

# Model Marital Arbitration Act: A Proposal

by

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Alternative dispute resolution has become a buzzword of the '90s. Perhaps in no area other than family law is such an emphasis placed on ADR. In large numbers, judges, attorneys and litigants have come to the conclusion that in many if not most cases, court is not the best place or way to resolve family disputes. Especially where a true family court is not available, experience teaches that a good likelihood exists that a domestic relations case will be assigned to a judge who literally hates family law cases and/or has little or no background or experience in domestic relations matters.<sup>1</sup> Logic would suggest that a major objective in any dispute resolution process, especially one involving families and children, should be to give the parties as much control as possible over both the mechanism for resolution of their disputes and the specific terms of the solution.

Particularly in the past ten to fifteen years, great advances have been made by the bar in the use of mediation as a tool to attempt to resolve family disputes. Although historically, in domestic relations cases, the attorneys have generally attempted to negotiate out-of-court settlement of cases, only recently has the use of a neutral third person to assist the parties and counsel in reaching a settlement gained widespread prominence. While

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<sup>1</sup> See, e.g., Lynne M. Kenney & Diana Vigil, *A Lawyer's Guide To Therapeutic Interventions in Domestic Relations Court*, 28 ARIZ. ST. L.J. 629, 632 (1996) ("Judges articulate frustration over the fact that they are trained to answer questions of law, not to 'manage social work cases.'" *Id.*). See also Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1091 (1994) (while "most state court systems have family and juvenile courts, . . . [n]ot only do many judges dislike serving on the family courts, but also, judges in many state domestic relations courts rotate through a family calendar, remaining for only one year before moving on to a criminal calendar." *Id.*).

precise statistics may not be available, it would probably be a safe guess that in the near future, most courts in the United States will require parties to certify that they have attempted to resolve their family law dispute through mediation, prior to coming to court. It may very well be that the majority of courts around the country already do so.<sup>1</sup>

Although mediation has received most of the ADR air play during the past ten or fifteen years, arbitration has also attracted considerable interest. In those cases where mediation or other efforts to reach an amicable settlement have failed, parties and counsel often prefer an alternative to the courthouse for resolution of unsettled issues. Arbitration is what usually comes to mind and is sometimes utilized. From all appearances, however, arbitration of marital disputes has plateaued at a point where it is not likely to make any significant further progress without a major change in the concept of arbitration as it currently exists and is understood.<sup>2</sup>

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<sup>1</sup> See Peter S. Chantilis, *Mediation U.S.A.*, 26 U. MEM. L. REV. 1031, 1033 (1996) ("Approximately half of the states have partial or total court-ordered mediation programs in effect. The other states do not have court-ordered mediation but have other forms of ADR implemented by law." *Id.*). See also Christy L. Hendricks, Note, *The Trend Toward Mandatory Mediation in Custody and Visitation Disputes of Minor Children: An Overview*, 32 J. FAM. L. 491 (1993-94).

<sup>2</sup> See, e.g., *Glauber v. Glauber*, 600 N.Y.S.2d 940 (N.Y. App. Div. 1993) (holding agreements to arbitrate custody unenforceable).

In this century arbitration has been used primarily in labor and commercial settings.<sup>3</sup> In the majority of the cases, the process has been utilized for resolution of a single dispute or of a very limited number of issues. Examples include a disagreement between a contractor and an owner concerning construction defects,<sup>4</sup> a conflict between an insured and an insurance company as to the amount of damages,<sup>5</sup> and a complaint alleging that a firefighter was discriminated against in the allocation of opportunities to work overtime and earn extra pay because of his union activities.<sup>7</sup> The concept of binding arbitration<sup>8</sup> lends itself well to those types of disputes. Because such controversies usually revolve around disputed factual matters, even if the fact finder had been a judge, usually, the case would not likely be reversed on appeal.

Many family law issues also lend themselves to resolution by binding arbitration. This is true both with respect to issues in the original dissolution action and post-decree matters. Examples include such issues as how the household furniture should be divided, valuation of specific assets, such as real estate or a business, and some child-related issues (local law permitting), such as whether summer visitation should or should not be expanded from X weeks to Y weeks.

With the court dockets becoming more and more crowded, with the substantial rise in the cost of even a “plain vanilla” divorce, brought on in part by the increasing complexity of marital disputes and by the extensive trial management requirements imposed on the parties and counsel, and the fact that all too many divorce cases continue to be assigned to judges who dislike domestic relations court duty and give the cases short shrift, arbitration would seem to be an ideal alternative in many cases. However, it has not caught on. For example, almost 300 members of the American Academy of Matrimonial Lawyers (approximately 20% of the total membership) have completed a program of three days or more to train them to serve as arbitrators and counsel in the arbitration of family law matters. Yet,

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<sup>7</sup> City and County of Denver v. Denver Firefighters Local No. 858, 663 P.2d 1032 (Colo. 1983).

<sup>8</sup> The term “binding” arbitration as used in this article means a final decision, with no right of appeal on the merits. Although the arbitration may be “binding,” the Uniform Arbitration Act does provide for appeal from:

- “(1) An order denying an application to compel arbitration made under Section 2;
- (2) An order granting an application to stay arbitration made under Section 2(b);
- (3) An order confirming or denying confirmation of an award;
- (4) An order modifying or correcting an award;
- (5) An order vacating an award without directing a rehearing; or
- (6) A judgment or decree entered pursuant to the provisions of this act.”

Uniform Arbitration Act §19, 7 U.L.A. (1997)

literally dozens of those who have completed that training and become certified arbitrators have reported to the author that they have handled very few, if any, arbitration matters since completion of their training and obtaining certification. What are the reasons? Some of it undoubtedly has to do with marketing: both the merchandising of the concept of arbitration of family law matters and marketing of the individual lawyer and her/his training and availability to serve as an arbitrator.

But another reason exists for arbitration’s lack of popularity. In discussions with numerous lawyers from all over the United States and several foreign countries, a recurring concern is raised: “I don’t have a problem recommending binding arbitration to a client where there are one or two pretty straight forward issues. But if you’re talking about having all of your final orders determined by binding arbitration, that scares the hell out of me.” The rationale goes as follows: “Even a good and experienced arbitrator can make a mistake (or my client may think she did). I am just not willing to leave my client without an appeal remedy in the unlikely event something goes wrong. I could even be

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<sup>3</sup> See generally FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 3 (5th ed. 1997).

<sup>4</sup> Ramonas v. Kerelis, 243 N.E.2d 711 (Ill. App. Ct. 1968).

<sup>5</sup> Travelers Ins. Co. v. Luckett, 279 So. 2d 885 (Fla. Dist. Ct. App. 1973).

sued by a client I left in that position. Besides, you can't arbitrate custody, visitation and support issues, and it doesn't make sense to bifurcate the case and try it in pieces."

When it comes to the issue of whether arbitration will be utilized or even suggested, the reality is that for the most part lawyers control the process. If counsel for each party does not endorse arbitration, it will not happen (except, perhaps in the rare case where the client knows about arbitration, has a strong preference for it, and also has the ability to stand up to the lawyer). On the other hand, if counsel supports the concept of arbitration, he will likely encourage the client to consider and elect that alternative.

So what is the solution? How can attorneys be convinced that they should support and encourage arbitration, at least in select cases? The answer may lie in having available to counsel a statute which specifically addresses arbitration of family matters and permits all issues, including custody, visitation, and child support, to be resolved by arbitration. This statute would/should provide that the parties have virtually unlimited discretion to structure the decision-making process in any way they want, and provide the parties with the option to have a right of appeal on the merits, on the record, directly to the same appellate court the case would go to if being appealed from a decision of the trial court before which the case otherwise would be heard. If the parties prefer an appeal to the trial court, either on the record or a trial *de novo*, they should have that option also.

A great appeal of arbitration is that the parties can write their own rules and select the person or persons who will decide their case. But the parties and their counsel should be able to predict with virtual certainty that their intent, as set out in their arbitration agreement will in fact pass muster with both the trial court which will be asked to confirm the arbitration award or decision and all higher courts. A number of the cases cited in this article for other propositions are also perfect examples of how the intent of the parties can be frustrated by the lack of certainty as to what they can and cannot do in structuring a process for resolution of their disputes.<sup>6</sup> Arbitration is often touted as a speedier and less expensive alternative to the traditional court system.<sup>7</sup> If the parties are unable to anticipate with confidence that their plan will be blessed by the courts, common sense tells us that they will be less enthusiastic about the arbitration alternative.

Historically, courts have tended to take a narrow view of agreements to arbitrate and arbitration generally. But that has changed dramatically, particularly at the federal level.<sup>8</sup>

Two recent U.S. Court of Appeals cases illustrate the concerns that the lawyers in those cases had about binding arbitration and the efforts they undertook to incorporate in their agreements to arbitrate, provisions for a right of appeal on the merits. In both cases the appeal provisions were upheld. In *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*,<sup>12</sup> the arbitration agreement provided in relevant part as follows: "[t]he arbitration decision shall be final and binding on both parties, except that errors of law shall be subject to appeal."<sup>13</sup> In reversing the district court, the appellate court commented: "When, as here, the parties agree contractually to subject an arbitration award to expanded judicial review, federal arbitration policy demands that the court conduct its review according to the terms of the arbitration contract."<sup>14</sup>

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<sup>6</sup> See note 15, *infra*.

<sup>7</sup> See, e.g., James E. Mahood, *A Negotiated Settlement: The Least Costly Route to Resolution*, 17 FAM. ADVOC. 46, 49 (Fall 1994).

<sup>8</sup> In *Allied-Bruce Terminix Co. Inc. v. Dobson*, 513 U.S. 265, 270-71 (1995), the U.S. Supreme Court offered a short history lesson on the attitude of courts toward arbitration:

First, the basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate. . . . The origins of those refusals apparently lie in "'ancient times,'" when the English courts fought "'for extension of jurisdiction—all of them being opposed to anything that would altogether deprive every one of them of jurisdiction'" . . . American courts initially followed English practice, perhaps just "'stand [ing] . . . upon the antiquity of the rule'" prohibiting arbitration clause enforcement, rather than "'upon its excellence or reason'" . . . Regardless, when Congress passed the Arbitration Act in 1925, it was "motivated, first and foremost, by a . . . desire" to change this antiarbitration rule. . . . It intended courts to "enforce



The issue in *LaPine Tech. Corp. v. Kyocera Corp.*<sup>15</sup> was an arbitration agreement which included the following: “The Court shall vacate, modify or correct any award: (i) based upon any of the grounds referred to in the Federal Arbitration Act, (ii) where the arbitrators’ findings of fact are not supported by substantial evidence, or (iii) where the arbitrators’ conclusions of law are erroneous.”<sup>16</sup>

Following issuance of the award by the arbitration tribunal Kyocera moved to vacate it on several grounds, including that the findings of fact were not supported by substantial evidence and that the arbitrators had made errors of law.<sup>17</sup> The district court ruled that it lacked jurisdiction to review alleged errors of fact or law and confirmed the award. The Seventh Circuit reversed and in doing so stated as follows:

In fine, when Kyocera and LaPine agreed to submit disputes to arbitration, they did so on the condition that the federal district court would review the arbitrators’ decisions for errors of fact and law. They did not agree to abide by an arbitral tribunal’s erroneous deci-

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[arbitration] agreements into which parties had entered,” . . . and to “place such agreements ‘upon the same footing as other contracts.’”

*Id.*

<sup>12</sup> 64 F.3d 993 (5th Cir. 1995).

<sup>13</sup> *Id.* at 996.

<sup>14</sup> *Id.* at 997.

<sup>15</sup> 130 F.3d 884 (9th Cir. 1997).

<sup>16</sup> *Id.* at 887. <sup>17</sup> *Id.*

sions. The FAA does not prohibit that kind of agreement; it encourages it. When the district court refused to abide by the terms of the agreement and then confirmed the results of the arbitration, it violated the purposes of the FAA and denied Kyocera the benefit of its bargain.<sup>9</sup>

While the federal courts have shown a willingness to go to great lengths to enforce to the letter arbitration agreements of parties, the states have tended to take a more parochial view of what parties may include in their agreements to arbitrate, especially with respect to family law issues.<sup>1011</sup>

The Michigan case of *Dick v. Dick*<sup>20</sup> illustrates perhaps better than any other marital arbitration case why a comprehensive statute specifically focusing on family issues is needed. *Dick* was again a case in which the parties and counsel wanted to use arbitration rather than taking their dispute to court, but also wanted to preserve a right of appeal on the merits in case of a perceived error by the arbitrator. Their arbitration agreement provided that all issues in their divorce, including custody, child support and division of property, would be submitted to arbitration. It also specified that the arbitrator would have all of the powers, duties, rights and obligations of the circuit court judge who would otherwise hear the case. The final provision of note in the arbitration agreement was a right of appeal of the arbitrator’s decision, on the merits directly to the Michigan Court of Appeals. Based upon the stipulation of the parties, the trial court entered an order for arbitration of all issues. The court’s order included the following language: “It Is Further Ordered that the decision of the Arbitrator, as incorporated in the Judgment of Divorce, shall be

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<sup>9</sup> *Id.* at 890. *But see* *Chicago Typographical Union v. Chicago Sun Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991) (in dicta, court said parties may not by agreement expand the scope of judicial review provided by the Federal Arbitration Act).

<sup>10</sup> *See e.g.*, *Masters v. Masters*, 513 A.2d 104 (Conn. 1986) (while parties may arbitrate custody and child support issues, custody is subject to *de novo* review by trial court); *Spencer v. Spencer*, 494 A.2d 1279 (D.C. 1985) (parties may agree that alimony and property issues may be binding, but notwithstanding their agreement, custody and child support remain reviewable by trial court); *Faherty v. Faherty*, 477 A.2d 1257 (N.J. 1984) (parties may agree that alimony award is binding, however child support may be reviewed *de novo* by trial court); *Glauber v. Glauber*, 600 N.Y.S.2d 740 (N.Y. App. Div. 1993) (alimony and child support may be resolved by arbitration but custody and visitation may not); *Crutchley v. Crutchley*, 293 S.E.2d 793 (N.C. 1982) (parties may agree to binding arbitration of alimony and property division issues, but custody and child support subject to review and modification by trial court).

<sup>11</sup> N.W.2d 185 (Mich. Ct. App. 1995)

appealable to the Court of Appeals on the same basis and with the same legal effect as though the decision had been rendered by the Circuit Judge.”<sup>12</sup>

The arbitration was then held and the arbitrator issued his decision, which was thereafter incorporated in its entirety in the judgment of divorce. The husband appealed to the court of appeals, primarily attacking the custody award. In a decision which must truly be considered singular, the court concluded: “The parties have attempted to create a hybrid form of arbitration. However, we find no authority for it. Rather, we conclude that, *having invoked binding arbitration*, the parties are required to proceed according to the applicable statute and court rule.”<sup>13</sup> Finding no allegation or evidence of fraud, duress, or other ground for setting aside the arbitrator’s award, the court declined to review it.

The author discussed the *Dick* case with one of the attorneys who participated and was informed that without the right of appeal provision the parties, without question, would not have entered into the arbitration agreement. Yet, the court of appeals took it upon itself to rewrite the parties’ contract and leave them with something they never intended or bargained for. A better result, once the court determined that the appeal provision was unenforceable, would have been to declare the entire arbitration agreement void, since the disapproved provision went to the essence of the contract.<sup>14</sup>

The majority of states have a general arbitration statute. Most have adopted some version of the Uniform Arbitration Act.<sup>24</sup> Why not just expand the existing statute to include desired family law provisions? While that is certainly an alternative, a separate family arbitration statute may be easier to get through state legislatures. If the decision is made to attempt to add specific family law provisions to the existing general arbitration statute, comment will undoubtedly be required from a number of other constituencies having an interest in arbitration, including labor, construction, securities, architecture and general commercial. Their interests may differ in varying degrees. Some may like portions of the family law additions, while others may not, or may like other portions. Achieving a consensus may become a long and difficult process. On the other hand, a bill limited to family matters should have an easier time of it. The unique nature of family law issues suggests that a special family arbitration statute, with considerations/provisions tailored to domestic issues, makes a lot of sense.

It is difficult to know at this juncture the most likely location of the opposition. There may be some who think that the traditional trial and appeal process should not be tinkered with, especially when it comes to a process whereby a decision of a private arbitrator selected by the parties can be appealed on the merits directly to an appellate court.

Always with a new statute comes the question: How much will this cost - what is the fiscal impact? It would appear quite clearly that adoption of the proposed statute would not cost the taxpayers anything. The reality is that it should result in some cost savings, since greater use of arbitration should result in fewer cases going to trial before judges who are paid by the taxpayers, which logically should then result in fewer appeals of domestic relations decisions than now occur with decisions from trial courts.<sup>15</sup> That in turn should convert to a need for fewer judges, staff and all the related expenses. Again, logic would suggest that this should be true, because the parties opting for arbitration will have a hand in selecting the arbitrator, who will presumably be highly experienced and qualified in family law and well respected by the parties and their counsel. The result should be that upon completion of the arbitration both parties and counsel will conclude that an appeal is either unnecessary or that it would be unsuccessful. The attractiveness of the

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<sup>12</sup> *Id.* at 187.

<sup>13</sup> *Id.* at 191 (emphasis added) (citations omitted).

<sup>14</sup> In defense of the court of appeals, this may have been one of those cases where bad facts make bad law. In its opinion the court was critical of both parties, but especially the husband, for his “acrimonious approach” and “vexatious” tactics. The court likely saw its decision as the best way to bring a terrible case to a conclusion, while achieving the “right” result. <sup>24</sup>Unif. Arbitration Act, 7 U.L.A. (1997).

<sup>15</sup> See Arthur S. Hayes & Ann Hagedorn, *Arbitration in Commercial Cases Found to Save Money, Not Time*, WALL ST. J., Sept. 5, 1990 at B10.

availability of an appeal, specifically authorized by statute, is that it is available “just in case. . . .” As counsel for a party, is not an alternative that offers all the benefits of arbitration and essentially all of the benefits of proceeding through the traditional legal system, an extremely attractive one?

The proposed Model Marital Arbitration Act which follows is a composite of portions of the Uniform Arbitration Act, the arbitration statutes of a number of different jurisdictions, proposed statutes in several states, plus some concepts developed by the author, all of which, when taken together, result in a comprehensive statute which will authorize parties to use a private judge in a variety of alternative ways to resolve their disputes. The key provision, however, is the option for a right of appeal. The parties must, if they wish, have the option to preserve the right to an appeal, on the merits, to the same court to which they would otherwise appeal a trial court ruling, without having to go through a trial *de novo* in the trial court. An appeal which includes a trial *de novo* likely will generate little interest. After all, one of the things that makes arbitration attractive is a speedier, lower cost process. If a party has the option, if dissatisfied with the arbitrator’s award, to a complete new trial before a judge, it is hard to imagine why parties would select that option. However, one of the true beauties of arbitration is the flexibility and unlimited options it offers (should offer) the parties. If, for whatever reason, the parties do want to provide for a trial *de novo* before the trial court judge on some or all issues, they should have that choice.

The proposed model act is a step in a new direction. The author welcomes comments and suggestions. Arbitration of family matters by a private judge of the parties’ own choosing presents an extremely attractive alternative to the court house, in many cases. But arbitration of marital disputes will never achieve its true potential without specific legislation permitting parties to elect to have all issues, including custody, visitation and child support resolved by arbitration, and especially including the option for a right of appeal on the merits directly to the appellate court.

(Proposed)

## **Model Marital Arbitration Act**

### **Section 1. Short Title**

This statute shall be known and may be cited as the (state) Marital Arbitration Act.

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### **Section 2. Validity of Arbitration Agreement**

A written agreement (“the agreement”) to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties, is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. An arbitration agreement shall be liberally construed so as to effectuate the intent of the parties to the fullest extent possible.

### **Section 3. Applicability of Act**

This Act shall apply to all arbitration proceedings respecting issues governed by it, conducted on and after the effective date hereof, provided that:

(a) The agreement states expressly that it has been entered into pursuant to the (state) Marital Arbitration Act, and \_\_\_\_\_

(b) The agreement was made on or after the effective date of this Act, or on or after the effective date of this Act the parties entered into an agreement providing that an arbitration agreement entered into prior to the effective date of this Act, shall be governed by the provisions hereof.

Nothing contained herein shall be deemed to affect the enforceability of any arbitration agreement not subject to the provisions of this Act which is enforceable in accordance with any other applicable law.

### **Section 4. Proceedings to Compel or Stay Arbitration**



(a) On application of a party showing an agreement described in Section 2, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

(b) On application, the court may stay an arbitration proceeding commenced or threatened on a showing that no agreement to arbitrate exists. Such an issue shall be immediately and summarily ruled upon by the court and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.

(c) If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under subdivision (a) of this section, the application may be made therein. Otherwise, and subject to Section 32, the application shall be made in any court of competent jurisdiction.

(d) Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefore has been made under this section or, if the issue is severable, the stay may be with respect to that issue only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

(e) An order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any basis for the claim sought to be arbitrated has not been shown.

(f) When necessary to prevent injustice, the \_\_\_\_\_ court shall have limited jurisdiction to enter temporary orders during the pendency of arbitration proceedings, so long as such orders do not conflict with the arbitration process. Any arbitration award addressing the same issues to which such temporary orders were directed shall supersede any such orders.

## Section 5. Contracting Out.

The parties to an arbitration agreement may agree, expressly or by implication, to vary or exclude any provision of this Act except the following:

- (a) Section 15(a) (equality and fairness)
- (b) Section 15(f) (extension of time limits) (c) Section 27 (vacating an award).
- (d) Section 29 (judgment or decree on award)

## Section 6. Waiver of Right to Object.

A party who participates in an arbitration despite being aware of non-compliance with a provision of this Act, except one mentioned in Section 5, or non-compliance with the arbitration agreement, and does not object to the non-compliance within the time limit provided or, if none is provided, within a reasonable time, shall be deemed to have waived the right to object.

## Section 7. Appointment of Arbitrators.

(a) If the arbitration agreement provides a method for appointment of arbitrators, that method shall be followed. The court shall appoint an arbitrator agreed to by the parties if the arbitrator is qualified under subsection (b) and consents to the appointment. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator is appointed and thereafter fails or is unable to act or continue acting, or if the parties are unable to agree to an arbitrator or a successor, the court on application of a party shall appoint one or more arbitrators as appropriate, who are qualified under subsection (b) and consent to the appointment.

(b) The court shall not appoint an arbitrator under this Act unless the individual meets all of the following qualifications:

(1) Is an attorney in good standing with the state bar  
of \_\_\_\_\_

(2) Has practiced as an attorney for not less than five (5) years immediately preceding the appointment, and actively practiced in the area of family law during three (3) of those five years. Any period of time during which an individual served as a \_\_\_\_\_ court judge or magistrate or referee handling family law matters shall be considered as active practice in the area of family law.

## Section 8. Immunity From Liability

(a) An arbitrator appointed under this Act is immune from liability in regard to all actions performed as arbitrator to the same extent as a \_\_\_\_\_ court judge who had jurisdiction of the action or issues submitted to arbitration.

(b) An arbitrator shall not be named as a party, called as a witness, be required to show cause, or otherwise appear or respond in any proceeding related to or arising out of his role as arbitrator; except, that an arbitrator may be called as a witness wherein a party has applied to the court to vacate the arbitration award based on partiality, corruption or other misconduct on the part of the arbitrator. If an arbitrator is called as a witness in such event, he shall be compensated for his time respecting such testimony, including preparation and travel, in the same manner provided by the arbitration agreement for his services as arbitrator. However, if a court vacates the award or any part thereof as a result of a finding of partiality, corruption or other misconduct on the part of the arbitrator, he shall not be compensated for his time incurred as a consequence of being called as a witness.

## Section 9. Majority Action by Arbitrators.

The powers of the arbitrators may be exercised by a majority unless otherwise provided by the agreement or by this Act.

## Section 10. Representation by Attorney.

A party has the right to be represented by an attorney at any proceeding or hearing under this Act. A waiver thereof prior to the proceeding or hearing is ineffective.

## Section 11. Arbitrable Issues

The parties to an action for divorce, legal separation, annulment, child custody, child visitation, child support, spousal maintenance, or to a postjudgment proceeding related to such an action, may, by a signed written agreement which so provides, stipulate that one or more of the following issues may be resolved by arbitration pursuant to this Act:

- (a) Child Custody
- (b) Visitation or Parenting Time
- (c) Child Support
- (d) Maintenance or Spousal Support
- (e) Real and Personal Property Matters
- (f) Payment of Debts
- (g) Attorney Fees, Costs and Expenses
- (h) Enforceability and Interpretation of Prenuptial and Postnuptial Agreements



(i) Other Contested Domestic Relations Matters.

The agreement shall be liberally construed respecting the issues the parties have agreed to submit to arbitration. Any reasonable dispute as to whether the agreement does or does not provide for submission of a specific issue to arbitration shall be resolved in favor of its submission.

## Section 12. Powers of Arbitrators

Arbitrators shall have the power to administer oaths, issue (or cause to be issued) subpoenas for the attendance of witnesses, including parties, and for the production of books, records, documents and other evidence for depositions or hearings, administer oaths, and all other powers available to a \_\_\_\_\_ court judge in the conduct of legal proceedings of a similar nature, except that an arbitrator shall not have contempt powers. Upon application, the court shall promptly enter such orders as may be appropriate or desirable for the implementation and enforcement of orders, awards and decisions of arbitrators.

## Section 13. Discovery

Unless otherwise provided by the agreement, discovery shall be available to the parties to the same extent as in similar matters before a \_\_\_\_\_ court judge. An arbitrator shall have the same power to limit discovery that a court would have when hearing similar matters.

## Section 14. Procedural Matters.

Unless otherwise provided by the agreement, the arbitrators shall determine all matters of procedure and they shall not be bound by any rule of procedure ordinarily applicable to civil actions.

## Section 15. Hearings

(a) The parties shall be treated equally and fairly.

(b) The arbitrators shall appoint the time and place for hearings and cause notification to the parties to be served personally, by telephone, facsimile, or regular mail, not less than ten (10) days before the hearing. Appearance at the hearing waives such notice unless at the time of such appearance the party expressly objects to the lack of proper notice and requests a postponement of the hearing.

(c) The arbitrators may adjourn any hearing from time to time as necessary and, on request of a party and for good cause, or upon their own motion, may postpone the hearing to a time not later than the date fixed by the agreement for making the award, unless the parties consent to a later date.

(d) The arbitrators may hear and determine the controversy upon the evidence produced, notwithstanding the failure of a party duly notified to appear.

(e) The court, on application, may direct the arbitrators to proceed promptly with the hearing and determination of the controversy.

(f) The court may extend the time within which the arbitrators are required to make an award, even if the time has expired.

(g) The parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing.

(h) The arbitrators may determine the manner in which evidence shall be received; they may decline to receive evidence which they determine to be cumulative or not material to the controversy.

(i) The rules of evidence shall be relaxed; however, the arbitrators shall not give undue weight to hearsay or other unsubstantiated evidence.

(j) The arbitrators shall apply applicable substantive law to the same extent the court would be required to do so if hearing the controversy.

(k) The hearing shall be conducted by all the arbitrators, but a majority may determine any issue and render a final award. If, during the course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrator or arbitrators appointed to act as neutrals may continue with the hearing and determination of the controversy.

(l) No transcript or other record of any hearing or other proceeding shall be required; however, the parties, or any of them, may have a shorthand reporter present or otherwise record the proceedings at their own expense, or on such other basis as the parties may agree for the sharing of the cost. The arbitrators may tape record or otherwise make a record of the proceedings for their own use. Any such tape recording or record shall not be made available to the parties or any court except upon agreement of the arbitrators.

## Section 16. Subpoenas

(a) A subpoena issued or caused to be issued by an arbitrator for a deposition or hearing shall be served, and upon application to the court by a party or the arbitrators, enforced in the manner provided by law for the service and enforcement of subpoenas in a civil action.

(b) All provisions of law compelling a person under subpoena to testify are applicable.

(c) Fees for attendance as a witness shall be the same as for a witness in the \_\_\_\_\_ court.

## Section 17. Appointment of Guardians and Experts

Arbitrators shall not have the power to appoint a guardian ad litem, custody evaluator, accountant or other expert, unless such expert will serve without cost to the parties.

## Section 18. Mediation and Conciliation

Arbitrators shall not use mediation, conciliation or similar techniques during any phase of the arbitration proceedings.

## Section 19. Closed Proceedings

All arbitration hearings and proceedings shall be closed to the public and no one shall be present other than the parties, their counsel, their expert advisors and witnesses, while testifying. Counsel for a party shall be deemed to include secretaries, paralegals and other necessary support personnel of counsel.

## Section 20. Settlement Negotiations

At no time prior to delivery of the award respecting an issue shall any party or counsel, whether through argument or by witness testimony, or otherwise, inform the arbitrators of any settlement negotiations which may have occurred respecting or surrounding that issue, or any statements or comments that a party or counsel may have made with respect thereto. Upon violation of this provision by any party or any counsel, the arbitrators may take such action and impose such sanctions against the offending party and/or that party's counsel as may be appropriate and equitable.

## Section 21. Limitations on Evidence

No person shall be compelled to produce information, property or documents or to give evidence in an arbitration that the person could not be compelled to produce or give in a court proceeding.

## Section 22. Award

(a) The award shall be in writing and signed by the arbitrators joining in the award. The arbitrators shall deliver a copy to each party personally or by regular mail, or as provided in the agreement.

(b) An award shall be made within the time fixed therefor by the agreement or, if not so fixed within thirty (30) days after conclusion of the evidentiary hearing. The parties may extend the time by written agreement, either before or after the expiration thereof. A party waives the objection that an award was not made within the time required unless he notifies the arbitrators of his objection prior to the delivery of the award to him.

(c) The arbitrators may make one or more interim awards, and may make more than one final award, disposing of one or more matters referred to arbitration in each award.

(d) Unless otherwise provided in the agreement, in their award, the arbitrators may include any form of legal or equitable relief a \_\_\_\_\_ court judge could grant, including specific performance, injunctions and other remedies; however, the award may not include a remedy which the court could not order. (e) As to the issues of custody, visitation, child support and other matters related to minor children, and all issues respecting which the parties have preserved a right of appeal to the court of appeals pursuant to Section 25, the arbitrators shall include in the award findings of fact and conclusions of law sufficiently detailed to permit a reviewing court to understand and evaluate the basis of the award respecting each such issue.

## Section 23. Explanation of Award

(a) A party may, within thirty (30) days after delivery of an award, request in writing that the arbitrators clarify one or more provisions of the award.

(b) If the arbitrators fail to provide the requested clarification within fifteen (15) days after receiving the request, the court may, on a party's application, order them to do so.

(c) If a party requests clarification of an award, a copy of that request shall be furnished forthwith to the other party.

## Section 24. Amending and Correcting Award By Arbitrators

(a) The arbitrators may, on their own initiative within thirty (30) days after delivery of an award, or at a party's request made within thirty (30) days after delivery of the award:

- (1) Correct typographical errors, errors of calculation and similar errors in the award;
- (2) Amend the award so as to correct an injustice caused by an oversight on the part of the arbitrators;
- (3) Supplement the award, reconsider any part of the award, or make an additional award to address a claim that was presented in the arbitration but omitted from the earlier award.

(b) A request made by a party in accordance with this section shall be in writing and a copy thereof shall be served forthwith on the other party. Such other party shall then have ten (10) days after the service of that request on him to serve a written objection or response to the request. A copy of such objection or response shall be served forthwith on the other party.

(c) The arbitrators shall then rule on the request for amendment or correction within fifteen (15) days after service of the objection or response by the non-requesting party, or if no objection or response is filed, within fifteen (15) days after the last date on which it could have been filed.

(d) The arbitrators need not hold a hearing before ruling on a request for amendment or correction made pursuant to this section. Their ruling shall be in writing and shall be delivered or mailed to the parties promptly.

## Section 25. Right of Appeal

(a) To the extent that the agreement so provides, any or all of the issues resolved or addressed by an award, or which the arbitrators failed or refused to address, shall be appealable on the merits directly to the \_\_\_\_\_ Court of Appeals. Otherwise, the award shall be binding and non-appealable, except as provided by this section.

(b)(1) Provisions of an award respecting child custody, visitation, child support, and other matters relating to a minor child which are binding and non-appealable pursuant to the agreement or subparagraph (a) of this Section shall nevertheless, before confirmation of the award as to those issues, be reviewed by the \_\_\_\_\_ court judge having jurisdiction of the matter, to determine if each aspect of the award which respects the minor child is in the child's best interests. The review may be made without a hearing and shall be based solely on the arbitration record, including documentary evidence and transcripts of the proceedings, if any. There shall be a presumption that the award is in the best interests of the child. A party objecting to the award in any respect shall have the burden of proof by clear and convincing evidence as to such objections.

(2) If the court determines that each aspect of the award which respects the minor child is in the child's best interest, the court shall confirm the award in accordance with Section 26. If the court finds that the award is not in the best interests of the minor child in any respect, the court shall enter an order returning the matter to the arbitrators, with advice that the award was found to be not in the best interests of the child for the reasons specified and requesting that the arbitrators reconsider their award as to those matters. The arbitrators may then, in their discretion, reconsider the matter and enter a new award, or they may decline to do so. If the arbitrators decline to amend their award, the court shall be so advised. If a new award is issued after remand from the court, the amended award shall be returned to the court to determine whether it meets the best interests of the child. If the court determines that the amended award meets the best interest of the child, it shall be confirmed. If the arbitrators have declined to amend their award, or if the court determines that any amended award still fails to meet the best interests of the child in any respect, the court may either order that the arbitration shall be terminated as to the unconfirmed matters or that it shall be returned to the arbitrators for further consideration and a further request that the award be amended.

(3) If an award respecting child custody, visitation, child support or other matters relating to a minor child is binding and non-appealable pursuant to the agreement or subparagraph (a) of this Section, orders entered by the \_\_\_\_\_ court confirming or declining to confirm the award in any such respect shall be final and non-appealable.

(c) The following aspects of an award may be appealed to the \_\_\_\_\_ court of appeals, to the extent provided by the agreement:

- (1) questions of law
- (2) questions of fact
- (3) questions of mixed law and fact

(d) Except to the extent otherwise provided in this Act, any appeal pursuant to this Act shall be taken in the same manner and to the same extent as from orders or judgments in a civil action.

(e) The time within which by law or rule an appeal must be commenced shall begin to run on the date the \_\_\_\_\_ court enters an order confirming the award. If an award is confirmed as to some matters but not as to others, the time for commencement of appeal respecting the confirmed matters shall begin to run on the date of the order confirming those portions of the award respecting those matters. For purposes of this subsection 25(e) time shall be computed in the same manner as for civil actions.

(f) An appeal may also be taken from:

- (1) An order denying an application to compel arbitration made under Section 4(a);
- (2) An order granting an application to stay arbitration made under Section 4(b);

- (3) An order confirming or denying confirmation of an award;
- (4) An order modifying or correcting an award;
- (5) An order vacating an award without directing a rehearing; or
- (6) A judgment or decree entered pursuant to the provisions of this Act.

(g) An appeal of an arbitration award shall be captioned

In re the Arbitration of \_\_\_\_\_ and \_\_\_\_\_, using only the initials of the parties. Any published or publicly reported opinion from any court shall contain only the initials of the parties, shall not contain business names or other information by which the parties are likely to be identified, and shall not include the names of the arbitrators.

(h) Entry of the decree of dissolution of marriage, legal separation or annulment shall not be delayed because of an appeal or contemplated appeal to an appellate court of all or part of an arbitration award.

## Section 26. Confirmation of an Award

(a) Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed, grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in Sections 27 and 28. If the award includes resolution of issues respecting child custody, visitation, child support or other matters relating to a minor child and the award in those respects is binding and nonappealable pursuant to the agreement or Section 25(a) of this Act, the court shall also conduct the inquiry and take such further action as required by Section 25(b) of this Act. If the award resolves an issue respecting child custody, visitation, child support or other matter relating to a minor child and the parties have agreed that questions of fact, questions of law, and questions of mixed fact and law respecting that issue shall be appealable directly to the court of appeals, the court shall not conduct the Section 25(b) inquiry respecting that issue but shall confirm the award in each such respect, unless grounds exist for vacating, modifying or correcting the award pursuant to Sections 27 and 28.

(b) The court shall not delay confirmation of those parts of an award which the court has found not to be contrary to the best interests of a minor child and which no party has requested that the court vacate, modify or correct. \_\_\_\_\_

— (c) By mutual agreement, the parties may at any time terminate the arbitration proceedings as to any matter and submit it to the court for resolution.

## Section 27. Vacating an Award.

(a) Upon application of a party, the court shall vacate an award where:

- (1) The award was procured by corruption, fraud or other undue means;
- (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
- (3) The arbitrators exceeded their powers;
- (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 15, as to prejudice substantially the rights of a party; or
- (5) There was no arbitration agreement and the issue was not previously determined adversely to the applicant in proceedings under Section 4 and the applicant did not participate in the arbitration hearing without raising the objection;

(b) An application under this Section shall be made within thirty (30) days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within thirty (30) days after such grounds are known or should have been known.

(c) In vacating the award on grounds other than stated in clause (5) of subsection (a) the court may order a rehearing before new arbitrators chosen as provided in the agreement, or in the absence thereof, by the court in accordance with Section 7, or if the award is vacated on grounds set forth in clauses (3) and (4) of subsection (a) the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with Section 7. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order vacating the award.

(d) If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award, subject to the provisions of Section 26.

### Section 28. Modification or Correction of Award By Court.

(a) Upon application, made within thirty (30) days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:

- (1) There is evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;
- (2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
- (3) The award is imperfect in a matter of form not affecting the merits of the controversy.

(b) If the application is granted, the court shall modify or correct the award so as to effect its intent and shall confirm the award as so modified or corrected. Otherwise, the court shall confirm the award as made.

(c) An application to modify or correct an award may be joined in the alternative with an application to vacate the award.

### Section 29. Judgment or Decree on Award.

Upon the granting of an Order confirming, modifying or correcting an award, a judgment or decree shall be entered in conformity therewith and shall be enforceable as any other judgment or decree. Costs of the application and of any proceedings subsequent thereto may be awarded by the court unless otherwise provided by the award or the agreement.

### Section 30. Applications to Court.

Except as otherwise provided, an application to the court under this Act shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions. Unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of a summons in a civil action.

### Section 31. Court, Jurisdiction.

Unless otherwise provided, the term "court" means a \_\_\_\_\_ court of this state. The making of an agreement described in Section 2 providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this Act and to enter judgment on an award thereunder.

### Section 32. Venue.



An initial application shall be made to the court of the [county] in which the agreement provides the arbitration hearing shall be held or, if the hearing has been held, in the county in which it was held. Otherwise the application shall be made in the [county] where the adverse party resides or has a place of business or, if he has no residence or place of business in this state, to the court of any [county]. All subsequent applications shall be made to the court hearing the initial application unless the court otherwise directs.

### Section 33. Effective Date.

