



The Path Less Traveled is About to Get Busier

BY MARIS J. WEINER

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The adoption of the Uniform Family Law Arbitration Act (UFLAA) this year has brought renewed focus on deciding family law issues within the context of Alternate Dispute Resolution (ADR). As a result, more individuals are expected to opt to arbitrate their family law disputes. While arbitration is not a new concept to family law, the UFLAA standardizes the process in Pennsylvania, ensuring consistency and clarity across cases, and closes the gaps left by the commercial arbitration statutes by addressing the unique needs of family law participants.

How does arbitration differ from other methods of ADR? While arbitration, mediation and collaborative law are all consensual processes that allow divorcing couples to exercise some degree of autonomy, there are significant differences between them. In a mediation, mediators facilitate negotiations between spouses or parents with the goal of arriving at a mutually acceptable agreement. Lawyers are not essential to mediation, but sometimes will participate. Collaborative law requires parties and their counsel to enter into a four-way contractual relationship designed to incentivize a settlement. Collaborative law negotiations are not facilitated or directed by a third party, such as a mediator, and if the process fails to achieve settlement, the lawyers must withdraw from representation. Arbitration, on the other hand, contrasts sharply with these dispute-resolution methods. In arbitration, the parties contract with a decision maker, often an experienced family law attorney, to act as a private judge to determine specific disputes. Family law arbitrators hear expert and lay witness testimony, examine documentary evidence, and reach a final decision. Unlike the public judicial process, arbitration is binding and final. If one party is unhappy with the outcome of the arbitration, there are no automatic procedures for review.

So, why choose arbitration over litigation? The answer is that arbitration offers several advantages over litigation. Unlike court proceedings, arbitration hearings are not public, and the parties can agree to their own terms of confidentiality. The arbitration process is predictable in the sense that the parties and the arbitrator can agree upon the expectations of the process – the exact issues to be resolved, the rules to be followed, the timetable for the process, and the costs. Arbitrators are allowed to use more relaxed rules of evidence. Because arbitration generally takes place on a faster timeline, it usually



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ends up being less expensive than litigation, even taking into account the arbitrator's fee. The trade-off in arbitration is the narrow scope of post-award judicial review. Typically, arbitration awards are vacated only for arbitrator misconduct, and not for errors of law. Nevertheless, arbitration is an attractive alternative to litigation for couples who are frustrated with overcrowded court dockets and costly drawn-out litigation.

Arbitration is much more private than trying a case in open court. Every document filed in court immediately becomes public record (unless a case is sealed). In cases involving high profile parties, or facts that parties may want to keep out of the public domain, arbitration is an excellent option.

The adoption of the UFLAA in Pennsylvania has now paved the way for family law litigants who want to avoid the stress and uncertainty of litigation in court. The UFLAA, according to the act's prefatory note, will provide "needed guidelines to ensure that the arbitration process is fair and efficient for the participants in family law disputes and protects the interests of vulnerable family members." The UFLAA covers arbitration in any contested issue arising under the Pennsylvania state's family law. Typical issues include equitable division of property, allocation of debt, spousal support, parenting time, child support and attorney's fees. The Act specifically prohibits an arbitrator from making a status determination, such as an award of divorce or annulment, and termination of parental rights. Arbitrators may issue sanctions, such as a fine or attorney's fees, for a party's misconduct during the arbitration proceedings, including failing to comply with the arbitrator's directives, but the arbitrator cannot hold a party in contempt. Instead, a party must seek this status determination by requesting the court to enforce the arbitrator's directive, if necessary.

The UFLAA sets out the basic standards for terms to be included in an arbitration agreement and establishes the basic requirements for family law arbitrators. One of the principal benefits of the

arbitration alternative to family law matters is the ability of the parties to decide who will be their judge. While litigation leaves the parties no choice but to be bound by the "luck of the draw," arbitration allows parties to intentionally select seasoned family law attorneys as their triers of fact. The UFLAA provides that arbitrators must be an active or retired attorney, or a retired judge, and must have received training identifying domestic violence and child abuse. Considering judicial review of the arbitrator's award is narrow, and does not include errors of law, the parties must carefully select and have confidence in their decision maker. Parties should seek an arbitrator with experience in family, who is impartial and has a reputation for integrity.

The Act extends to, and protects, child-related disputes. The UFLAA recognizes the state's *parens patriae* responsibility for children and vulnerable family members in several nonwaivable provisions. In contrast to the limited judicial review in commercial arbitration, the UFLAA requires robust judicial scrutiny in child-related awards. In particular, under the Act a court cannot confirm an award determining child custody or child support unless it finds that the award complies with applicable law and is in the child's best interests. The Act requires that arbitration proceedings involving child-related issues must be recorded, and any award regarding children must specifically set forth the underlying reasons for the decision. If an arbitrator has a reasonable basis to believe that a child is the subject of abuse or neglect, the Act requires the arbitrator to terminate the arbitration and report the findings to the appropriate state authority. In addition, if domestic violence is evident between the parties, a court, not the arbitrator, must decide whether arbitration may proceed. In order for arbitration to go forward, a party at risk of harm must reaffirm the agreement to arbitrate, and the court must find that adequate procedures are in place to protect the party from risk of harm or intimidation.

While the UFLAA is intended to operate against the backdrop of Pennsylvania's general laws on arbitration, it includes specific provisions essential to a fair and efficient process within the realm of family law. The UFLAA is a welcome development in the law. It provides needed standards to ensure that family law arbitrations retain the advantages of efficiency while also serving the specific needs of families in dissolution. Given the ever-increasing burdens on the courts and the resulting delays, there has never been a better time to recommend arbitration as an option to your family law clients.