this evidence violated Florida's mediation privilege.¹²⁴ Similarly, the New Jersey Court of Appeals found that the trial judge erred in ordering a mediator to be deposed and his written records examined in a dispute over enforcement of a mediated marital settlement. The court stated that "private mediations must remain confidential or they will have no beneficial impact."¹²⁵ A Texas appellate court also precluded enforcement of an oral settlement agreement by refusing to overturn the trial court's decision not to allow a mediator's deposition to establish the terms of an oral mediated settlement agreement.¹²⁶ Undoubtedly, the practical solution is to put the mediated agreement in writing. States vary on whether it is critical for the agreement to be signed by both parties to be enforceable.¹²⁷

In contrast, some courts may take a less stringent approach in excluding a mediator's documents or testimony. For instance, in *Metz v. Metz*, the Supreme Court of Wyoming found no prejudice or other difficulty with the trial court's decision to hear testimony from the mediator to determine whether the parties had reached a divorce settlement agreement.¹²⁸ The Supreme Court reasoned that the trial court's decision to admit the mediator's testimony was not prejudicial because "both the trial court and the parties' counsel were sensitive to the necessity of not get-

¹²⁴ *Hudson v. Hudson*, 600 So.2d 7 (Fla. Dist. Ct. App. 1992).

¹²⁵ *Addesa v. Addesa*, 919 A.2d 885, 889 (N.J. Super. Ct. App. Div. 2007).

¹²⁶ *Rendon v. Avance*, 67 S.W.3d 303 (Tex. App. 2001).

¹²⁷ *See, e.g., Bennett v. Bennett*, 587 A.2d 463 (Me. 1991).

¹²⁸ *Metz*, 61 P.3d 383 at 389 (Wyo. 2003).

ting into the details of the settlement discussions.”¹²⁹ A California appellate court upheld the enforceability of a mediation agreement although the trial court considered the testimony of the mediator and other individuals who attended the mediation. In affirming the trial court’s holding, the appellate court found the mediator’s testimony persuasive.¹³⁰ On the other hand, preclusion of the mediator’s testimony may not always be fatal to one’s asserted defense.¹³¹

Amid the potential misuse of mediation agreements, one suggested agreement, used in mediations between parents disputing a parenting agreement, includes the following provisions:

If any disputes arise between the parents regarding any of the provisions of this Order, including modification or implementation, or any other issue relating to the children’s welfare and best interests, the complaining party shall first notify the other party of the nature of the complaint and both parties shall make reasonable attempts to negotiate a settlement of the dispute. When practicable under the circumstances, the complaints shall be made in a written form and given to the other party. The party receiving said complaint shall, when practicable, reply to the complaint in a similar written form. If the parties are unable to resolve their dispute within fourteen days, the parties shall mediate their dispute with the designated mediator, Ms. Smith. Parties may seek adjudication by a court if mediation is unsuccessful or for matters which involve immediate danger to the child’s health or welfare. Because successful mediation requires the cooperation of both parents, both parties agree to comport themselves in a considerate and restrained manner. Both parties specifically agree not to intimidate or attempt to intimidate the other. Mediation costs shall be shared equally by the parties.¹³²

These terms do not open the door for parties to later attack the provisions as being void delegations of judicial authority. They comply with the UMA as well as the theories behind mediation and joint custody. This language protects all of the parties, including the mediators, and provides for the children’s best interests.¹³³

¹²⁹ *Id.*

¹³⁰ *In re Marriage of Brown*, No. A102126, 2004 WL 928243 (Cal. Ct. App. Apr. 29, 2004).

¹³¹ *Addesa*, 919 A.2d at 885 (despite not admitting mediator’s evidence, agreement was found to be unconscionable and thus, unenforceable).

¹³² *Turoff*, *supra* note 121, at 564.

¹³³ *Id.*

VI. Conclusion

Undoubtedly, as practitioners alert clients to the benefits of alternative dispute resolution and more states begin to embrace its proliferation in statutes, the landscape of family law practice will increasingly change. Although arbitration may not be appropriate, or even permitted, in every family law dispute, a matrimonial practitioner should be aware of the rules and procedures followed in his or her state, since particular provisions vary tremendously. While some family issues, like property, may be permissibly submitted to arbitration, others, particularly those related to children, may be barred. Likewise, while some issues may be subject to the court's review, other issues may be reviewed only under very limited circumstances.

While the development of mediation in the family law context has been less disjointed than arbitration, considerations related to the good faith requirement and mediation privilege pose significant concerns regarding reviewability and enforcement of agreements. Of utmost concern is that the underlying principles of alternative dispute resolution—finality and expediency in a less adversarial setting—are being compromised in the wake of the system's expansion. Ironically, the process that was intended to keep parties out of court is creating a gravitational pull back in. However, as the AAML and family law practitioners alike remain engaged in the development and synthesis of alternative dispute resolution, would-be litigants remain all the more likely to reap the benefits.

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