

## Family Law Arbitration: Legislation and Trends

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After an article on family law arbitration appeared several years ago,<sup>1</sup> there have been developments related to legislation for this alternative dispute resolution (ADR) technique.

In 2005 the American Academy of Matrimonial Lawyers (AAML) published a Model Family Law Arbitration Act (Model Act), based on the Revised Uniform Arbitration Act,<sup>2</sup> on its website.<sup>3</sup> One state, North Carolina, adopted amendments to its

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<sup>1</sup> George K. Walker, *Arbitrating Family Law Cases by Agreement*, 18 J. AM. ACAD. MATRIMONIAL LAW. 429 (2003).

<sup>2</sup> UNIF. ARBITRATION ACT (2000), 7(1) U.L.A. 1 (2005), commonly known as the REVISED UNIF. ARBITRATION ACT (hereinafter RUAA) and thus referred to in this article, to distinguish it from the older UNIFORM ARBITRATION ACT (1956) (hereinafter UAA), *id.* 95 (2005), still in force. See *Table of Jurisdictions Wherein Act Has Been Adopted*, *id.* 8 (2008 Cum. Ann. Pocket Pt.).

<sup>3</sup> 2004 American Academy of Matrimonial Lawyers Arbitration Committee, MODEL FAMILY LAW ARBITRATION ACT (Mar. 12, 2005) (hereinafter MODEL ACT), available at [www.aaml.org](http://www.aaml.org). Where MODEL ACT provisions (hereinafter MODEL ACT, followed by section number) are the same as or similar to RUAA sections, notes will refer to both. Commentaries follow every MODEL ACT provision but will not generally be referred to separately in the article. Readers wanting further analysis or sources can consult those Commentaries by downloading the MODEL ACT and checking analysis in Part III.A. Due to computer downloading variances, page numbers to the MODEL ACT may not match this article's page citations.

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family law arbitration statutes to conform to the RUA model.<sup>4</sup> Other legislatures have enacted new ADR legislation, and court systems have new rules, related to family law.<sup>5</sup> Still other states' bar groups have legislation under consideration.<sup>6</sup> Federal and state cases continue to operate within statutory and rule formulas. With these actions have come new issues, primarily from states requiring review of custody and support agreements.

Outside the arenas of family law and new ADR techniques to help resolve family law issues,<sup>7</sup> there have been issues related to, and challenges to, general arbitration statutes and law.<sup>8</sup> The

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<sup>4</sup> Compare N.C. GEN. STAT. §§ 50-41 - 50-62 (2007), with *id.* §§ 50-41 - 50-62 (2001), the latter reprinted in 3 GEORGE K. WALKER, 2006 REVISED HANDBOOK: ARBITRATING FAMILY LAW CASES UNDER THE NORTH CAROLINA FAMILY LAW ARBITRATION ACT AS AMENDED IN 2005 (2006), available on the North Carolina Bar Association website, [www.ncbar.org](http://www.ncbar.org). The Act's 2001 version and rules adopted under it may govern older agreements to arbitrate. GEORGE K. WALKER, ARBITRATING FAMILY LAW CASES BY AGREEMENT: HANDBOOK FOR THE NORTH CAROLINA FAMILY LAW ARBITRATION ACT (1999) publishes these forms and rules; 3 WALKER, 2006, *supra*, reprints it. In 2003 North Carolina enacted the North Carolina Revised Uniform Arbitration Act, N.C. GEN. STAT. §§ 1-569.1 - 1-569.31 (2007) replacing its Uniform Arbitration Act version, *id.* 1-567.1 - 1-567.20 (2001), no longer published in the North Carolina General Statutes; 3 WALKER, 2006, *supra* reprints it. Due to computer downloading variances, page numbers to 1-3 WALKER, 2006, *supra*, may not match this article's page citations in some cases.

<sup>5</sup> See *infra* Part III.A.

<sup>6</sup> See *infra* Part III.B.

<sup>7</sup> *E.g.*, collaborative law or parent coordinators, both relatively new methods. See *infra* Part III.C. Other "standby" alternatives to litigation continue to be settlement, perhaps requiring court approval, and mediated settlement conferences, the results of which may also require court approval.

<sup>8</sup> *E.g.*, challenges to clauses in agreements to arbitrate barring class actions. See generally Nathan Koppel, *Recent Rulings Bolster the Case for Class Actions*, WALL ST. J., July 3, 2008, at B7, reporting on *Fiser v. Dell Computer Corp.*, 188 P.3d 1215, 1218-21 (N. Mex. 2008), which invalidated Dell's clause prohibiting class actions as being unconscionable and against public policy. The MODEL ACT does not prohibit class actions, but suggests forms and rules and offers a clause that does. See Part II.J *infra*. There have been actions and calls for statutory exceptions to the Federal Arbitration Act, 9 U.S.C. §§ 1-207 (2006) (hereinafter FAA), to remove consumer and similar disputes from its purview. See, *e.g.*, Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (2008) (hereinafter Arbitration Fairness Act); Peter L. Murray, *Viewpoint: The Privatization of Civil Justice*, 91 JUDICATURE 272, 316 (No. 6, 2008); Richard E. Speidel, *International Commercial Arbitration: Implementing the New York Convention*, ch. 6 in EDWARD BRUNET ET AL., ARBITRATION LAW IN AMERICA:

RUAA, drafted to replace the UAA, now over a half century old, continues to gain acceptance among the states, albeit at a slower than expected pace.<sup>9</sup>

In 2006 the AAML, through its Arbitration Committee, surveyed the AAML membership to inquire about developments in matrimonial arbitration; the result was a rich lode of data and comments on developments, or lack of them, among U.S. jurisdictions. In some cases survey responses reported other ADR options, new and old, related to resolving family law disputes outside the courthouse, often with court supervision.<sup>10</sup>

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A CRITICAL ASSESSMENT (2006) (proposing FAA amendments); Jean R. Sternlight, *Consumer Arbitration*, ch. 5 in *id.* (promoting exempting consumer contracts from FAA coverage); *but see* Christine Varney, *Arbitration Works Better Than Lawsuits*, WALL ST. J., July 14, 2008, at A17; Stephen J. Ware, *Interstate Arbitration: Chapter 1 of the Federal Arbitration Act*, ch. 4 in BRUNET ET AL. (opposing eliminating consumer contracts from FAA coverage, proposing amendments to the Act). Presumably amendment advocates would also urge consumer protections for the RUAA and similar state legislation to cover situations the FAA does not reach. New Mexico has them in its RUAA version. Compare RUAA §§ 1-33, with N. MEX. STAT. ANN. §§ 44-7A-1 - 44-7A-32 (2004). The Arbitration Fairness Act would nullify predispute arbitration situs clauses; some state legislation already does so, e.g., N.C. GEN. STAT. § 22B-3 (2007).

<sup>9</sup> As of mid-2008, 13 jurisdictions had enacted the RUAA. *See Table of Jurisdictions Wherein Act Has Been Adopted*, 7(1) U.L.A. 1(2008 Cum. Ann. Pocket Pt.). On the transnational law plane, the UNCITRAL Model Law on International Commercial Arbitration has been modified. *See generally* United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration, with Amendments as Adopted in 2006, available at [www.uncitral.org/uncitral/en.uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en.uncitral_texts/arbitration/1985Model_arbitration.html) (visited Sept. 1, 2008); R. Jeremy Sugg, Comment, *Interim Relief and International Commercial Arbitration in North Carolina: Where We Are and Where We Should Be Looking*, 30 CAMPBELL L. REV. 389 (2008). This may encourage amending national legislation and, within the United States, amending state codes dealing with international arbitrations to the extent federal law does not preempt state law. A now dated essay, George K. Walker, *Trends in State Legislation Governing International Arbitrations*, 17 N.C. J. INT'L L. & COM. REG. 419 (1992) surveyed state international arbitration legislation. More jurisdictions have similar statutes today.

<sup>10</sup> The author expresses thanks to the AAML, its members who took time from busy practices to respond to the survey, and to Lynn Burleson, former AAML Arbitration Committee chair, who initiated it. The results have been an invaluable cross-check on research and an outstanding resource for this article. For example, a state may have what amounts to family law arbitration operating under a different title. Maine's referee system for family law disputes is a func-

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No jurisdiction except North Carolina seems to have a version of the AAML Model Act;<sup>11</sup> one state, Georgia, considered adopting it but did not.<sup>12</sup> Why? Legislative cycles, *e.g.*, states that can enact new statutes (as distinguished from budget fixes or emergency legislation) only in alternate years; higher priority agenda items in a time of economic crisis; suspicion of or opposition to arbitration among consumer advocates,<sup>13</sup> some within the trial bar, and some business groups concerned about “runaway” arbitral awards; legislative or judicial policies for reviewing agreements related to marriage dissolution;<sup>14</sup> fear of using a new ADR option when other options seem to work well enough (The Bert Lance philosophy: “If it ain’t broke, don’t fix it”); court

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tional equivalent of family law arbitration. *See infra* Part III.A.10. In some cases AAML members sent research articles, papers or comments to explain statutes, rules or procedures. The author, although licensed in two states, does not profess expertise in the law of all jurisdictions. His academic experience has been *inter alia* in arbitration and ADR. Family law and ADR may have common unifying features among the states, *e.g.*, all jurisdictions allow filing for divorce and most have a form of ADR. However, the devils in the details may not be readily apparent to a researcher from the “outside.”

<sup>11</sup> Outside the United States, Ontario is among jurisdictions that have family law arbitration legislation. The statutes bar using other than Canadian law; therefore, Islamic law is not permitted in proceedings. *See generally* Jehan Aslam, *Judicial Oversight of Islamic Family Law Arbitration in Ontario: Ensuring Meaningful Consent and Promoting Multicultural Citizenship*, 38 N.Y.U.J. INT’L L. & POL’Y 841 (2006). There has been little notice of the MODEL ACT in law journals, either; *see* R. Mark Browning, *Hawaii’s Family Court Promotes Innovative Divorce Resolutions*, 10 HAW. B.J. 23, 26-27 (2006) (Act could relieve court congestion, awards subject to judicial review); Aaron E. Zurek, *All the King’s Horses and All the King’s Men: The American Family After Troxel, the Parens Patriae Power of the State, a Mere Eggshell Against the Fundamental Right of Parents to Arbitrate Custody Disputes*, 27 HAMLINE J. PUB. L. & POL’Y 357, 404-10 (2006) (advocating modified version of the Act in the wake of *Troxel v. Granville*, 530 U.S. 57 (2000)); 77 BUFFALO L.J. (2005). Websites have picked up on the Act. *See, e.g.*, Stephen C. Knight, *Divorce Arbitration*, Knight on Family Law (June 8, 2005), <http://knightonfamilylaw.com> (2005) (visited July 8, 2008); Diana L. Scaggs, *Arbitration in Kentucky Divorce Cases?*, Divorce Law Journal (Oct. 25, 2006), <http://louisvilledivorce.typepad.com> (visited July 8, 2008).

<sup>12</sup> Georgia legislation ties family law arbitration to its general arbitration statutes. *See infra* Part III.A.7.

<sup>13</sup> *See supra* note 8 and accompanying text.

<sup>14</sup> A number of states have legislation or cases requiring such. *See generally infra* Part III.A.

decisions hostile to some or all aspects of arbitration;<sup>15</sup> perhaps a perception that these matters should be tried in a public courtroom rather than a private tribunal;<sup>16</sup> and general inertia; among others, might be cited as reasons.

## I. Plan of the Article

This article begins with a general premise that arbitration by agreement is not a panacea, cure or substitute for other methods, old and new, for resolving family law disputes; other techniques may work better in a particular case.<sup>17</sup> A second premise is that the Model Act, with its suggested forms and rules, is not cast in stone for verbatim use everywhere. Like the RUAA and the UAA, the Act and its ancillary forms and rules are guides for legislation and practice;<sup>18</sup> they must be modified to suit a particular state's jurisprudence. A third is that the Model Act may have defects, some unforeseen by later events. The Committee wrote on a blank slate; one goal of this article is suggesting amendments to the Act and its forms and rules that may make it more attractive for adoption.

Part II analyzes the Model Act with its suggested forms and rules, as drafted by the AAML Arbitration Committee, approved by the AAML and published on the AAML website.<sup>19</sup> Part II notes issues that may affect its enactment around the nation and suggests alternative legislation for some jurisdictions. Part II also compares the Model Act to the RUAA, other legislation and recommended forms and rules published with the Model Act. Part III discusses statutory and case law developments related to family law arbitration, including the interrelationship of ADR techniques besides arbitration, within a particular jurisdiction. Part IV discusses possible uses of the Act

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<sup>15</sup> *E.g.*, judicial decisions holding that clauses that bar consumer class actions are unconscionable. *See infra* Part II.J.

<sup>16</sup> *Cf.* Murray, *supra* note 8.

<sup>17</sup> *See* MODEL ACT, at 139.

<sup>18</sup> The annotated UAA and RUAA publish notes on variant legislation in enacting jurisdictions. It is necessary, however, to consult a particular state's statutes for exact, up-to-date variants and amendments. The U.L.A. versions, although generally comprehensive, are a secondary source for the state law versions.

<sup>19</sup> *See supra* note 3 for the website citation.

for states that already have family law arbitration statutes or rules, suggestions for those states that have no family law arbitration legislation, and advances possible uses of the suggested standard forms and rules accompanying the on line Model Act. Part V offers conclusions and comments on possible future trends, including positive and negative influences on using arbitration and questions on enactment of family law arbitration legislation including interface with other ADR methods, development of standard forms and rules, and education and promotion of family law arbitration. Part V ends as this article begins, noting that arbitration is not the solution for every family law case, although it is a valuable option that should be considered for enactment and use.

## **II. The AAML Model Family Law Arbitration Act**

When the AAML Arbitration Committee completed its work and the AAML published the Model Act in 2005, the result was a shot in the dark. Only 10 jurisdictions had adopted the RUAA;<sup>20</sup> in some quarters there may have been questions on whether many states would accept it,<sup>21</sup> even though the new draft legislation in part tries to resolve issues that developed after the UAA was available for adoption in the fifties.<sup>22</sup> As of mid-2008, 13 jurisdictions had adopted the RUAA, which represents steady progress, although universal acceptance may not come soon.<sup>23</sup>

Part II analyzes the Model Act and forms and rules suggested for use with the Act; they are also published on line with the Act in *Model Act*<sup>24</sup> with Commentaries after suggested provisions.

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<sup>20</sup> *Table of Jurisdictions, supra* note 9, at 1.

<sup>21</sup> The author's experience in North Carolina was that legislators were concerned with the seemingly open-ended language of RUAA § 21, declaring that arbitrators may award punitive damages and attorney fees. The North Carolina version, N.C. GEN. STAT. §§ 1-569.21(a), 1-569.21(b) (2007), provide that punitive damages and attorney fees may be awarded only if other law allows them or parties contract for them.

<sup>22</sup> MODEL ACT at 19-20 summarizes problem areas that have developed.

<sup>23</sup> *Table of Jurisdictions, supra* note 9, at 1. In 2008 27 jurisdictions continued to follow the UAA. *Id.* at 8. See *supra* note 20 and accompanying text.

<sup>24</sup> MODEL ACT, *supra* note 3.

The Model Act numbers its proposed legislation beginning with § 101 and follows the RUAA, starting with § 1, except a special statute, § 124A, governing modifications of alimony, post-separation support, child support or child custody awards.<sup>25</sup> The Model Act begins with § 101, because in 2004 the AAML Arbitration Committee drafters submitted two Model Act versions, the first following the UAA with section numbers beginning with § 1, and the second starting at § 101 for the RUAA-based version, to avoid confusion. The AAML leadership decided to proceed with a RUAA-based model; the §§ 101-34 numbers remain in the Model Act to minimize confusion if drafters chance upon the 2004 version of the Committee's work.<sup>26</sup>

A. *Policy of the Act; Linkage to Substantive Family Law Statutes and Other Arbitration Legislation*

Following the original and later North Carolina legislation, a policy statement begins Model Act § 101:

- (a) It is the policy of this State to allow, by agreement of all parties, the arbitration of all issues arising from a marital separation or divorce, except for the divorce itself, while preserving a right of modification based on substantial change of circumstances related to alimony, child custody and child support. Pursuant to this policy, the purpose of this Article is to provide for arbitration as an efficient and speedy means of resolving these disputes, consistent with family law legislation of this State Statutes and similar legislation, to provide default rules for the conduct of arbitration proceedings, and to assure access to the courts of this State for proceedings ancillary to this arbitration.<sup>27</sup>

<sup>25</sup> See *id.* at 86-88; *infra* Parts II.Q.3, II.T.2.

<sup>26</sup> That 2004 draft is on file with the AAML; it might be consulted for those jurisdictions that are content with the UAA and do not plan to enact the RUAA in the foreseeable future. MODEL ACT, at 16. Forms and rules in *id.* are not the same as those in the 2004 draft and represent the final product of the AAML Arbitration Committee, which the AAML leadership approved to accompany the MODEL ACT. 1 WALKER, 2006, *supra* note 4, Part II, publishes forms and rules slightly different from the MODEL ACT versions, reflecting North Carolina's practice needs. Parties should be sure that any forms and rules reflect their jurisdiction's law and needs of a particular case.

<sup>27</sup> Compare MODEL ACT § 101(a), with N.C. GEN. STAT. § 50-41(a) (2007). MODEL ACT § 134, echoes N.C. GEN. STAT. § 50-41(b) (2007) to provide a title for the Acts. *Pataky v. Pataky*, 585 S.E.2d 404, 414 (N.C. Ct. App. 2003), *aff'd, discret. rev. improvidently granted*, 602 S.E.2d 360, 361 (N.C. 2004), cited the North Carolina Act, similar to the MODEL ACT, encouraging its use

Model Act § 126 establishes the general subject-matter jurisdiction of a state's courts, declaring that a court of the state with jurisdiction over the controversy and the parties may enforce an agreement to arbitrate; an agreement to arbitrate providing for arbitration in the state confers exclusive jurisdiction on the court to enter judgment on an award under the Act.<sup>28</sup>

Section 127 says venue is where the first application to a court in the county or other local political subdivision<sup>29</sup> where the agreement to arbitrate specifies the arbitration will be held, or where the arbitration was held. Otherwise, for example, if an agreement does not declare an arbitration site, arbitration must be held where an adverse party has a residence or place of business in the state. Later motions must be made in the court that hears the initial motion.<sup>30</sup> Usually the first application will be a motion to compel arbitration,<sup>31</sup> but a motion for provisional remedies can come earlier.<sup>32</sup> Under § 126 a court having jurisdiction over a controversy and the parties may enforce the agreement to arbitrate; an agreement to arbitrate providing for arbitration in a state confers exclusive jurisdiction on the court to enter a judgment on an award under the Act.<sup>33</sup> The Model Act's suggested

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for family law issues without court interference. Texas legislation has a similar policy statement. *See infra* note 550 and accompanying text.

<sup>28</sup> Before a controversy arises, parties may not waive or vary the effect of MODEL ACT § 126. *Id.* § 104(b)(1). *Compare* RUAA §§ 4(b)(1), 126; *see also* MODEL ACT, at 91; *infra* Part II.F.

<sup>29</sup> In Alaska, *e.g.*, local political subdivisions are called boroughs; in Louisiana, parishes; and in Virginia, cities and counties are separate local subdivisions. A state enacting the Act must conform MODEL ACT § 127 and other provisions to particular local nomenclature.

<sup>30</sup> MODEL ACT § 127, referring to *id.* § 105; *compare* RUAA §§ 105, 127; *see also* MODEL ACT, at 92-93. Parties may waive or vary the effect of § 127. *Id.* § 104(a); *compare* RUAA § 4(a); *see also infra* Part II.F.

<sup>31</sup> MODEL ACT § 107; *compare* RUAA § 7; *see also* MODEL ACT, at 59-60.

<sup>32</sup> MODEL ACT § 108; *compare* RUAA § 8; *see also* MODEL ACT, at 60-61; *infra* Part II.H.

<sup>33</sup> MODEL ACT § 126; *compare* RUAA § 126; *see also* MODEL ACT § 125 (judgment on award); MODEL ACT, at 91-92; Forms A, *id.* 103; *infra* Part II.R. Parties may waive or agree to vary the effect of § 126, but only after a controversy arises that is subject to the agreement to arbitrate. MODEL ACT, § 104(b)(1); *compare* RUAA § 4(b)(1); *see also* MODEL ACT, at 56-67; *infra* Part II.F.



Basic Rules reflect a possibility of contracting for different sites, or an arbitrator's moving a site.<sup>34</sup>

Section 127 also establishes special arbitration venue rules, among them the site that parties choose. There should be no problem with one chosen after a dispute arises; state and perhaps future federal arbitration law might invalidate only pre-dispute situs clauses.<sup>35</sup> State law *lex specialis* and perhaps later in time construction principles, and state law policies favoring arbitration,<sup>36</sup> should prevail over general state law ban on pre-dispute clauses if a state enacts § 127.<sup>37</sup> Federal law prohibitions should come into play only if a family law arbitration is consolidated<sup>38</sup> with a parallel arbitration subject to federal arbitration law.<sup>39</sup> Even if a state court holds a pre-dispute contract provision invalid for a family law case, a severability clause would save the basic agreement. Parties could agree, after a dispute arises, on a site; this would be valid. Even if no agreement is possible then, a party can file to compel arbitration;<sup>40</sup> the statutory choice of that county would govern,<sup>41</sup> with perhaps post-filing agreement on another, more preferable site.<sup>42</sup> Unconscionability claims<sup>43</sup> based on a purportedly onerous pre-dispute situs clause should be eliminated if parties, by amending the agreement, choose a site after a dispute has arisen.

<sup>34</sup> Basic R. 8, 19, 28(a), MODEL ACT, at 117, 122, 125.

<sup>35</sup> *Cf.*, e.g., draft Arbitration Fairness Act, *supra* note 8; N.C. GEN. STAT. § 22B-3 (2007) (clause valid only if chosen after a dispute arises).

<sup>36</sup> MODEL ACT § 101(a).

<sup>37</sup> This should be the result for states like North Carolina, which has a version of *id.* but does not have the equivalent of *id.* § 127. The state does have the analogous RUAA § 27 provision, N.C. GEN. STAT. § 1-569.27 (2007).

<sup>38</sup> MODEL ACT § 110; *see also infra* Part II.J, advocating a clause in agreements to arbitrate to negate the possibility of consolidation.

<sup>39</sup> The FAA governs transactions in interstate and foreign commerce. 9 U.S.C. § 1 (2006); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); *see also supra* note 8 and accompanying text. If legislation like the draft Arbitration Fairness Act, *supra* note 8, goes into force, the FAA will exclude consumer and similar transactions in interstate and foreign commerce, further narrowing the kind of disputes with which family law cases might be concerned.

<sup>40</sup> MODEL ACT § 106.

<sup>41</sup> *Id.* § 127.

<sup>42</sup> *See supra* notes 29-35 and accompanying text.

<sup>43</sup> *See, e.g., supra* note 8.

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Model Act § 129 reinforces reference to a particular jurisdiction's arbitration and family law statutes:

Certain provisions of this [Act] have been adapted from the [Uniform Arbitration Act or Revised Uniform Arbitration Act, whichever is in force in a jurisdiction] and [citation to appropriate parts of a jurisdiction's family law legislation]. This [Act] shall be construed to effect its general purpose, to make uniform provisions of these [Acts] and [citation to appropriate parts of a jurisdiction's family law legislation].<sup>44</sup>

As the Model Act and the North Carolina legislation comments make clear, the purposes of these statutes are to declare legislative policy favoring arbitration for family law disputes, to preserve substantive family law of the particular state, and to incorporate by reference decisional law flowing from that law, and from the state's current arbitration legislation.<sup>45</sup> The North Carolina Court of Appeals cited that state's version of § 129 to consider UAA cases dealing with modification of awards.<sup>46</sup> To be sure, some states, such as Indiana,<sup>47</sup> may not wish this kind of uniform interpretation. If so, Model Act § 129 can be modified

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<sup>44</sup> Parties may not waive or vary the effect of MODEL ACT § 129. *Id.* § 104(c). Compare RUAA § 4(c); see also MODEL ACT, at 93; *infra* Part II.F. MODEL ACT § 129 publishes this provision in italics as a variant from the North Carolina statute. See MODEL ACT, at 23. Compare N.C. GEN. STAT. § 50-63(a) (2007) (incorporating by reference former N.C. UAA, current N.C. RUAA, N.C. International Commercial Arbitration & Conciliation Act, N.C. GEN. STAT. chs. 50A, 50B, 51, 52, 52C, that state's family law legislation provisions). MODEL ACT § 101(b) tracks RUAA § 1. Words like "[Act]" enclosed in brackets follow the RUAA model; some jurisdictions might choose a synonym, e.g., Statute or Law. See also Optional R. 105 Commentary, MODEL ACT, at 133, cautioning against unwitting use of choice of law clauses.

<sup>45</sup> See generally MODEL ACT, Commentaries to §§ 101, 129; 1 WALKER, 2006, *supra* note 4, at 6, 40.

<sup>46</sup> *Kiell v. Kiell*, 633 S.E.2d 827, 828-29 (N.C. Ct. App. 2006) (following earlier North Carolina UAA cases, that parties agreeing to arbitrate are not entitled to a jury trial); *Semon v. Semon*, 587 S.E.2d 460, 462 (N.C. Ct. App. 2003) (similarity between North Carolina Family Law Arbitration Act and state's UAA provisions for modifying award). Courts cite the Family Law Act and cases based on it for issues under other arbitration legislation. See, e.g., *Smith v. Young Moving & Storage, Inc.*, 606 S.E.2d 173, 175 (N.C. Ct. App. 2004) (citing *Semon*, 587 S.E.2d 460, FLAA in UAA-governed case on award modification issue).

<sup>47</sup> IND. CODE ANN. §§ 34-57-5-1(a)(Lexis/Nexis 2008 Cum. Supp.) (appellate decisions under family law arbitration legislation not precedent for other arbitrations); see also *infra* Part III.A.7.

or eliminated, perhaps with a legislated caveat on the Indiana model in the policy statement, *i.e.*, Model Act § 101(a), that decisions under the family law arbitration legislation are not precedent for other arbitrations, for instance, on the Indiana model:

Appellate decisions of the courts of this State[, and decisions of the trial courts of this State,] shall not be precedent [or persuasive authority] for cases under other arbitration laws of this State.

This is the most restrictive model, declaring in bracketed material that a state's trial court decisions, if, for example, a state's jurisprudence allows citation of them to other trial or appellate courts, as well as denying the decisions persuasive authority, *i.e.*, lacking not only precedent but the weight of a well-reasoned treatise or law journal article.

Legislation like the Indiana statute, if enacted elsewhere, may deprive a state's courts of useful precedent on arbitration, perhaps promoting more appellate litigation in cases governed by the UAA or the RUAA, in that parties must seek rulings on identical or similar issues. The Indiana statute, and legislation like it elsewhere, would seem to allow Indiana courts' use of other states' decisions as persuasive authority while depriving parties of what their own courts would say if allowed to use family law arbitration law as precedent. It would also seem that other states could cite Indiana family law cases as persuasive authority, while Indiana courts could not.<sup>48</sup> Under no circumstances, of course, can state legislation deny effect to federal statutory or case law from the Supreme Court.<sup>49</sup> This issue might arise in family law cases if, for example, federal statutes protect

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<sup>48</sup> Another state would cite the judgment as a part of a sister state's laws and not as a judgment to be recognized and enforced under full faith and credit, U.S. CONST. art. IV § 1; 28 U.S.C. § 1738 (2006). Compare *Baker v. General Motors Corp.*, 522 U.S. 222, 232-36 (1998) (judgment recognition, enforcement standards), with *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 818-19 (1985) (choice of law standards). As *Baker* notes, there are exceptions to the general iron rule of full faith and credit judgment recognition and enforcement. Provisions other than full faith and credit, *e.g.*, due process, enter into the constitutional law decision matrix for choice of law issues. See generally *Shutts*, 472 U.S. 797; EUGENE F. SCOLES ET AL., CONFLICT OF LAWS §§ 3.20-3.24, 3.30, 24.8-24.23 (4th ed. 2004).

<sup>49</sup> U.S. CONST. art. VI, § 2, cl. 1; *Howlett v. Rose*, 496 U.S. 356, 381-82 (1990).

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spouses or children.<sup>50</sup> Legislation like the Indiana statute can have an effect of balkanizing decisions within a particular state, while allowing other jurisdictions to cite them as persuasive authority, particularly if the other arbitration statute has a provision like § 129 that invokes the RUAAs, which in turn has a provision contemplating uniformity among jurisdictions enacting the RUAAs.<sup>51</sup>

Section 129 could be read to hold that agreements to arbitrate, or arbitral awards springing from an agreement to arbitrate, are subject to a state's law requiring court review of custody and support agreements, or all agreements to arbitrate, as some jurisdictions require,<sup>52</sup> under *in pari materia* principles. However, a *lex specialis* interpretation, or invocation of the later in time rule, might deny courts that interpretation. Legislatures concerned with § 129's general, nonspecific language could add this, perhaps as a separate subpart to their § 101 versions:

Notwithstanding any provision of this [Act], the courts of this State shall review any agreement to arbitrate, and any arbitration award providing for [here insert terms always subject to court review, *e.g.*, child custody and support, spousal support, etc., perhaps citing appropriate legislation].<sup>53</sup>

States with a blanket review policy could add this to their version of § 101:

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<sup>50</sup> See *infra* Part II.H.

<sup>51</sup> RUAAs § 29; see also MODEL ACT, at 94-95.

<sup>52</sup> See, *e.g.*, CONN. GEN. STAT. § 46b-66c (West 2008 Cum. Ann. Pocket Pt.) (agreements must be submitted to court for approval); *In re Marriage of Popack*, 998 P.2d 464, 468-69 (Colo. Ct. App. 2000), interpreting COLO. REV. STAT. ANN. § 14-10-128.5(2) (Lexis/Nexis 2006) (award de novo review); *Masters v. Masters*, 513 A.2d 104, 110-14 (Conn. 1986) (custody, support arbitrable, but court has final responsibility for child's best interests); *Spencer v. Spencer*, 494 A.2d 1279, 1285 (D.C. 1985) (same); *Reynolds v. Whitman*, 663 N.E.2d 867, 868-69 (Mass. App. Ct. 1996) (arbitral award subject to judicial review); *Harvey v. Harvey*, 680 N.W.2d 835, 838-39 (Mich. 2004) (*per curiam*) (although Domestic Relations Arbitration Act allows arbitrating child custody, child support, parenting issues, circuit court retains authority to modify award to insure best interests of child); *Kelm v. Kelm*, 749 N.E.2d 299, 302-04 (Ohio 2001) (parties cannot agree to contractually waive, by agreeing to arbitrate, court's *parens patriae* right to protect child's best interest in custody, visitation decisions).

<sup>53</sup> Some jurisdictions only require court approval for an agreement to arbitrate without qualifications but require review of all arbitral awards. *E.g.*, N.H. REV. STAT. ANN. §§ 542:11(I), 542:11(VI) (Lexis/Nexis 2006).

The courts of this State shall review all agreements to arbitrate, and all arbitration awards for [here insert fairness standards such as those in Michigan].<sup>54</sup>

Other options for customizing the Model Act are given below.<sup>55</sup>

The sole purpose of the Model Act is to provide an ADR option to displace litigation, not to amend substantive law. The Act is not a “package deal”; as its title suggests, it is a model, a guide or a benchmark.

To be sure, parties agreeing to arbitrate under the Act forego some features of litigation, such as a jury trial.<sup>56</sup> On the other hand, other attributes of litigation, such as representation by counsel, remain, although parties may waive or restrict the right to a lawyer after a controversy covered by an agreement to arbitrate arises.<sup>57</sup>

#### B. *Forms, Rules and Documents To Be Used With Family Law Arbitrations*

Every jurisdiction has constitutional and legislative frameworks for civil litigation, including statutes for certain procedures, *e.g.*, for prejudgment actions like attachment, or appeals. Most have special ADR legislation. Beneath this statutory structure lie general procedural rules, in some states promulgated by courts and in others by the legislature. Under-

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<sup>54</sup> MICH. COMP. LAWS ANN. § 600.5072 (Lexis/Nexis 2004 Rev.); *see also infra* Part III.A.11.

<sup>55</sup> Another site for this kind of addition could be in a modified MODEL ACT § 108. *See also infra* Part II.H.

<sup>56</sup> *Kiell*, 633 S.E.2d at 828-29, followed earlier North Carolina UAA cases, holding parties agreeing to arbitrate under the Family Law Act are not entitled to jury trial. In an unreported U.S. District Court opinion in a case of first impression, *United States v. Cox*, No. 3:05CR02, 2006 WL 1431694, at \*1 (W.D.N.C. 2006) held that a wife was a bona fide purchaser for value of an arbitral award under the Act in forfeiture proceedings under 18 U.S.C. § 982(a)(2) (2006). After dismissal of appeal to the U.S. Court of Appeals, the District Court awarded attorney fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (2006). *United States v. Cox*, No. 3:05CR02, 2007 WL 2122021, at \*1 (W.D.N.C. 2007).

<sup>57</sup> MODEL ACT §§ 104(b)(4), 116; *compare* RUAA §§ 4(b)(4), 16; *see also* MODEL ACT, at 56-57, 71-72; Basic R. 9, *id.* 117, establishing standards for notifying parties of counsel’s name, address, etc., and which might be construed to override the MODEL ACT § 104(b)(4) waiver option by conferring a blanket right to counsel; *infra* Part II.F.

neath this are frequently special rules to flesh out the general rules, or local rules governing practice in a particular city's or county's courts, perhaps in only one court, *e.g.*, family court. Family law arbitration, like general arbitration, follows the same format. Beneath statutes like the Model Act must lie rules that are not inconsistent with the legislation; sometimes these rules fill gaps statutes do not cover, and sometimes they can derogate from the statutory norms if the legislation allows it. Model Act § 101(a), declaring that it gives "default rules," recognizes this.

The Model Act publishes suggested Basic Rules and Optional Rules, most derived from the American Arbitration Association (AAA) Commercial Arbitration and International Commercial Arbitration rules,<sup>58</sup> that can be used for arbitrations under the Act.<sup>59</sup> Commentary describing its origins and offering more sources follows each rule.

As their titles suggest, the Basic Rules might be considered for any family law arbitration; the Optional Rules address special situations, such as cases involving parties or witnesses with different primary languages.<sup>60</sup> The Basic and Optional Rules can be used, maybe tailored in wording, for cases under other family law arbitration statutes. The Model Act also publishes suggested forms, more general in nature than rules, dealing with broad issues related to arbitration: scope of the arbitration, what rules apply, arbitrator ethics standards, the arbitration site, consolidation, and an open-ended form for additional provisions or rules.<sup>61</sup> Some jurisdictions may publish additional forms or rules that can be helpful.<sup>62</sup> Counsel might consider general form books, although most of these forms relate to commercial or labor arbitration, or specialized kinds of arbitration within general commercial arbitration, *e.g.*, building construction disputes, and may not be suitable for family law arbitration any more than for a Uniform Commercial Code-governed sales dispute. Some

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<sup>58</sup> These are the ones most commonly in use; rules published by other sources, including the AAML, were also consulted and occasionally incorporated into the text of the Basic and Optional Rules. MODEL ACT, at 102, 111.

<sup>59</sup> *See id.* at 111-35.

<sup>60</sup> Optional Rules 102, 103, *id.* at 132 (interpreters, language used in the arbitration).

<sup>61</sup> *See id.* at 100-10.

<sup>62</sup> *See, e.g.*, 2 BURLESON & WALKER, 2006, *supra* note 4 (clauses, forms that can be used in arbitrations under North Carolina family law legislation).

forms, prepared with the UAA in mind, predate the RUAA and must be reviewed with caution on that account, since the Model Act follows the RUAA.

Special forms and rules for individual states' arbitration practice and availability of general forms promotes questions and warnings. The first issue relates to forms and rules alongside a state's statutes and case law under them. For example, a commercial arbitration form waiving court review, modification or appeal of an arbitral award runs afoul of the Model Act, which assures court review of such issues as those related to child custody and support.<sup>63</sup> In many if not all states, an agreement to limit review might be valid in commercial arbitration.<sup>64</sup>

The second issue is to ask if a form meets a particular arbitration's needs. Alternative Forms A are examples of the second point: What will be arbitrated is the single most important decision in any arbitration.<sup>65</sup> Do parties want to arbitrate all issues related to dissolving a marriage, or do they want to settle only property distribution? Is the arbitration ancillary to a divorce, where custody and support issues may be at stake, or is it arbitration to modify a prior award or judgment for custody and support, perhaps years after a divorce?

An example of both points is a decision on whether and to what extent there is need for prejudgment assets protection, or a decision on whether parties may seek judicial review of errors of law. The Model Act allows waiving prejudgment assets protection, other than where state or federal law requires emergency protection for children or spouses.<sup>66</sup> Basic Rule 20 allows provisional remedies as the Model Act provides.<sup>67</sup> Counsel wanting to change this blanket rule can use Forms B or E<sup>68</sup> but must be

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<sup>63</sup> See MODEL ACT §§ 104(c), 122-25, 128; compare RUAA §§ 4(c), 22-25, 28; see also *infra* Parts II.F, II.Q-II.U.

<sup>64</sup> See, e.g., Inter-American Commercial Arbitration Commission Rules, Art. 29(b) ("The award shall be made in writing and shall be final and binding on the parties and subject to no appeal. The parties undertake to carry out the award without delay.") (Apr. 1, 2002), available at American Arbitration Association Commercial Rules, <http://www.adr.org/sp.asp?id=22093> (last visited Nov. 22, 2008).

<sup>65</sup> See MODEL ACT, at 103-04.

<sup>66</sup> MODEL ACT §§ 104, 108; compare RUAA §§ 4, 8.

<sup>67</sup> Basic R. 20, MODEL ACT, at 122.

<sup>68</sup> MODEL ACT, at 104, 106.

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aware of limitations the Act, incorporating limitations under state or federal law, might impose.<sup>69</sup>

Another example relates to review of errors of law. The Act allows it, including appeal, if parties contract for it.<sup>70</sup> Basic Rule 38, following general arbitration practice, denies judicial review and appeal of errors of law. However, the Rule 38 Commentary offers an optional clause to allow review.<sup>71</sup> If that is desired, Forms B and E can be used.<sup>72</sup> The Supreme Court has denied effect to a contractual agreement to appeal issues; the FAA does not explicitly provide for such.<sup>73</sup> (Typical Model Act arbitrations will not involve FAA coverage, and the case usually will not govern family law arbitrations under state law, although that is possible if divorce arbitration is consolidated with an arbitration involving interstate or foreign commerce under the FAA.<sup>74</sup>) The Court's decision may be persuasive for cases under state arbitration law.<sup>75</sup> State law dealing with appeals under state procedure is muddled on the point; the RUAA lacks a provision on the issue.<sup>76</sup>

What if parties agree to arbitrate but do not select rules? The common-law principle is that the arbitrator can choose rules so long as they are basically fair.<sup>77</sup> The Act does not change this,

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<sup>69</sup> See also *infra* Part II.H.

<sup>70</sup> MODEL ACT §§ 123(a)(9), 128(b), for which there are no RUAA equivalents. As Part II.U *infra* demonstrates, appeal issues are relatively limited after an arbitration. Arbitration theory is that final resolution of disputes should be downsized to an initial decision maker the parties choose, the arbitrator, as much as possible.

<sup>71</sup> MODEL ACT, at 131.

<sup>72</sup> See *id.* at 104-07.

<sup>73</sup> *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1402-09 (2008).

<sup>74</sup> *Cf.* MODEL ACT § 110; *id.*, Form CC, MODEL ACT & Commentary, at 108-09 (declaring MODEL ACT-governed cases may not be consolidated with other arbitrations, thereby invoking the § 110(c) opt-out provision, but offering alternate form if consolidation is desired); see also *infra* Part II.J.

<sup>75</sup> *E.g.*, *Quinn v. Nafta Traders, Inc.*, 257 S.W.3d 795 (Tex. Civ. App. 2008) (following *Hall St.*, 128 S. Ct. at 1404, because of similarities between Texas Arbitration Act, TEX. CIV. PRAC. & REM. CODE ANN. § 171.087 (Vernon 2005), and 9 U.S.C. §§ 10-11 (2006)).

<sup>76</sup> See RUAA § 28 *Comment*; see also *Hall St.*, 128 S. Ct. at 1403 & n.5 (prior division among U.S. Courts of Appeals on contracting to appeal upon grounds other than those in 9 U.S.C. §§ 10-11 (2006)).

<sup>77</sup> *E.g.*, *Keebler Co. v. Truck Drivers Local 170*, 247 F.3d 8, 11 (1st Cir. 2001).



but its Commentary, following the North Carolina statute, suggests a sequential selection procedure as an addition to Model Act § 111 that might be enacted: (1) if parties cannot agree, the arbitrator(s) must select them, “after hearing all parties and taking particular reference to model rules developed by arbitration organizations or similar sources”; (2) if the arbitrator(s) cannot decide on rules, a party may apply to a court for an order designating rules, “with particular reference to model rules developed by arbitration organizations or similar sources.”<sup>78</sup> It would be up to parties appearing before the court to advocate what rules they want in step (2). The result under this statutory variant is that the parties may or may not get the same rules package they could have chosen, but there is also a risk that imposed rules could be quite different from those which they would have negotiated. In a jurisdiction without this statutory variant, under the Model Act the arbitrator may select fair rules if the parties do not do so.<sup>79</sup> In any event, an arbitrator can establish fair procedures for matters not covered by rules parties choose. No set of rules, or contracted-for additions to standard rules, can anticipate every situation. Like systems of court rules,<sup>80</sup> an arbitrator must have (and does have, under the common law) authority to fill gaps.

Basic Rules suggested for use in family law arbitrations also cover other aspects of arbitration practice. Basic Rule 1 declares that the family law rules trump any other arbitration rules that might apply in an arbitration;<sup>81</sup> this might happen if a family law arbitration is consolidated with a family (husband-wife) business dissolution arbitration required by a separate contract.<sup>82</sup> Basic Rule 36 sets standards for interpreting and applying rules, including multi-arbitrator cases.<sup>83</sup> Arbitrators have authority to waive or modify the rules “to permit efficient and expeditious presenta-

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<sup>78</sup> Compare MODEL ACT, at 65, with N.C. GEN. STAT. § 50-45(e) (2007).

<sup>79</sup> See *supra* note 77 and accompanying text.

<sup>80</sup> Cf. FED. R. CIV. P. 83(b).

<sup>81</sup> MODEL ACT, at 112.

<sup>82</sup> See MODEL ACT § 110 and compare RUAA § 10. Form CC, MODEL ACT, at 108, would forbid consolidating arbitrations; MODEL ACT § 110(c) allows this. See also *id.* 108-09, offering an alternate Form CC if parties wish to consolidate. See also *infra* Part II.J.

<sup>83</sup> MODEL ACT, at 130.

tion of the case.”<sup>84</sup> They cannot modify or waive rules reciting provisions in the Act for which the Act denies modification or waiver.<sup>85</sup> A party proceeding with arbitration after knowledge that a provision or requirement of the rules has not been complied with, and who fails to object in writing, shall be deemed to have waived the right to object.<sup>86</sup>

Basic Rule 1’s presumption is that rules applying to an arbitration are forward-leaning; amendments to rules published after an agreement to arbitrate will control. If parties want to freeze the rules as of a certain day, the agreement must recite that.<sup>87</sup> Parties can negotiate rules amendments after an agreement is in force, but if a case has become sharply adversarial, agreement may not be possible.

There are two options for applying rules to an arbitration: writing them into an agreement to arbitrate or incorporating them by reference in the agreement. The first option can result in a long document; the Model Act publishes 38 Basic Rules and 6 Optional Rules over 24 pages, including Commentaries and variant versions.<sup>88</sup> Most arbitration agreements use a few forms, *e.g.*, those for the arbitration’s scope,<sup>89</sup> and incorporate rules by reference, except special rules for an arbitration, *e.g.*, review of issues of law.<sup>90</sup> The Model Act advocates this.<sup>91</sup>

Part II.B illustrates a big similarity and a big difference between family law litigation and family law arbitration. Like litigation, there are rules, including “local rules,” *i.e.*, special rules crafted for a particular type of case. The difference is that, except as controlled by other law or legislation, the parties negotiate the rules, including the special rules. (Essentially, it is the difference between professional or college league baseball, where there are preordained general rules and local rules for each ballpark, and pickup sandlot games, where the three-strikes,

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<sup>84</sup> Basic R. 17(d), *id.* at 122.

<sup>85</sup> MODEL ACT § 104; compare RUAA § 4; *see also* MODEL ACT, at 56-57; *see also infra* Part II.F.

<sup>86</sup> Basic R. 24, *id.* at 124.

<sup>87</sup> *Id.* at 112. Form AA, *id.* at 107, supplies a suggested clause to freeze the date of the rules.

<sup>88</sup> *Id.* at 111-35.

<sup>89</sup> Forms A, *id.* at 103.

<sup>90</sup> *See supra* note 70 and accompanying text; *infra* Part II.U.

<sup>91</sup> *See* Forms B.1-B.6, E.1-E.2, MODEL ACT, at 104, 106-07.

four-balls rules may apply, but the bases may be other than bags 90 feet apart. Even here, teams with opposing weak hitters can agree on other than three strikes.) This feature of arbitration means that parties and counsel must understand what the legislation and case law allow or forbid and what they want to give fair procedural coherence to their arbitration. It also means that rules for one case may not be suitable for the next one. Unlike the relatively immutable procedural rules and statutes for litigation,<sup>92</sup> many arbitration rules can be changed; indeed standard rules should be considered for change, to customize a case, subject to limitations in legislation or rules of court.<sup>93</sup> The Basic and Optional Rules only suggest what seems to have worked, or what the options may be, under the Act. They follow commonly-accepted arbitration forms and rules in format and text,<sup>94</sup> so that parties, counsel and courts familiar with other arbitration forms and rules will be more conversant with the family law arbitration rules. Using a standard format, rather than unnecessary amendments, may make an opponent more amenable to use what is proposed, indeed to agree on arbitration at all.

How should standard forms and rules be published so that they are available for study and possible incorporation by reference or recitation in an agreement to arbitrate? The solution in North Carolina was to publish them in a *Handbook* along with commentaries on the legislation, available on the North Carolina Bar Association website for free download.<sup>95</sup> Courts might be persuaded to publish them, as was the case with the North Carolina ethics standards for arbitrators, which are primarily aimed at that state's court-ordered arbitration program, but which can be adapted for arbitrations by agreement.<sup>96</sup> The forms and rules might be published in hard copy, but this may impose costs and

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<sup>92</sup> Sometimes parties can stipulate to facts or variances from court rules, perhaps with court approval. Cf. FED. R. CIV. P. 29, 36; Elliott Wilcox, *Sifting the Issues with Stipulations*, 44 TRIAL 39 (No. 7, 2008). In other cases they may not. Cf. FED. R. CIV. P. 6(b).

<sup>93</sup> See *infra* Parts II.F, II.H.

<sup>94</sup> See *supra* notes 58-59 and accompanying text.

<sup>95</sup> See *supra* note 4.

<sup>96</sup> See MODEL ACT, at 105-06, inter alia citing Order Adopting the North Carolina Canons of Ethics for Arbitrators, Sept. 9, 1999, 350 N.C. 877 (1999); George K. Walker, *State Rules for Arbitrator Ethics*, 23 J. LEGAL PROF. 155 (1999).

perhaps detriments to access in today's computer age if a party cannot get access to the book. In any case forms and rules should be standard to assure initial uniformity, although customization must be considered for a particular case.

Another issue is the procedure for reviewing and perhaps updating legislation, forms and rules. Every state has a different method for this; it may be through legislative committees or a statutory drafting office that is a part of state government for statutes, a general bar organization and its committees, or a specialized bar group. The North Carolina Bar Association's Family Law Section has been the originator for the legislation, forms and rules. After approval within the Section, proposals go to the Association leadership, and then to the legislature for draft legislation. Forms and rules revision has been the responsibility of the Section, subject to Bar Association approval and publication. This was how the original Family Law Arbitration Act and its ancillary forms and rules were developed, and how the 2005 revisions evolved.<sup>97</sup> Whatever the process, it should be broad-based with ready public access to the results. An innovative procedure, no matter how potentially beneficial and well thought out, may not have legislative and bar acceptance if it is generally perceived to be the work of a small, closed group, particularly if the perception is that the same small group will be principal beneficiaries of the procedure.

### C. *When the Act Applies*

Model Act § 103, following RUA § 3, has different provisions for declaring when the statute applies to agreements to arbitrate. Section 103(a) can be used in a jurisdiction that has not enacted family law legislation previously; it says that the Act governs agreements to arbitrate made on or after the Act's effective date. Sections 103(b) and 103(c) offer transition provisions for a state with previously-enacted legislation.<sup>98</sup>

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<sup>97</sup> See also *supra* note 4 and accompanying text.

<sup>98</sup> See also MODEL ACT, at 55. Parties cannot agree to waive or vary the effect of *id.* §§ 103(a), 103(c). *Id.* § 104(c); see also RUA § 3-4; *infra* Part II.F.

#### D. Definitions

Model Act § 101(b) copies RUAA § 1 standard definitions. Two are noteworthy. “Person” means “an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency or instrumentality; public corporation; or any other legal or commercial entity.” While most family law arbitrations will only involve human beings, *i.e.*, “individuals,” if a dispute involves a family business breakup that is also subject to arbitration and possible consolidation under Model Act § 110, other kinds of “persons” may be involved.<sup>99</sup> “Record” means “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.” “Record” must be read in connection with Model Act § 130, declaring that “provisions of this Act governing the legal effect, validity, and enforceability of electronic records or electronic signatures, and of contracts performed with the use of such records or signatures conform to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce Act, requirements, or as otherwise authorized by federal or State law governing these electronic records or electronic signatures.”<sup>100</sup>

#### E. Notice

Model Act § 102(a) tracks RUAA § 2 to provide that a person as defined in § 101(b) “gives notice to another person by taking action that is reasonably necessary to inform the other person, in the ordinary course, whether or not the other person acquires knowledge of the notice,” except as otherwise provided in the Act. “A person receives notice when it comes to the person’s attention or the notice is delivered at the person’s place of residence or place of business, or at another location held out by

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<sup>99</sup> See *infra* Part II.J.

<sup>100</sup> MODEL ACT § 130 adds the last material (“or as otherwise . . . signatures”) to cover a possibility of later federal law or applicable state law to the extent federal law does not supersede it. See also 15 U.S.C. § 7001-06, 7021, 7031 (2006); MODEL ACT, at 95; N.C. GEN. STAT. § 50-62(b) (2007); 1 WALKER, 2006, *supra* note 4, at 41.

the person as a place of delivery of such communications.”<sup>101</sup> These provisions seem to satisfy general constitutional requirements for notice.<sup>102</sup>

#### F. *Waivers of or Varying the Effect of the Act’s Provisions and Protections*

Section 104 differs greatly from the RUAA on when parties can waive or vary the effect of Model Act provisions. For example, as in ordinary civil litigation, parties may contract out of a right to appeal in RUAA-governed commercial arbitration cases.<sup>103</sup> They may not do so under the Model Act.<sup>104</sup>

Although both statutes begin with a general proposition that parties may waive or vary the effect of any statute,<sup>105</sup> this is qualified by two subsections, listing legislation that is subject to parties’ agreeing to waive or vary the effect of a provision only after a controversy arises,<sup>106</sup> or that is not subject to parties’ agreeing to waive or vary the effect of some statutes under any circumstances.<sup>107</sup> A key difference between the RUAA and the Model Act is that the Act makes nonwaivable those provisions related

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<sup>101</sup> MODEL ACT § 102(c); compare RUAA § 2. MODEL ACT § 105(b) is an example of a special notice provision.

<sup>102</sup> Cf. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); see also MODEL ACT, at 54; 1 WALKER, 2006, *supra* note 4, at 12.

<sup>103</sup> This is commonly done by a special clause in the agreement to arbitrate. The developing law seems to say that parties cannot contract into more appellate review than the arbitration statute allow. However, MODEL ACT §§ 123(a)(9), 128(b) allow parties to contract for review of issues of law.

<sup>104</sup> Compare *id.* § 104(c) with RUAA § 4(c); see also N.C. GEN. STAT. § 50-42.1(c) (2007); MODEL ACT, at 56; 1 WALKER, 2006, *supra* note 4, at 8.

<sup>105</sup> Compare MODEL ACT § 104(a) with RUAA § 4(a).

<sup>106</sup> Compare MODEL ACT § 104(b)(1), citing *id.* §§ 105(a), 106(a), 108(a), 108(b), 117(a), 117(b), 126 with RUAA § 4(b)(1). MODEL ACT § 104(b)(2) forbids unreasonably restricting the right under *id.* § 109 to notice of an arbitration proceeding; compare RUAA § 4(b)(2). MODEL ACT § 104(b)(3) forbids agreeing to unreasonably restrict the right under *id.* § 112 to disclosure of any facts by a neutral arbitrator; compare RUAA § 4(b)(3). MODEL ACT § 104(b)(1) forbids waiving or agreeing to vary the effect of §§ 117(a) or 117(b); compare RUAA §§ 4(b)(1). MODEL ACT § 104(b)(4) forbids waiving or unreasonably restricting the *id.* § 116 right of a party to a lawyer before a controversy arises; compare RUAA § 4(b)(4).

<sup>107</sup> Compare MODEL ACT § 104(c), citing *id.* §§ 103(a), 103(c), 107, 108(c), 108(d), 108(e), 114, 118, 120(d), 120(e), 122-24A, 125(a), 125(b), 128-32.

to court review at the trial or appellate level.<sup>108</sup> This ensures that litigants or persons (such as children affected by a custody or support award) have the courthouse open at all levels if they comply with the Act's filing and other provisions and general trial or appellate law. It also assures the continued protection, through review and appeal, that federal or state laws providing for emergency relief may afford.

### G. *Validity of an Agreement to Arbitrate*

Agreements to arbitrate must be in a "record," traditionally a hard copy document, although other formats can be used. These agreements are "valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for revocation of a contract."<sup>109</sup> An agreement may be in a prenuptial or postnuptial contract, but a prenuptial agreement cannot include terms for child support, child custody or the divorce itself.<sup>110</sup> A court must rule on motions to compel arbitration; the arbitrator decides if a condition precedent to arbitrability has been fulfilled and if a contract with a valid agreement to arbitrate is enforceable.<sup>111</sup>

Indiana's family law arbitration statute allows parties to agree to arbitrate if both spouses appear pro se, or if lawyers represent both. If one spouse has counsel, and the other does not, the procedure cannot apply.<sup>112</sup> One party must have been an Indiana resident or have been stationed at a U.S. military installation in Indiana for at least six months immediately before

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<sup>108</sup> Compare MODEL ACT § 104(c) with RUAA § 4(c); see also N.C. GEN. STAT. § 50-42.1 (2007); MODEL ACT, at 56; 1 WALKER, 2006, *supra* note 4, at 8.

<sup>109</sup> See MODEL ACT § 101(b)(6); compare RUAA § 1(b)(6); see also Part II.D *supra*.

<sup>110</sup> MODEL ACT § 106(a); compare RUAA § 6(a); N.C. GEN. STAT. §§ 50-42(a) (2007); 1 WALKER, 2006, *supra* note 4, at 7.

<sup>111</sup> MODEL ACT §§ 106(b)-106(c); compare RUAA §§ 6(b)-6(c); N.C. GEN. STAT. §§ 50-43(a) - 50-43(b) (2007); 1 Walker, 2006, *supra* note 4, at 58; see also MODEL ACT § 107 (procedure for motions to compel or stay arbitration); RUAA § 7. Applications to a court are by motion under MODEL ACT § 105, which has a special notice and venue provision; compare RUAA § 5; see also MODEL ACT §§ 102(a) (special notice provisions govern), 127 (general venue provisions).

<sup>112</sup> IND. CODE ANN. § 34-57-5-1(b) (Lexis/Nexis 2008 Cum. Supp.).

the filing of a petition or cause of action.<sup>113</sup> The Model Act does not thus limit its coverage.<sup>114</sup>

Should the Act have limited coverage to cases involving lawyers representing both parties? The response depends partly on a state's jurisprudence, whether a jurisdiction employs court-supervised arbitration (as Indiana does<sup>115</sup>) or leaves it to parties, subject to other limits such as forbidding prenuptial agreements for support and custody, under general freedom of contract principles as the Act does.<sup>116</sup> Experience with pro se cases, *i.e.*, do-it-yourself divorces where no party has a lawyer, or "imbalanced" cases where one spouse has counsel and the other does not. The latter situation may include situations where a spouse has flown the coop and jurisdiction is sought through a long-arm statute<sup>117</sup> or the equivalent. For states operating under a freedom of contract policy, if a limitation to counseled cases is thought appropriate, when should a lawyer be required, when an agreement is signed, when a complaint for divorce is filed, or when arbitration begins or is supposed to begin? For those jurisdictions, it would seem that the time of signing the agreement to arbitrate is the bright line. Otherwise, a party could sign the contract and walk away from a later-filed divorce action or an arbitration after being given notice under the Act.<sup>118</sup> If so, Model Act § 106(a) could be amended:

(a) During or after marriage, parties may agree in a record to submit to arbitration any controversy, except for the divorce itself, arising out of the marital relationship. Parties may not agree in a record to submit any controversy, except for the divorce itself, arising out of the marital relationship, if one party does not have counsel as

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<sup>113</sup> *Id.* § 34-57-5-4 (Lexis/Nexis 2008 Cum. Supp.). A court must review an award. *Id.* § 34-57-5-3 (Lexis/Nexis 2008 Cum. Supp.). The Indiana statute thus falls into the category of those involving court supervision of family law arbitrations. It incorporates by reference Indiana ADR rules, declaring that a case remains within the trial court's jurisdiction. IND. CODE ANN. § 34-57-5-13 (Lexis/Nexis 2008 Cum. Supp.), incorporating, *e.g.*, ADR R. 1.7 by reference. *See also infra* Part III.A.8.

<sup>114</sup> Some states appear to treat pro se cases and those involving counsel equally. *Cf.* N.H. REV. STAT. ANN. § 542:11(I) (Lexis/Nexis 2006).

<sup>115</sup> *See supra* note 113 and accompanying text.

<sup>116</sup> MODEL ACT § 106(a), the North Carolina choice, N.C. GEN. STAT. § 50-42(a) (2007); *see also supra* note 109 and accompanying text.

<sup>117</sup> *E.g.*, N.C. GEN. STAT. § 1-75.4 (12) (2007).

<sup>118</sup> *Cf.* MODEL ACT § 102; *supra* Part II.E.



evidenced by signatures in the agreement to arbitrate. Before marriage, parties may agree in a record to submit to arbitration any controversy, except for child support, child custody or the divorce itself, arising out of the marital relationship. Such an agreement contained in a record to submit any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for revocation of a contract.

Similarly, states concerned with problems of cases with all-pro se parties could enact this as the second sentence of a revised § 106(a):

Parties may not agree in a record to submit any controversy, except for the divorce itself, arising out of the marital relationship, if a party or both parties do not have counsel as evidenced by signatures in the agreement to arbitrate.

This would eliminate do-it-yourself arbitration and goes a step further than the Indiana statute, which approves arbitration with no lawyer representation for anyone.<sup>119</sup> A court faced with no counsel or one counsel cases might note these exclusions for litigants. If parties want to arbitrate, they must comply. If parties get a lawyer's signature on the document, it presumes that the lawyer has counseled the client(s). If the lawyer is later discharged, the case continues to be eligible for arbitration; counsel signature binds the client(s). That does not eliminate the problem of pro se cases in the courts, and it will not eliminate the problems of arbitrators who agree to hear these cases. It should put these cases on equal footing with situations where parties begin with a lawyer and then decide to proceed pro se in the courts. In no case is it wise to proceed without a lawyer, but parties are free to proceed with litigation (or arbitration) without benefit of counsel.

The Act applies to marriage;<sup>120</sup> it does not apply to other family situations, such as support for and custody of children born out of wedlock as the result of a couple's relationship, or perhaps a joint custody and support relationship between, for instance, a brother and a sister for care of a nephew or niece whose parents are deceased. On the other hand, the Act does not discriminate between marriages between men and women or same-

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<sup>119</sup> See *supra* note 112 and accompanying text.

<sup>120</sup> Cf. MODEL ACT §§ 101(a), 106(a); see also *supra* Part II.A.

sex marriages or similar relationships. If a jurisdiction would recognize a same-sex marriage as valid, that relationship would come under the Act. On the other hand, civil unions and the like, unless the Act is altered to include them, would not. If a state wants to broaden Act coverage to cover other kinds of relationships, it can be amended to include them. The AAML drafters wanted to advance basic arbitration legislation regarding a traditional family relationship and marriage, the idea being that jurisdictions could expand Act coverage depending on local laws, local needs and local policies.

If there is a valid arbitration agreement, what should it contain? A bare-bones agreement might recite that the spouses agree to arbitrate, under the applicable state legislation, some or all controversies arising out of their divorce. This would be enough to trigger court-imposed arbitration, but that approach can lead to trouble. Part II.B of this article, reflecting the Model Act and suggested forms and rules, should be consulted for issues parties wish to include, or exclude, from the agreement.<sup>121</sup> The best way to begin is to review family law arbitration legislation in force in a particular state, that state's general law on arbitration, and cases on family law arbitration and general arbitration under the legislation. Suggested forms, rules and other documents suggested for use in family law<sup>122</sup> or general arbitration should then be consulted, making certain that general arbitration materials dovetail with the family law arbitration statutes and cases and needs of a particular case.<sup>123</sup> An agreement can then be drafted, perhaps incorporating standard rules instead of reciting them in the agreement.

#### H. *Provisional Remedies*

Under § 108 provisional remedies, *i.e.*, procedures protecting children, spouses or marital estate assets before a final arbitral award, are in the arbitrator's hands to the same extent as if a case is in civil litigation,<sup>124</sup> with important exceptions. First, if an arbitrator has not been appointed and before he or she is author-

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<sup>121</sup> *E.g.*, arbitration can be used to resolve issues arising long after a divorce, such as a changes in support payments or custody.

<sup>122</sup> MODEL ACT, at 101-35 publishes these for possible use with the Act.

<sup>123</sup> *See also supra* Part II.B.

<sup>124</sup> MODEL ACT § 108(b)(1); *compare* RUAA § 8(b)(1).

ized and able to act, a court, upon a party's motion and for good cause shown, may issue orders for remedies "to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action."<sup>125</sup> Second, a party may move a court for provisional remedies "if the matter is urgent and the arbitrator is not able to act timely or if the arbitrator cannot provide an adequate remedy."<sup>126</sup> Third, a special provision declares that although parties may agree to limit provisional remedies, they may not contract out of a jurisdiction's statutes and law granting immediate, emergency relief or protection for spouses or children; federal law; or treaties to which the United States is a party.<sup>127</sup> Parties do not waive a right to arbitrate by moving for provisional remedies.<sup>128</sup> Basic Rule 32(a) confirms this principle: "No judicial proceeding by a party relating to the . . . arbitration shall be deemed a waiver of the party's right to arbitration."<sup>129</sup> Another special provision requires an arbitrator who has cause to suspect child abuse or child neglect to report the matter to the appropriate local social services office.<sup>130</sup>

Parties cannot agree to waive or vary the effect of §§ 108(c)-108(e), providing for spousal and child rights under state or federal law dealing with immediate, emergency relief or protection, arbitrator reporting requirements in suspected child abuse cases, and protection for a party seeking pre-arbitration relief. They may agree to waive or vary the effect of §§ 108(a)-108(b), reciting general rules for prearbitration relief, but only after a controversy arises.<sup>131</sup>

Basic Rule 20 tracks § 108 to allow all provisional remedies; parties wishing to curtail them, subject to § 108 limitations,

<sup>125</sup> MODEL ACT § 108(a); *compare* RUAA § 8(a).

<sup>126</sup> MODEL ACT § 108(b)(2); *compare* RUAA § 8(b)(2).

<sup>127</sup> MODEL ACT § 108(c), for which there is no RUAA counterpart. N.C. GEN. STAT. § 50-44(g) (2007) inspired MODEL ACT § 108(c).

<sup>128</sup> MODEL ACT § 108(e); *compare* RUAA § 8(c).

<sup>129</sup> *See also* MODEL ACT, at 128.

<sup>130</sup> MODEL ACT § 108(d), for which there is no RUAA counterpart. N.C. GEN. STAT. § 50-44(h) (2007) inspired MODEL ACT § 108(d). Section 108(d) must be tailored to fit a state's reporting requirements, *e.g.*, for the appropriate agency or court that receives these reports. Arbitrators have immunity comparable to a judge under *id.* § 114; *see infra* Part II.K.

<sup>131</sup> MODEL ACT §§ 104(b), 104(c); *see also supra* Part II.F.

should negotiate a special rule.<sup>132</sup> Basic Rule 35 allows an arbitrator to require parties to deposit, ahead of a hearing, enough funds as the arbitrator deems necessary to cover arbitration expenses, including the arbitrator fee if any. The arbitrator must render an accounting to the parties and return an unexpended balance at the end of a case.<sup>133</sup> Basic Rule 12 allows the arbitrator, for good cause shown, to postpone a hearing upon a party's written request or upon the arbitrator's initiative. The arbitrator must grant a postponement if all parties request it. The arbitrator may impose costs of a postponement that parties or the arbitrator incur in connection with the postponement.<sup>134</sup>

Basic Rule 16 allows a proceeding to go forward, unless the law provides otherwise, if a party or counsel is absent or fails to win postponement after due notice. An award may not be made only on a party's default; an arbitrator must require the appearing party to submit such evidence as the arbitrator requires for making an award.<sup>135</sup>

Basic Rule 21 says that after all parties have presented evidence and other materials, the arbitrator must ask all parties if they have any further proofs to offer or witnesses to be heard, or if they wish to be heard in final argument. If replies are negative, or if satisfied that a record is complete, the arbitrator must declare the hearing closed. If briefs will be filed, the hearing must be declared closed as of a final date the arbitrator sets for briefs. If documents will be filed late and the receipt date for these is after the brief receipt date, the later date governs for closing the hearing. The time for the arbitrator to make an award otherwise begins to run when the hearing closes.<sup>136</sup> Basic Rule 27 dovetails with Rule 21 to set a 30-day limit for an award to be rendered, unless the agreement specifies otherwise or the law requires another limit, such as if a court sets a limit.<sup>137</sup>

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<sup>132</sup> See MODEL ACT §§ 104(b)(1), 108; Forms B, E; MODEL ACT, at 60-62, 104-05, 122-23.

<sup>133</sup> See also MODEL ACT, at 130.

<sup>134</sup> See also *id.* at 119.

<sup>135</sup> See also *id.* at 121. Requiring a default movant to produce evidence is contrary, at least in part, to default practice in civil litigation in some jurisdictions. Cf. FED. R. CIV. P. 55. It is a common feature of arbitration.

<sup>136</sup> Basic R. 21, *id.* at 123, referring to Basic R. 18, *id.* at 122.

<sup>137</sup> See *id.* at 125. MODEL ACT § 119(b) allows the court to order a time limit if an agreement to arbitrate does not.

As an option, or perhaps in addition to a general statutory § 129 requirement to report agreements involving custody, support or similar matters to a court,<sup>138</sup> this might be added to § 108, governing provisional remedies, for jurisdictions requiring these reports:

(f) The courts of this State may review any preaward ruling by an arbitrator providing for [here insert terms always subject to court review, *e.g.*, child custody and support, spousal support, etc., perhaps citing appropriate legislation]; a party to the arbitration [alternatively, the arbitrator in a case involving a pro se party, or the arbitrator] must present such preaward ruling to the court for approval.

An option for placing this in § 108 is a subsection under § 101.<sup>139</sup> For states like North Carolina, which does not require filing, there is no need for subsection 108(f). If all parties have counsel, the burden should fall on the lawyers. A good case can be made for requiring arbitrators to file a ruling if a party is not represented by counsel.<sup>140</sup> A third option is to require arbitrators to file rulings in all cases where these issues are present. No filing should be required in other situations, *e.g.*, property settlements for childless couples if no spousal support is at issue, unless these issues are also subject to court approval. In either situation, filed or not, unless parties agree otherwise,<sup>141</sup> an interim provisional remedies award must be reasoned, in other words, it should follow the format of Federal Rule of Civil Procedure 52 for findings of fact and conclusions of law.<sup>142</sup>

The Model Act allows parties to ask that an arbitrator's preaward ruling, perhaps incident to granting provisional remedies, to be converted to an award that can be confirmed by a court:

If an arbitrator makes a preaward ruling in favor of a party to the arbitration . . . , the party may request the arbitrator to incorporate the ruling into an award under Section 119. A prevailing party may make

<sup>138</sup> See *supra* notes 44-52 and accompanying text.

<sup>139</sup> See *supra* notes 53-54 and accompanying text.

<sup>140</sup> Cf. IND. CODE ANN. § 34-57-5-1(b) (Lexis/Nexis 2008 Cum. Supp.); see also *infra* Part III.A.8.

<sup>141</sup> Cf. MODEL ACT at 126, Commentary to Basic R. 28(c); see also *infra* Parts II.O, II.P.

<sup>142</sup> Parties can agree to waive this requirement. MODEL ACT § 119(c), for which there is no RUAA equivalent. See also *supra* Parts II.F, *infra* Parts II.O, II.P.

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a motion to the court for an expedited order to confirm the award under Section 122, in which case the court shall summarily decide the motion. The court shall issue an order to confirm the award unless the court vacates, modifies or corrects the award under Sections 123, 124 and 124A.<sup>143</sup>

The Act does not specifically recite that such an award is subject to redaction or sealing as a final award or consent award converted to a judgment under § 125 would be. Section 118 incorporates §§ 119 and 122, the provisions for all awards and for confirming awards. Section 125(a) speaks of “an award” without qualification; section 125(d) speaks of “any arbitration award or order” without qualification. This language should include § 118 provisional remedies awards. However, if a state has any question about privacy through redaction or sealing, a provision like this could be included as language in § 118:

Any order or award for provisional remedies presented to a court for confirmation and judicial enforcement is subject to Section 125(d) principles for sealing or redacting the order or award.

If a problem is perceived for § 108, similar language could be included:

(g) Any order or award for relief under this section that is presented to a court is subject to Section 125(d) principles for sealing or redacting the order or award.

That should cure any perceived gaps for privacy protection. Basic Rule 11 or equivalent language in the agreement to arbitrate would cover a case while it is in arbitration; language like the foregoing would cover a § 118 order or partial award for provisional remedies or § 108 relief while before a court.<sup>144</sup> This arti-

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<sup>143</sup> MODEL ACT § 118 (italics, parentheses removed); compare RUAA § 18. MODEL ACT, at 74, reprints provisions not in the MODEL ACT or the RUAA in N.C. GEN. STAT. §§ 1-569.18(b), 1-569.18(c) (2007), forbidding judicial review of an arbitrator’s preaward ruling or appellate review of pre-award court orders or judgments, which might be considered by other jurisdictions.

<sup>144</sup> MODEL ACT § 125(d) was included out of an abundance of caution. Although a court should respect, as a matter of contract law, a privacy agreement among parties, the court might take the position that it may protect privacy under its powers to redact or seal court records, and that absence of such a provision would bar redacting or sealing a record. Section 125, if enacted, would treat arbitral awards or orders under the same standards a court would exercise, *e.g.*, if it had a custody and support agreement before it incident to giving judgment in a divorce case. See also *infra* Part II.P.

cle takes the position that such amendments are not necessary, but a jurisdiction concerned with a “privacy gap” could insert them.

### I. *Beginning Arbitration*

Arbitration pursuant to a preexisting agreement, perhaps using language under the initial alternate Form A or its equivalent,<sup>145</sup> begins by giving notice “in a record” to other parties, usually only opposing counsel and/or the party’s spouse, to an agreement to arbitrate, in a manner agreed by the parties or, if the agreement does not specify a method, by certified or registered mail, return receipt requested and obtained, or by service as authorized for beginning a civil action. The notice must describe the nature of the controversy and remedies sought. If a party does not object to lack of or insufficiency of notice and appears at a hearing, that party waives objection to lack or insufficiency of notice.<sup>146</sup> Before a controversy arises parties may not agree to unreasonably restrict notice of the initiation of arbitration.<sup>147</sup>

Basic Rule 3 elaborates on content of the notice and requires a respondent to file an answering statement, including any counterclaim, within 30 days. Failure to make an answering statement to the notice or a counterclaim is treated as a denial.<sup>148</sup> An arbitrator if appointed must receive copies of these documents.<sup>149</sup> Parties may file changes to notices or counterclaims;

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<sup>145</sup> See MODEL ACT, at 103, *e.g.*, as part of a prenuptial agreement. The second Form A, *id.* may guide drafting an agreement to arbitrate after a controversy has arisen, *e.g.*, after a complaint for divorce has been filed or after a divorce is final and custody or support modification issues arise.

<sup>146</sup> MODEL ACT § 109; compare RUAA § 9. MODEL ACT § 1 defines “record;” see *supra* Part II.D.

<sup>147</sup> MODEL ACT § 104(b)(2); see also Part II.F *supra*. In practice what this may mean is that, *e.g.*, the 30-day turnaround times to exchange claims, etc. can be shortened by a clause as part of an agreement to arbitrate signed after parties file for divorce.

<sup>148</sup> This is different from civil practice; failure to respond to a complaint, counterclaim or similar pleading results in default and perhaps summary treatment thereafter unless a court sets aside the default. *Cf.* FED. R. CIV. P. 8, 55.

<sup>149</sup> See also MODEL ACT, at 113-14.

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copies must go to the arbitrator if one has been appointed.<sup>150</sup> The rules do not cover other documents in the nature of pleadings in civil actions, *e.g.*, cross-claims or third party practice. These may be subject to special rules in an agreement or by an arbitrator ruling.<sup>151</sup> Basic Rule 37 declares that times, such as the 30 days for responses, are governed by standards of a jurisdiction's procedural rules or statutes. This should help calendaring; the same time rules apply, whether a matter is in court or with an arbitrator, unless parties agree otherwise. For example, in a state observing the equivalent of Federal Rule of Civil Procedure 6, those standards would be incorporated into the arbitration's time rules unless parties agree otherwise.<sup>152</sup> The 30-day response time can be modified to follow a state's general response time for civil litigation, or any other reasonable time. Commercial arbitration rules follow shorter times.<sup>153</sup>

J. *Consolidating Arbitrations*

The Model Act and the RUAA allow consolidating arbitrations under circumstances similar to civil action joinder involving the same or related transactions. Although the Act allows a court to order consolidation even if parties do not act to join related arbitrations, parties may contract out of consolidation.<sup>154</sup> It is unlikely that divorce arbitration will present the same or related transactions that are issues in another arbitration. However, consider a married couple who, before marriage, are in a business relationship. If the business agreement(s) has or have arbitration clauses, and the business is a marital estate asset, there is a risk of court-ordered consolidation. Unless family law counsel believes consolidation is preferred, an opt-out clause should be part of a family law arbitration agreement.

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<sup>150</sup> Basic R. 5, *id.* at 114. Basic R. 4, *id.* 114, governs beginning an arbitration by submission, *i.e.*, where a dispute arises and parties then sign an agreement to arbitrate.

<sup>151</sup> Basic R. 36, *id.* at 130.

<sup>152</sup> *Id.* at 130.

<sup>153</sup> *Id.* at 114.

<sup>154</sup> MODEL ACT § 110; *compare* RUAA § 10. Section 110 and RUAA § 110 require opting-out of consolidation, an opposing policy to older arbitration legislation requiring parties to opt into consolidation. *See generally* 1 WALKER, 2006, *supra* note 4, at 25-27, commenting on N.C. GEN. STAT. § 50-50.1 (2007), superseding *id.* § 50-50 (2003), which followed opt-in statutes.



The rules only provide for opt out of class action arbitrations, responding to a relatively recent Supreme Court case.<sup>155</sup> The North Carolina *2006 Revised Handbook* offers separate rules to opt out of other arbitrations or class arbitrations.<sup>156</sup> The AAML and North Carolina drafting committees, considering issues carefully, thought it prudent to recommend opt out for consolidations, given that some prenuptial or postnuptial agreements may be signed years before a dispute. Parties should be given an opportunity to take a second look before deciding on opt-in, particularly for class actions; support and custody may be seriously affected by costs of other arbitrations. On the other hand, consolidation may result in savings in the family law case.

Courts have begun to hold that contract terms in agreements to arbitrate that opt parties out of consumer class actions are unconscionable and against public policy.<sup>157</sup> Unconscionability under state law is always a possible defense in a case involving agreements to arbitrate, but decisions applying to consumer transactions should not automatically apply to governed arbitrations. In most if not all situations the family law case should follow parties' decision to opt out of consolidation with class actions. The Act declares a policy for arbitration, subject to limitations.<sup>158</sup> Class action consolidation imposed in a family law arbitration triggers policies for maintaining integrity of a marital estate; a class action can result in a drain on assets that might otherwise go to a spouse or children. It seems to be better policy to allow family law arbitrations to go forward, with disposition of marital assets by an award; class action parties can be left to resulting assets for those parties.<sup>159</sup> This would be particularly true

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<sup>155</sup> Optional R. 106 & Commentary, MODEL ACT, at 133-34, inter alia referring to *Green Tree Finan. Corp. v. Bazzle*, 539 U.S. 444, 447-55 (2003) (Breyer, J., plurality op.; Stevens, J., concurring), and offering a draft rule for opting into class action arbitrations.

<sup>156</sup> Basic R. 5A, 5B, 1 WALKER, 2006, *supra* note 4, at 57-58, also offering draft rules for opting into either arbitrations.

<sup>157</sup> *E.g.*, *Fiser v. Dell Computer Corp.*, 188 P.3d 1215, 1218-21 (N. Mex. 2008); *see also* Koppel, *supra* note 8; *supra* note 8 and accompanying text.

<sup>158</sup> MODEL ACT § 101(a); *see also supra* Part II.A.

<sup>159</sup> In effect, this was what happened in *United States v. Cox*, No. 3:05CR02, 2007 WL 2122021, at \*1 (W.D.N.C. 2007). For a discussion of *Cox*, *see supra* note 56 and accompanying text.

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for assets otherwise exempt from seizure under state or federal law.<sup>160</sup>

Basic Rule 1 provides that if there are two or more agreements to arbitrate, the rules chosen by the parties shall apply. This is protection for family law cases if parties elect to consolidate.<sup>161</sup> Parties can, of course, opt out of this trumping rule.<sup>162</sup>

#### K. *The Arbitrator(s)*

Under § 111, if parties to an agreement to arbitrate contract for a way to appoint the arbitrator(s), that procedure must be used, “unless the method fails.”<sup>163</sup> This might happen if parties, maybe unwisely, name an arbitrator in an agreement years ahead of a dispute, the named arbitrator dies, the agreement does not have a backup selection procedure, and parties cannot agree on a successor by amendment to the original agreement. If there is a valid agreement to arbitrate, and parties cannot agree on an arbitrator, a court may, upon a party’s motion, appoint the arbitrator. This arbitrator has all the powers of one designated in an agreement or who would have been appointed by the parties pursuant to the agreement.<sup>164</sup>

An individual who has “a known, direct, and material interest in the outcome of the arbitration . . . or a known, existing, and substantial relationship with a party may not serve as an arbitrator required by an agreement to be neutral.”<sup>165</sup> (Most family law arbitrations will involve a single neutral arbitrator, as distinguished from business disputes where parties may appoint non-neutral representatives to a multiarbitrator panel.)

These statutes limit party choice of arbitrators. The Model Act, following the RUAA, also imposes duties on arbitrators to disclose, after making reasonable inquiry, known facts that a rea-

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<sup>160</sup> See *supra* Part II.H.

<sup>161</sup> See *supra* notes 153-59 and accompanying text.

<sup>162</sup> Cf. Forms B, E, MODEL ACT, at 104, 106.

<sup>163</sup> MODEL ACT § 111(a).

<sup>164</sup> *Id.* N.C. GEN. STAT. § 50-45(c) (2007) spells out criteria for a court’s choosing an arbitrator: the parties’ positions and desires; issues in dispute; skill, substantive training and experience of prospective arbitrators, including their skill, substantive training and experience in family law issues; the arbitrator’s availability; *compare* IND. CODE ANN. § 34-57-5-2 (Lexis/Nexis 2008 Cum. Supp.) (choice from court list); *see also infra* Part III.A.8.

<sup>165</sup> MODEL ACT § 111(b).

sonable person would consider likely to affect his or her impartiality. Arbitrators have continuing disclosure obligations. If an arbitrator makes such a disclosure and a party objects to an arbitrator's appointment or continued service, or if an arbitrator does not disclose such facts, these are additional grounds for vacating awards upon timely objection.<sup>166</sup> Parties may not agree to unreasonably restrict the right to disclosure of any facts by a neutral arbitrator before a controversy arises.<sup>167</sup> Arbitrators subscribe to an oath or affirmation, which must be filed with the arbitration record.<sup>168</sup>

Besides statutory controls on arbitrator behavior, agreements may include a clause for arbitrator ethics standards. Most cases hold that these ethics rules are not grounds to vacate an award, but courts may consider an agreement's contractual standards in a vacatur motion proceeding.<sup>169</sup>

Arbitration forms or rules can specify procedures for choosing arbitrators. Form A and Basic Rule 2 provide for a single arbitrator. This should be satisfactory for most family law arbitrations, although multiarbitrator panels may be more appropriate (but more expensive) in complex cases. In a multiarbitrator case, one panelist might be a child psychologist, another an accountant, and a third a lawyer. There is nothing, apart from statutory or contract rules, to require that a lawyer serve as an arbitrator. Multiarbitrator cases should provide for who will preside. If there is an even number of arbitrators, a special rule should provide for who casts tie-breaker votes.<sup>170</sup> Model Act § 113 says that if there is more than one arbitrator, their powers must be exercised by a majority, but an agreement to arbitrate can waive this.<sup>171</sup> Waiver of the majority rule might help to allow

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<sup>166</sup> *Id.* § 112, referring to *id.* § 123(a)(2); *see also* RUA § 12, 23(a)(2); Part II.S *infra*. MODEL ACT § 101(b)(5) defines "person"; *see also supra* Part II.D. 2 BURLESON & WALKER, 2006, *supra* note 4, at 55 publishes a sample arbitrator disclosure form.

<sup>167</sup> MODEL ACT § 104(b)(3); *see also* Part II.F *supra*.

<sup>168</sup> Basic R. 13, MODEL ACT at 119; *see also* 2 BURLESON & WALKER, 2006, *supra* note 4, at 57-58 for oath forms.

<sup>169</sup> *See* Form C, MODEL ACT at 105; 1 WALKER, 2006, *supra* note 4, at 48-49.

<sup>170</sup> MODEL ACT, at 103, 112-13; 1 Walker, 2006, *supra* note 4, at 46, 54.

<sup>171</sup> MODEL ACT § 104; *compare* RUA § 4; ; *see also* MODEL ACT, at 56-57, 67-68.

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a presiding arbitrator to rule on, for example, discovery issues, while leaving other decisions to majority (or unanimous) vote. Optional Rule 101, which if selected by the parties for an agreement and which applies only in transnational cases, *e.g.*, if one spouse is a U.S. citizen and the other is a foreign national, provides that a neutral arbitrator must be chosen from a third country's nationals, if either party requests it within 30 days before an arbitrator is appointed. In the hypothetical just given, no U.S. citizen, national or resident could arbitrate the case if either party objected and Optional Rule 101 was part of the agreement.<sup>172</sup>

Model Act § 114 establishes arbitrator immunity standards, which are generally those protecting a judge of the state when the judge acts in a judicial capacity, plus other immunities that may apply to an arbitrator. If an arbitrator fails to disclose conflicts of interest, that arbitrator does not lose immunities the Act grants.<sup>173</sup> Parties may not agree to waive or vary § 114's effect.<sup>174</sup>

If an arbitrator ceases to act or is unable to act during an arbitration, a replacement must be appointed in accordance with the Act or as the agreement provides.<sup>175</sup>

Basic Rule 15(f) says that there may be no direct communication between parties and a neutral arbitrator except at oral hearings, unless parties and the arbitrator agree otherwise. Parties and the arbitrator may agree in writing on simultaneous postal mail, e-mail, facsimile or other means of simultaneous communications.<sup>176</sup>

#### L. *Arbitration Site*

From practical and legal perspectives, one of the most important decisions is choice of the arbitration site, sometimes referred to as the arbitration situs.

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<sup>172</sup> See also MODEL ACT, at 131.

<sup>173</sup> MODEL ACT § 114, referring to *id.* § 112; compare RUA § § 12, 14; see also *supra* notes 165-66 and accompanying text.

<sup>174</sup> MODEL ACT § 104(c); see also *supra* Part II.F.

<sup>175</sup> MODEL ACT § 115(c), referring to *id.* § 111; compare RUA § § 11, 15(c); see also *supra* notes 163-64 and accompanying text.

<sup>176</sup> See also MODEL ACT, at 120-21.

Arbitration proceedings can be informal, in terms of dress, date, time and location. There is nothing wrong with holding an arbitration in a convenient resort center on a weekend, with everyone in casual dress; the only downside would be expense; a courtroom is a free public service for litigation.<sup>177</sup> Counsel, working with an arbitrator if appointed, should consider site options that will be more conducive to successfully resolving a case than a courthouse or, perhaps, law offices, both of which can be intimidating to parties. If an arbitrator agrees, arbitration can be held evenings or weekends; this may be useful if both spouses have the usual workweeks. Babysitters may be more available during evenings or weekends.

Choice of the site has important legal implications, too. State arbitration statutes like the Model Act, and divorce laws generally, are territorial in application; § 126 confers subject-matter jurisdiction over a court of the state with jurisdiction over the controversy and the parties for enforcement of an agreement to arbitrate; an agreement to arbitrate providing for arbitration within a state confers exclusive jurisdiction on the court to enter judgment on an award under the Act.<sup>178</sup> Therefore, it is quite important to choose a site within a jurisdiction where a divorce or other proceeding has been filed, so that its courts can rule on arbitration-related issues. Other states may not have a comparable procedure; in that case, appearing before another state's courts may subject parties to the UAA or the RUAA, neither of which are tailored to family law arbitration, or that state's family law arbitration statutes. A party opposing proceedings in another state might have a successful motion for improper venue. Arbitrators apply conflict of laws principles of the state in which they sit to hear the arbitration, perhaps the most important legal reason not to go out of the state where the family law case is filed

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<sup>177</sup> *E.g.*, a successful three-arbitrator case heard over several weeks, involving substantial equitable distribution issues, at the Wake Forest University Graylyn International Conference Center, an early Twentieth Century mansion. *See generally* A. Doyle Early, Jr. et al., *Arbitrating the Complex Case by Panel*, ch. 4 in NORTH CAROLINA BAR FOUNDATION, *PERILS AND PITFALLS IN ADR: A FAMILY LAW PERSPECTIVE* (2005).

<sup>178</sup> Parties may not waive or agree to vary the effect of MODEL ACT § 126, before a controversy arises. *Id.* § 104(b)(1). *Id.* § 127 establishes venue principles for the Act; parties cannot waive or vary the effect of its provisions. *Id.* § 104(c). *See also supra* Part II.F.

to a nearby state's resort, no matter how attractive and comfortable it might be. Unless parties include a valid choice of law clause in the agreement, there could be quite untoward results.<sup>179</sup>

Form D suggests an arbitration situs clause.<sup>180</sup> An arbitrator can be empowered to move an arbitration to a more convenient site, or to set different sites, dates and times for different hearings.<sup>181</sup> This should be within the state originally chosen for the arbitration.

Don't fall into a trap of contracting for arbitration outside the state where the divorce or other proceeding has been filed. If an arbitrator moves in that direction under authority given him by the agreement,<sup>182</sup> object and inform the arbitrator of the consequences.

*M. Administrative Conference; ADR Options; Discovery;  
Summary Disposition*

Like pretrial conferences in civil litigation, § 115(a) allows arbitrators to call administrative conferences before a hearing, which is roughly analogous to a civil trial, on the merits. Basic Rules 6(a)-6(d) spell out the procedure and topics. If parties agree, Rule 6(e) allows arbitrators to arrange mediation under principles stated in a jurisdiction's rules. Arbitrators appointed in a case may not serve as mediators.<sup>183</sup> It may seem anomalous to have mediation after parties agree to arbitration, and that may be so for states where family law cases are initially eligible for mediation.<sup>184</sup> On the other hand, for jurisdictions that do not have family law mediation, parties subject to an arbitration agreement may prefer to mediate all issues or some of them,

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<sup>179</sup> See also MODEL ACT, at 133, publishing Optional R. 105.

<sup>180</sup> See also Basic R. 7, *id.* at 106, 116.

<sup>181</sup> Basic R. 7(c), 8, *id.* at 116-17, which can be excluded if parties do not want to give the arbitrator this authority.

<sup>182</sup> See *supra* note 34 and accompanying text.

<sup>183</sup> See also MODEL ACT, at 115-16.

<sup>184</sup> North Carolina has statutes and rules allowing arbitration, instead of mediation, to go forward. N.C. GEN. STAT. § 7A-38.4A(g) (2007); see also *id.* § 7A-38.4A(c) (2007) (chief district court judge "may order a mediated settlement conference or another settlement procedure, as provided under" *id.* § 7A-38.4A(g)). See also N.C. GEN. STAT. § 50-13.1(c) (2005); N.C. Unif. R. Regul. Mediation of Child Custody & Visitation under N.C. Custody & Visitation Mediation Prog., R. 8.

leaving the rest for an arbitrator. In states where mediation is initially bypassed in favor of arbitration by agreement, the parties may have second thoughts on the preferable ADR technique. Rule 6(e) preserves flexibility.

Minimized discovery, and minimal court intervention in factfinding, has been a traditional policy of arbitration. The UAA left discovery mostly in the arbitrator's hands. The Model Act, following the RUAA, establishes a two-step process for discovery, which usually should begin after an administrative conference sets parameters.<sup>185</sup> An arbitrator can issue subpoenas for witness attendance and production of records and other evidence, can permit depositions under conditions the arbitrator sets, and can permit other discovery, including compliance orders and protective orders.<sup>186</sup> As a second step, a court may enforce subpoenas or discovery-related orders for witness attendance and protection of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another state.<sup>187</sup> Basic Rules 6(c), 6(d), 15(h) and Optional Rule 104 expand on the statutory discovery formula.<sup>188</sup>

Parties may agree to request summary disposition, like summary judgment in civil practice, or one party may request summary disposition provided that party notifies all other parties and they have a reasonable opportunity to respond.<sup>189</sup> This might result in a prehearing award if partial summary disposition is granted.<sup>190</sup>

#### N. Evidence and Procedure

The Model Act says little about evidence and procedure, except to say that arbitrators must conduct hearings as he or she "considers appropriate for a fair and expeditious disposition of the proceeding." Arbitrators can determine the admissibility,

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<sup>185</sup> See *supra* note 183 and accompanying text.

<sup>186</sup> MODEL ACT §§ 117(a)-117(f); compare RUAA §§ 17(a)-17(f). Before a controversy arises, MODEL ACT, § 104(b)(1) forbids parties from agreeing to waive or vary the effect of *id.* §§ 117(a), 117(b); compare RUAA § 4(b)(1); see also *supra* Part II.F.

<sup>187</sup> MODEL ACT § 117(g); compare RUAA § 17(g).

<sup>188</sup> See MODEL ACT, at 115-16, 120-21, 132-33.

<sup>189</sup> MODEL ACT § 115(b); compare RUAA § 15(b).

<sup>190</sup> See *supra* note 143 and accompanying text.

relevance, materiality and weight of the evidence.<sup>191</sup> Arbitrators must make records of awards, which must be authenticated, within the time an agreement to arbitrate specifies, or within the time a court orders.<sup>192</sup>

With respect to evidence and procedural rules for arbitrations, parties have a wide path for crafting rules. The Model Act recites the general principles found in most arbitrations. There are a few special rules for family law arbitration, *e.g.*, that the award must be “reasoned,” *i.e.*, like Federal Rule of Civil Procedure 52 findings of fact and conclusions of law, rather than a statement of winner and loser and how much or what goes where, the typical award, analogous to a general verdict, in many U.S. commercial cases.<sup>193</sup>

Privacy of proceedings is another difference between litigation and arbitration and is said to be a big advantage of ADR,<sup>194</sup> although family law counsel may be familiar with cases where there are closed hearings, such as those involving juveniles, and sealed records. Basic Rule 11 declares the general privacy rule, requiring an arbitrator, parties and counsel to maintain privacy of hearings “unless the parties agree otherwise in writing, or the law provides otherwise,” the latter being where a record must be produced, *e.g.*, in criminal proceedings. Persons having “a direct material interest in the arbitration may attend hearings. The arbitrator shall otherwise have the power to require exclusion of any witness, other than a party or other essential person [perhaps a parent when a child testifies], during any other witness’ testimony.” The arbitrator determines if any other person can attend.<sup>195</sup> Model Act § 125(d) extends privacy protection to awards confirmed as judgments, allowing a judge to seal or re-

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<sup>191</sup> MODEL ACT § 115(a); *compare* RUAA § 15(a); *see also infra* notes 197-201 and accompanying text.

<sup>192</sup> The court, or parties to the agreement, may extend the time for preparing an award. A party waives objection that an award is not timely made unless that party gives notice of the objection to the arbitrator before receiving notice of the award. MODEL ACT §§ 119(a)-19(b); *compare* RUAA §§ 19(a)-19(b).

<sup>193</sup> MODEL ACT § 119(c), for which there is no RUAA equivalent; *see also infra* Part II.P.

<sup>194</sup> Murray, *supra* note 8, at 315-16, says that private dispute resolution can be corrosive of fair results, as compared with courthouse decisions.

<sup>195</sup> *See also* MODEL ACT, at 118; *supra* Part II.D, analyzing the definition of “person.”



dact an arbitrator's order or award before the court as the judge would if the case had been litigated to final judgment.<sup>196</sup>

In common with many states' practice, Basic Rule 10 says parties must arrange for stenographic or other recordings; unless otherwise agreed, a party arranging a recording pays the cost.<sup>197</sup>

Unlike general civil litigation, Basic Rule 17 says the evidence and civil procedure rules are general guides in conducting the arbitration; an arbitrator has discretion to modify the rules "to permit efficient and expeditious presentation of the case." However, rules of privilege apply as in civil actions. Evidence must be taken in the presence of all arbitrators and parties, unless a party is absent or in default, or has waived the right to be present.<sup>198</sup> The difference in the evidence rules is important. It means, for instance, that hearsay rules, except as they codify privilege, do not apply in arbitration. Arbitrators can receive hearsay and give it the weight it deserves, perhaps the same as excluding it, *i.e.*, nothing; the control is the arbitrator's determination of relevance and materiality.<sup>199</sup> Parties can control this aspect of the case by special rules waiving or modifying the Act's general evidence rules,<sup>200</sup> except as to privileges, but to do so cuts against the philosophy of arbitration, which seeks departure from technical rules to allow a decision-maker, the arbitrator whom parties have chosen and therefore should trust, to rule on matters, giving the evidence that is adduced appropriate weight, which can be zero. The same can be said for technical aspects of civil procedure rules. Parties can and should craft these variants carefully.<sup>201</sup>

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<sup>196</sup> See *infra* notes 197-200 and accompanying text.

<sup>197</sup> If a party wants a record, that party must give seven days notice to the opponent. This may facilitate agreement rather than the possibly double cost of stenography by one party and video recording by the other. Basic R. 10 & Commentary, MODEL ACT, at 118.

<sup>198</sup> Basic R. 17(d)-17(e), *id.* at 121-22. See also *supra* note 148 and accompanying text.

<sup>199</sup> MODEL ACT § 115(a); Basic R. 17(c), MODEL ACT, at 121-22; compare RUA § 15(a).

<sup>200</sup> See MODEL ACT § 104(a) and compare RUA § 4(a); *supra* Part II.F.

<sup>201</sup> For example, Basic R. 3, MODEL ACT, at 113, establishes simple pleading rules with 30-day turnaround times; parties can agree on shorter or longer times, and extra pleading provisions, for a given case. See also *supra* notes 148-53 and accompanying text.

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Arbitrators can receive and consider witnesses' evidence in affidavits but only afford those affidavits such weight that the arbitrator deems them entitled to after considering opponents' objections.<sup>202</sup>

The Optional Rules offer clauses for consideration in certain arbitrations. Optional Rule 102 says that a party wanting an interpreter must contract with the interpreter and pay costs of the interpreter, unless the agreement specifies otherwise. Optional Rule 103 says that the language of the arbitration must be the same as that used in the documents that include the agreement to arbitrate. An arbitrator may order that any documents in a language other than the language of the arbitration must be accompanied by a translation. A document proponent must bear translation expenses, which can be assessed as a cost in the arbitration. Basic Rule 104 allows an arbitrator to appoint one or more independent experts to report in writing on specific issues designated by the arbitrator.<sup>203</sup> As their titles suggest, these Optional Rules may not fit every arbitration and may not be necessary in most. Parties electing the Basic Rules must affirmatively include any Optional Rules in an agreement to arbitrate.<sup>204</sup>

O. *The Hearing*

The Model Act says little about the principal hearing, *i.e.*, the arbitration "trial." As discussed earlier, the Act and recommended rules provide for preaward arbitrator rulings, perhaps in provisional remedy or discovery proceedings.<sup>205</sup> Hearings follow evidence and procedure rules employed at those sessions.<sup>206</sup> Parties have a right to counsel at the hearing, unless they have waived that right.<sup>207</sup> If a party or counsel does not appear at the hearing, they may have waived any right to be present.<sup>208</sup> The arbitrator may require parties to deposit, before a hearing,

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<sup>202</sup> An arbitrator can receive post-hearing documents, which might include affidavits, if parties agree on this or if the arbitrator so directs. All parties must be given an opportunity to examine these documents and other evidence. Basic R. 18, MODEL ACT, at 122.

<sup>203</sup> See also *id.* at 132-33.

<sup>204</sup> See alternative Forms B, *id.* at 104.

<sup>205</sup> See *supra* Parts II.H, II.M.

<sup>206</sup> See *id.*

<sup>207</sup> See *supra* notes 57, 111, 135, 139 and accompanying text.

<sup>208</sup> See *supra* note 57 and accompanying text.

enough funds as the arbitrator deems necessary to cover arbitration expenses, including arbitrator fees, if any. The arbitrator must render an account to the parties and return any unexpended balance at the end of the case.<sup>209</sup>

Hearings must begin on the date and time and at the site the parties have chosen, unless the arbitrator has authority to change the date, time or place and does so.<sup>210</sup> A hearing can be postponed if all parties agree, or if the arbitrator decides that good cause has been shown after a party moves for a continuance.<sup>211</sup> Parties must make arrangements for recording a hearing. They can agree to share costs; otherwise a party arranging for a recording must pay these costs.<sup>212</sup> The Optional Rules also provide for interpreters and the language in which the arbitration will be conducted.<sup>213</sup>

Hearings open with filing of the arbitrator's oath, and by a recording of the date, time and place of the hearing and the arbitrator's presence along with presence of parties and counsel, if any, the arbitrator's receipt of the statement of claim and answering statement if any, including counterclaims, if any, and an answering statement, if any, to counterclaims.<sup>214</sup> If additional documents in the nature of pleadings are involved, *e.g.*, cross-claims allowed by special rule, those must also be filed. The arbitrator may ask for statements clarifying the issues; in some cases these statements may have been filed at a Basic Rule 6(b)-6(c) preliminary hearing.<sup>215</sup>

The complaining party then presents evidence supporting his or her claims. Defendant then presents evidence supporting defenses to the claim and counterclaim evidence. The complaining party then presents evidence supporting responses to a counterclaim. Witnesses must submit to questions or other, *i.e.*, cross, examination. An arbitrator can vary this procedure, and must do so if additional claims such as cross-claims are involved, but must

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<sup>209</sup> See *supra* note 133 and accompanying text.

<sup>210</sup> See *supra* note 35 and accompanying text.

<sup>211</sup> See *supra* notes 134-35 and accompanying text.

<sup>212</sup> See *supra* note 197 and accompanying text.

<sup>213</sup> See *supra* notes 60, 204 and accompanying text.

<sup>214</sup> Basic R. 15(a), MODEL ACT, at 120; see also *supra* notes 148-53 and accompanying text.

<sup>215</sup> Basic R. 15(b), *id.*

afford “a full and equal opportunity to all parties” to present material, relevant evidence.<sup>216</sup> An arbitrator may receive exhibits if a party offers them; witnesses’ names and addresses and descriptions of exhibits in the order received must be part of the record.<sup>217</sup> Arbitrators may receive evidence by affidavits.<sup>218</sup> If the parties agree, an arbitrator may hire one or more independent experts to report in writing to the arbitrator on specific issues the arbitrator designates, with copies to parties.<sup>219</sup>

If custody is at issue, the arbitrator can be authorized to interview a child privately to ascertain the child’s needs as to custodial arrangements and visitation rights. “In conducting such an interview, the arbitrator shall avoid forcing the child to choose between parents or to reject either of them. The arbitrator shall conduct this interview in the presence of counsel for the child, if the child has separate counsel, but not in the presence of the parents or their counsel.”<sup>220</sup> With both parties’ written approval, an arbitrator may obtain a professional opinion relevant to a child’s best interests. The opinion must be submitted to the parents and to the child’s counsel in sufficient time for them to comment on the opinion to the arbitrator before the hearings close. The parties must share the cost of the opinion, as agreed by them. If there is no agreement, the arbitrator apportions costs.<sup>221</sup>

A party calling a witness pays that witness’s expenses. Parties bear equally all other arbitration expenses, including an arbitrator’s required travel and other expenses or any witness or proof produced at an arbitrator’s direct request.<sup>222</sup>

All of these provisions in the Basic and Optional Rules can be varied by an agreement to arbitrate, so long as the agreement does not violate other law, *e.g.*, rules on arbitrator immunity waiver or privilege.<sup>223</sup>

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<sup>216</sup> Basic R. 15(c), *id.*

<sup>217</sup> Basic R. 15(d)-15(e), *id.*

<sup>218</sup> *See supra* note 202 and accompanying text.

<sup>219</sup> *See supra* note 203 and accompanying text.

<sup>220</sup> Basic R. 15(g), MODEL ACT, at 120.

<sup>221</sup> Basic R. 15(h), *id.*

<sup>222</sup> An arbitrator can assess these expenses or any part against a specific party or parties. An agreement to arbitrate can vary these rules. Basic R. 33(a), *id.* at 128.

<sup>223</sup> *See supra* notes 131, 173-74, 198 and accompanying text.

After the parties present evidence and other materials, the arbitrator must ask the parties if they have further proofs to offer or witnesses to be heard, or if they wish to be heard in final argument. If replies are negative, or if the arbitrator is satisfied the record is complete, he/she declares the hearing closed. If briefs will be filed, the hearing must be declared closed as of the final date the arbitrator sets for briefs. If documents will be filed late and the receipt date for these comes after the receipt date for briefs, the later date governs for closing the hearing. The time for an arbitrator to make an award begins to run upon the closing of the hearing.<sup>224</sup> Basic Rule 27 sets a 30-day limit for an award to be rendered, unless an agreement specifies otherwise or the law requires another, *e.g.*, if a court sets a time limit.<sup>225</sup> Parties may wish to use briefing options under Rule 27 to submit proposed findings of fact and conclusions of law for the arbitrator's use in making the award, if the agreement follows the Model Act default principle of a reasoned award.<sup>226</sup> If these proposed findings and conclusions are submitted before the hearing, as local rules of court may require for proposed findings of fact and conclusions of law in judge-tried cases, that may help assure a complete record and accelerate the rendering of an award. Proposed findings and conclusions may help reduce an arbitrator's work and cut an hour-based fee; the arbitrator can use them as checklists for completeness. Filing proposed findings and conclusions before a hearing might be required in an arbitrator's administrative conference order.

#### P. *The Award*

A previously-mentioned fundamental difference between the Model Act and other kinds of arbitrations is its reasoned award default rule,<sup>227</sup> *i.e.*, an award that recites an arbitrator's findings of fact and conclusions of law. A reasoned award may not be necessary in every divorce case, *e.g.*, a single-issue prop-

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<sup>224</sup> See *supra* notes 136-37, 148-53 and accompanying text.

<sup>225</sup> MODEL ACT § 119(b) allows a court to order a time limit if an agreement to arbitrate does not. See also *supra* notes 136-37, 148-53 and accompanying text.

<sup>226</sup> MODEL ACT § 119(c); see also *supra* notes 141-42, 193 and accompanying text; *infra* Part II.P.

<sup>227</sup> MODEL ACT § 119(c).

erty division matter where there are no children of the marriage and other matters have been resolved. On the other hand, given the policy of the law across the United States that custody and support issues always remain open, and the Model Act's recognition of this in § 124A, nearly all Act-governed cases will require reasoned awards. The reasoned award is gaining increasing use in the United States; in international arbitrations it is the norm. One of its virtues is that it explains an arbitrator's decisions on disputed facts and rationales under the law that lead to ultimate rulings on liability, nonliability or assets apportionment.<sup>228</sup> Parties and their counsel can read how the arbitrator came to decisions; in a one-line, win-lose award like the general verdict in civil litigation, there may be more incentive to file vacatur motions, perhaps to test how the arbitrator arrived at a decision.

There are two components to reasoned awards that parties must consider: time and cost. The Model Act is silent on the precise time for an award. Basic Rule 27 establishes a 30-day default rule unless the parties agree otherwise or the law specifies another time.<sup>229</sup> Parties and counsel must decide, perhaps by supplemental agreement if a prenuptial or postnuptial agreement was signed long before the dissolving marriage became complicated by birth or adoption of children or acquisition of considerable assets, if 30 days is long enough for an arbitrator to make a reasoned award. The arbitrator must be consulted. Parties can expect experienced arbitrators to ask, based on their knowledge of and experience with the complexity of a case, whether the contracted time is reasonable. As an arbitration proceeds through hearings, parties should begin drafting proposed findings of fact and conclusions of law to submit to the arbitrator to help with the award to be crafted. An arbitrator may request these, perhaps at an administrative conference. The second factor, cost, has two components: (1) reasonable cost of arbitrator time to prepare a reasoned award; (2) cost, if an arbitrator charges an hourly fee, that can be reduced if parties submit proposed findings and conclusions.

Basic Rule 28(c) follows the Model Act to opt for a reasoned award but adds a caveat: "Notwithstanding the parties'

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<sup>228</sup> See 2 BURLESON & WALKER, 2006, *supra* note 4, at 59 for a sample reasoned award.

<sup>229</sup> See *supra* notes 136-37, 148-53 and accompanying text.

agreement in writing that an award shall not be reasoned, an arbitrator may determine that a reasoned award is appropriate, in his or her discretion.” The Committee added this to take care of a situation where an agreement might be practical and lawful when signed, *e.g.*, where no support or custody issues could reasonably be anticipated at that time, but where those issues arise thereafter.<sup>230</sup> An example might be a childless couple’s prenuptial agreement where there are no support issues, followed by an adoption of a minor child, and still later, a divorce where there are support and custody issues and no possibility of a novation to require a reasoned award. This would save the agreement to arbitrate. If parties want to eliminate the caveat, the forms offer ways to do this, to opt for a reasoned award under all circumstances. Parties could also declare in an agreement that they do not want a reasoned award; they must do so affirmatively to opt out of the Model Act § 119(c) default provision.<sup>231</sup> Model Act § 121(c) separately requires a reasoned award for punitive damages, another provision requiring a separate opt out clause.<sup>232</sup>

Arbitrator fees are not cheap; it is a cost factor that must be considered before parties sign an agreement to arbitrate and must be compared with litigation costs, including time burned while courts consider priority litigation, such as criminal cases governed by speedy trial rules or emergency child support or urgent custody issues in another family law filing. There are, of course, other costs related to litigation that arbitration may minimize, *e.g.*, hearing a case at times more convenient to litigants, or privacy.<sup>233</sup> Nevertheless, counsel must consider the arbitrator fee as a cost item that is not paid if a case is litigated.

There are two kinds of awards: those coming through an arbitrator’s preaward ruling, perhaps incident to a provisional remedies proceeding under Model Act § 118,<sup>234</sup> and awards at the end of a case. Model Act § 119, incorporated by reference in § 118, governs the latter.

Arbitrators must make a record of an award, which must be signed or otherwise authenticated as authorized by federal or

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<sup>230</sup> See also MODEL ACT, at 126.

<sup>231</sup> See Forms B, E in *id.* at 104, 106.

<sup>232</sup> See *infra* notes 247-52, 311 and accompanying text.

<sup>233</sup> See *supra* notes 177-82, 194-96 and accompanying text.

<sup>234</sup> See *supra* Part II.H.

state law by any arbitrator concurring in the award. The arbitrator must give notice of the award, including a copy of it, to parties.<sup>235</sup> An award must be made within the time the agreement specifies. A court may extend, or the parties may agree in a record to expand, the time before or after the specified or ordered time. A party waives objection that an award was not timely made unless that party gives notice of the objection to the arbitrator before receiving notice of the award.<sup>236</sup> As noted earlier, the default rule is for a reasoned award.<sup>237</sup>

Basic Rule 28 governs an award's form and scope. It must be in writing and dated. It must be signed in the manner required by law, *i.e.*, by applicable state or federal law as Model Act § 119 provides by a majority of the arbitrators, if more than one arbitrator hears a case, and must recite where an arbitration was conducted and where an award was made.<sup>238</sup> Rule 28 does not provide for the relatively rare situation of an even number of arbitrators and signatures; this Rule must be modified for that case.<sup>239</sup> Reciting arbitration and award sites is important; conflict of laws issues may arise from choice of these places. The site should be within the same state where the divorce or other proceeding has been filed.<sup>240</sup> Rule 28 does not deal with a nonsigning or dissenting arbitrator. If an arbitrator does not sign in a multi-arbitrator case, that does not affect an award's validity, as

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<sup>235</sup> MODEL ACT § 119(a); compare RUA § 19(a); see also MODEL ACT, at 75. MODEL ACT § 101 defines "record;" § 102 defines "notice;" Section 104(a) declares that these provisions can be modified by agreement of the parties. Basic R. 30 would require parties or their counsel to accept first-class mail or e-mail copies of the award at their last known address, by personal service, "or filing of the award in any other manner permitted by law, as legal and timely delivery." Basic R. 31 allows an arbitrator, upon a party's request, to furnish that party at that party's expense, certified copies of any papers in the arbitrator's possession that may be required in judicial proceedings related to the arbitration. MODEL ACT, at 127. See also *supra* Part II.F.

<sup>236</sup> MODEL ACT § 119(b); compare RUA § 19(b); see also MODEL ACT at 75. MODEL ACT § 101(b)(6) defines "record;" § 102 defines "notice;" Section 104(a) declares that the parties can agree to modify these provisions. See also *supra* Part II.F.

<sup>237</sup> MODEL ACT § 119(c); see also *supra* notes 226-27, 231 and accompanying text.

<sup>238</sup> See also MODEL ACT at 126-27.

<sup>239</sup> See also *supra* notes 170-71 and accompanying text.

<sup>240</sup> See *supra* notes 35-43 and accompanying text; *supra* Part II.L.



long as a majority can act and the agreement does not change that rule.<sup>241</sup> It might be wise to modify the Rule to require the presiding arbitrator in a multi-arbitrator case to report that an arbitrator did not sign or expressed dissent without filing a dissenting opinion. A modified rule could also require dissenters to file reasoned dissents.<sup>242</sup>

Basic Rule 29 provides for a consent award upon settlement, if parties settle once arbitration begins. A consent award may set forth settlement terms, which must award costs, including arbitrator fees and expenses.<sup>243</sup> A consent award must be reasoned if parties have chosen, by not opting out of the statutory default rule in Model Act §119(c), to require the arbitrator to render such an award. If parties have opted out of a reasoned award, the consent award need not be reasoned, unless the arbitrator is given authority by rule to render one, despite the parties' agreement.<sup>244</sup> This award is subject to the same confirmation and judgment procedure as an award following adversarial proceedings.<sup>245</sup>

Besides awards for punitive damages and attorney fees, the Model Act allows an arbitrator to order "such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration."<sup>246</sup> Basic Rule 28(b) echoes this, authorizing an arbitrator to grant any remedy or relief the arbitrator deems just and equitable, including specific performance, within the scope of the agreement to arbitrate. It is important for parties to consider carefully the remedies an arbitrator can give, including preaward relief, provisional remedies, damages (with or without punitive damages), costs and attorney fees, and recite that in an agreement.<sup>247</sup>

The Act takes a conservative approach to allowing punitive damages. It allows them or "other exemplary relief" if such an award would be justified in a civil action on the same claim, "and

<sup>241</sup> See MODEL ACT § 113; *supra* note 171 and accompanying text.

<sup>242</sup> See Forms B, E, MODEL ACT at 104-07.

<sup>243</sup> See *id.* at 127.

<sup>244</sup> The same reasons for and against reasoned awards after an adversarial proceeding, except reduced expense attributable to an arbitrator's drafting such an award, apply. See *supra* notes 230-32, 237 and accompanying text.

<sup>245</sup> See *infra* Part II.R.

<sup>246</sup> MODEL ACT § 121(c); compare RUA § 21(c).

<sup>247</sup> See MODEL ACT, at 125-29.

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the evidence produced at the [arbitration] hearing justifies the award under the legal standards otherwise applicable to the claim.” However, if an arbitrator awards punitive damages or other exemplary relief, “the arbitrator shall specify in the award the basis in fact justifying and the basis in law authorizing the award and state separately the amount of the punitive damages or other exemplary relief.”<sup>248</sup> The result is that punitive damages are subject to a separate reasoned award regime from Act § 119(c)’s general default rule; parties can opt out of both.<sup>249</sup> Basic Rule 28 would deny punitive damages unless the parties agree otherwise.<sup>250</sup> Therefore, parties wishing to claim punitive damages or other exemplary relief must write a special rule into an agreement to arbitrate.<sup>251</sup> Section 123(a)(8) allows punitive damages vacatur if a court determines an award for them is clearly erroneous.<sup>252</sup>

The Act allows reasonable attorney’s fees and other reasonable expenses of arbitration “if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.”<sup>253</sup> Otherwise, an arbitrator may award interest and costs as provided by law.<sup>254</sup> Basic Rule 33(b) declares: “To the extent provided by law, fees and expenses of counsel shall be included among costs of the hearing.” Thus the Act and other federal or state law are the baseline standards for attorney fees, which typically go to a complaining spouse. There is no common denominator around the country for components of these fees; the Rule leaves it to parties to assert and prove the fees the client or children deserve. Where no fees would be due under state law, the arbitrator can-

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<sup>248</sup> MODEL ACT §§ 121(a), 121(e), which follow N.C. GEN. STAT. §§ 1-569.21(a), 1-569.21(e) (2007); compare RUAA § 21; see also N.C. GEN. STAT. § 50-51(e) (2007); Commentary, MODEL ACT, at 79-81; 1 WALKER, 2006, *supra* note 4, at 28-29.

<sup>249</sup> MODEL ACT § 104; see also *supra* Part II.F.

<sup>250</sup> Basic R. 28(d), MODEL ACT, at 126.

<sup>251</sup> See Forms B, E, *id.* at 104, 106.

<sup>252</sup> See also *infra* Part II.S.

<sup>253</sup> MODEL ACT § 121(b), which differs from RUAA § 21(b) and follows the N.C. GEN. STAT. §§ 1-569.21(b), 50-51(f)(2)(a) approach; see also MODEL ACT, at 79-81; WALKER, 2006, *supra* note 4, at 27-29.

<sup>254</sup> See also Commentary, listing inter alia Basic R. 15 and Optional R. 102, MODEL ACT, at 120, 132 as among costs provisions in the Rules.

not award them under Rule 33(b). However, parties can contract for additional fees; the Rule 33 Commentary provides a suggested clause for this.<sup>255</sup>

Basic Rule 33(a) lists other costs and expenses: witness expenses, paid by a party producing a witness; other arbitration expenses, including required travel and other expense of the arbitrator, and the cost of proof produced at the arbitrator's direct request, to be shared by the parties. The parties can agree otherwise, or an arbitrator can assess expenses or a part of them against a specific party or parties.<sup>256</sup> Rule 34 adds to Rule 33(a) by providing that the parties and the arbitrator must agree on arbitrator compensation when they choose an arbitrator.<sup>257</sup> An arbitrator compensation agreement should dovetail with Rule 33(a) to make clear how arbitrator expenses that Rule 33(a) lists will be paid.<sup>258</sup> These provisions are consonant with the Model Act, which declares that "an arbitrator's expenses and fees, together with other expenses, must be paid as provided in the award."<sup>259</sup> The award is, of course, predicated on the parties' agreement.

Basic Rule 33(b) follows a like pattern for other expenses, fees and costs and sanctions; they must be paid as a jurisdiction's version of the Act or federal law provide, unless parties agree otherwise. However, an agreement cannot contravene federal or state laws requiring imposition of expenses, fees, costs and sanctions.<sup>260</sup>

#### Q. *Arbitrator Modification or Correction of an Award*

Three Model Act provisions govern arbitrators' modifying or correcting awards. Section 120 provides for arbitrators' modifying or correcting an award. Section 124 allows correcting or

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<sup>255</sup> MODEL ACT, at 129. Parties wanting a variant from Rule 33(b) can insert such a clause, so long as the provision does not violate federal or state law mandating fees. See Forms B, E, *id.* 104-07; *supra* notes 253-54 and accompanying text.

<sup>256</sup> Basic R. 33(a), MODEL ACT, at 128.

<sup>257</sup> See *id.* at 129.

<sup>258</sup> See 2 BURLESON & WALKER, 2006, *supra* note 4, at 53, for a sample arbitrator fee contract.

<sup>259</sup> MODEL ACT § 121(d); compare RUA § 21(d); see also MODEL ACT, at 79-81.

<sup>260</sup> MODEL ACT, at 129.

modifying an award by a court but allows the court to send some modification or correction issues to an arbitrator. Section 124A has procedures for modifying or correcting awards for alimony, postseparation support or child custody and support by a court or an arbitrator.<sup>261</sup>

1. *Procedure for arbitrator modification or correction of an award: Traditional grounds*

Within 20 days of receiving an award, a party may move the arbitrator to modify or correct an award if: (1) there was an evident mathematical miscalculation or an evident mistake in the description of a person, thing or property referred to in the award; (2) if the award is “imperfect in a matter of form not affecting the merits of the decision on the claims submitted;” (3) because the arbitrator did not make a final and definite award upon a claim the parties submitted to the arbitration; or (4) to clarify an award. A party objecting to a motion must give notice within 10 days after receiving notice of the motion.<sup>262</sup> Any modified or corrected award is subject to the general award, confirmation of award, vacatur and modification rules, which might include sanctions for frivolous modification or correction motions.<sup>263</sup> These motions can delay a final award while an arbitrator considers them and files an amended award, thus the need for the deterrence value of possible sanctions for frivolous motions.

An arbitrator might spot other needed modifications or corrections while reconsidering an award because of a modification or correction motion; arbitrators should include arbitrator-generated modifications or corrections, noting these amendments in the amended award. An arbitrator who notes a mathematical error, for example, might send parties a modified or corrected award on his or her own motion before a motion for modification or correction; this would extend times for confirming the award and further procedures. If that happens, careful arbitrators should note this in an amended award.

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<sup>261</sup> Parts II.Q.2, II.Q.3 *infra* analyze MODEL ACT §§ 124, 124A.

<sup>262</sup> MODEL ACT §§ 120(a)-120(c), referring to *id.* §§ 124(a)(1), 124(a)(3); compare RUAA §§ 20(a)-20(c), referring to *id.* §§ 24(a)(1), 24(a)(3).

<sup>263</sup> MODEL ACT § 120(e), referring to *id.* §§ 119(a), 122-124A; compare RUAA § 20(e). Parties cannot agree to waive or vary the effect of § 120(e). MODEL ACT § 104(c). See also MODEL ACT, at 77; *supra* Parts II.F, II.P.

2. *The court and submission of modification or correction issues to an arbitrator*

The RUAA introduced a new option for a court seized of an award presented for confirmation: remitting corrective or modification action a party could otherwise take to the arbitrator. If a confirmation, vacatur or modification motion or motions are before a court, the court may submit modification or correction action to the arbitrator (1) if there was an evident mathematical miscalculation or an evident mistake in description of a person, thing or property referred to in an award; (2) if an award is “imperfect in a matter of form not affecting the merits of the decision on the claims submitted;” (3) because the arbitrator did not make a final and definite award upon a claim the parties submitted to the arbitration; or (4) to clarify an award. These are the same bases for correction or modification that could be grounds of a party’s motion to the arbitrator.<sup>264</sup> Modified or corrected awards are subject to the general award, confirmation of award, vacatur and modification rules, which might include sanctions for frivolous modification or correction motions.<sup>265</sup> Such motions could delay a final award while an arbitrator considers them and files an amended award. An arbitrator might spot other needed modifications or corrections while reconsidering the award as a result of a party’s modification or correction motion; these should be included with a notation of amendments in the new award.<sup>266</sup>

If a court remits an award for correction to the arbitrator, the court upon motion can revisit the award, now corrected, to

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<sup>264</sup> Compare MODEL ACT § 120(d), with *id.* § 120(a) and RUAA § 20(d). Parties cannot agree to waive or vary the effect of § 120(d). MODEL ACT § 104(c). See also *supra* Part II.F. If a jurisdiction wishes to remove arbitration from a case after the initial award, and require courts to correct all errors including clerical errors, § 120(d) could be omitted. If a state wants to allow arbitrators to correct clerical errors and leave other corrections to the court, § 120(d) could be enacted in modified format. See also *infra* notes 280-81 and accompanying text, analyzing options for jurisdictions requiring submission of all agreements, and therefore all arbitral awards, for postseparation support or alimony, child support or custody, or similar components of awards.

<sup>265</sup> MODEL ACT § 120(e), referring to *id.* §§ 119(a), 122, 123, 124 and 124A; compare RUAA § 20(e); see also MODEL ACT, at 77; *supra* Parts II.P, *infra* Parts II.R, II.S.

<sup>266</sup> See also MODEL ACT, at 77.

fix remaining problems to the extent Model Act § 124 allows it.<sup>267</sup>

3. *Procedure for modifying awards involving postseparation support, alimony, child custody or child support*

The Model Act introduces a special statute, § 124A, not in the RUAA,<sup>268</sup> which leaves open issues of modified awards for alimony, postseparation support, child custody or child support under the same circumstances that a court of a particular jurisdiction could review a judgment for modification. This was inspired by a North Carolina Family Law Arbitration Act provision superseding a state Supreme Court case that had denied arbitration of custody and support issues under the UAA. The UAA finality rules for awards after a short motion period following confirmation and conversion to judgment conflicted with family law legislation allowing later court review of judgments and possible modifications for support and custody upon a showing of substantial change of circumstances.<sup>269</sup>

Section 124A(a) declares that a court or arbitrator may modify alimony, postseparation support, child support or child custody awards under conditions stated in a jurisdiction's law for such modifications, pursuant to procedures recited in the rest of § 124A.

Section 124A(b) says that unless parties agree in a record that postseparation support or alimony awards shall be nonmodifiable, an award for postseparation support or alimony may be modified if a court order for alimony or postseparation support could be modified under a jurisdiction's statutes. Under some states' laws, parties can agree on nonmodifiable postseparation support or alimony; § 124A(b) preserves this rule. If a state does not allow nonmodifiable postseparation support and alimony, or either of them, that state's § 124A(b) version should be eliminated or changed to reflect to recite which fixed damage

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<sup>267</sup> MODEL ACT § 124, referring to *id.* § 120. Parties cannot agree to waive or vary the effect of § 124. *Id.* § 104(c). See also *supra* Part II.F.

<sup>268</sup> MODEL ACT § 124A includes the "A" to preserve the numerical sequence of later MODEL ACT sections corresponding to RUAA sections.

<sup>269</sup> *Crutchley v. Crutchley*, 293 S.E.2d 793 (N.C. 1982), superseded by N.C. GEN. STAT. § 50-56 (2007); see also 1 WALKER, 2006, *supra* note 4, at 35-36. .

components, alimony or postseparation support, fall within its purview.<sup>270</sup>

Similarly, § 124A(c) says that child support or child custody awards may be modified if a court order for custody or support could be modified under a particular jurisdiction's family law statutes.

Section 124A(d) provides that if an award for modifiable postseparation support or alimony, or an award for child support or custody has not been confirmed, upon the parties' agreement in a record, these matters may be submitted to arbitrators the parties choose, perhaps the former arbitrators. Model Act provisions related to court or arbitrator modifications or corrections, or vacatur, apply to allow appropriate modification or amendment of the new award.<sup>271</sup> The result under § 124A(d) is that these matters can go to a former or a new arbitrator without getting an award confirmed.<sup>272</sup> This might happen in a jurisdiction allowing an agreement on modifiable postseparation support or alimony, or an award for child support or custody, where the result is achieved by an arbitral award, to be opened at any time. The parties might elect to appoint the same arbitrator or a new one. As an example, the latter case might occur, if child custody or support issues come long after an initial award, and the original arbitrator is not available, because of retirement or death.

Section 124A(e) covers the next step, where a court has confirmed an award. It allows parties, by joint motion and court approval, to submit an award for modifiable postseparation support or alimony, or an award for child support or custody, to arbitrators of the parties' choice, perhaps the same or a new arbitrator. As under § 124A(d), Act provisions related to court or arbitrator modifications or corrections, or vacatur, apply to allow appropriate modification or amendment of the new award.<sup>273</sup>

Section 124A(f) incorporates § 124 by reference, except where § 124A applies, to modifications or corrections of awards for modifiable postseparation support or alimony, child support or custody. A court can decide clerical errors and the like itself,

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<sup>270</sup> See also MODEL ACT, at 88.

<sup>271</sup> MODEL ACT § 124A(d), referring to *id.* §§ 111, 120, 122-24A.

<sup>272</sup> MODEL ACT, at 88.

<sup>273</sup> MODEL ACT § 124A(e), referring to *id.* §§ 111, 120, 122-24A; compare *id.* § 124A(d).

or it can remit them to an arbitrator.<sup>274</sup> Parties cannot agree to waive or vary the effect of Section 124A.<sup>275</sup>

As also analyzed in Part II.S, a court can hear motions to vacate on the ground that an award for child custody or child support is not in the best interests of the child, but this motion must be filed within 90 days after a movant receives notice of the award, or within 90 days after the movant receives notice of a modified or corrected award, unless the motion alleges corruption, fraud or other undue means.<sup>276</sup> If an award is vacated because it is not in the best interest of a child, a rehearing may be before the original or a successor arbitrator.<sup>277</sup> If the court denies vacatur, it must confirm the award unless motions to modify or correct the award pend.<sup>278</sup>

If an arbitration agreement binds parties, and they cannot agree on an arbitrator, a court may appoint one as the Act provides.<sup>279</sup>

Section 124A was drafted for jurisdictions that do not require submission of every agreement, and every arbitral award flowing from an agreement for postseparation support or alimony, or for child support or custody issues, to a court for approval. Section 124A is pro-arbitration in requiring a court to remit issues to an arbitrator. However, §§ 124A(a) and 124A(c) as drafted allow courts to modify child support or custody awards without arbitrator action. Section 124A(c) could be rewritten to permit a court to modify awards covering all four issues. If so, and if a legislature's decision is to remove arbitrators from the case at that point, §§ 124A(d)-124A(e) should not be enacted.<sup>280</sup> They could be retained if a jurisdiction wants continued arbitrator involvement. In any case the residual incorporation by reference provision, § 124A(f), should be kept to allow modifications

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<sup>274</sup> See MODEL ACT, at 88.

<sup>275</sup> MODEL ACT § 104(c); see also *supra* Part II.F.

<sup>276</sup> MODEL ACT §§ 123(a)(7), 123(b), referring to *id.* §§ 119, 120.

<sup>277</sup> *Id.* § 123(c), referring to *id.* § 119(b).

<sup>278</sup> *Id.* § 123(e), referring to *id.* §§ 124, 124A; see also MODEL ACT, at 83-85.

<sup>279</sup> See MODEL ACT §§ 107, 111; *supra* Part II.G.

<sup>280</sup> As noted above, MODEL ACT § 124A(b) should be dropped if a state's law does not allow contracting for nonmodifiable postseparation support or alimony, or changed if that state's law allows one but not the other. See *supra* note 270 and accompanying text.



or corrections of, *e.g.*, clerical errors by the arbitrator or the court, moving what is in § 124A(f) up to § 124A(d) if Model Act §§ 124A(d) and 124A(e) will not be enacted. A state could also modify § 120 to remove arbitrator authority to correct awards after they have been confirmed.<sup>281</sup>

#### R. *Confirming an Award; Judgment on an Award*

If there are no proceedings to correct, modify or vacate an award, a court may confirm an award under Model Act § 122;<sup>282</sup> parties cannot agree to waive or vary the effect of § 122.<sup>283</sup> Section 122 applies to a partial award, a consent award or a final award by an arbitrator.<sup>284</sup> If parties comply fully with an award under the Act, there is no reason to seek confirmation. This might occur in a marital property division case with no support or custody issues, and parties comply with the award, unless a state requires such an agreement to be filed with a court.<sup>285</sup>

Often, however, a party will want the protection of a judgment, which carries with it opportunities for enforcement as in family law cases that go through litigation to judgment. In that case confirmation should be sought. The result under the Model Act, as under general arbitration legislation, is automatic conversion to a judgment, that “may be recorded, docketed and enforced as any other judgment in a civil action.”<sup>286</sup> The structure of the subsection may offer a settlement opportunity through the “may be” language; recording and docketing need not be automatic. Unless a jurisdiction has law automatically converting a signed judgment to a record to be docketed, the parties might settle completely without recording and docketing an adverse judgment. What might be recorded in this hypothetical would be

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<sup>281</sup> See *supra* Part II.Q.1.

<sup>282</sup> MODEL ACT § 122, referring to *id.* §§ 120, 123-24A, excepts from its operation “unless the parties agree otherwise in a record that part or all of an award shall not be confirmed by the court,” taken from N.C. GEN. STAT. § 50-53(a) (2007), which might be added if other jurisdictions allow parties to agree to not present awards for confirmation. Otherwise, this material should be deleted. Compare RUA § 22; see also MODEL ACT, at 82.

<sup>283</sup> MODEL ACT § 104(c); see also *supra* Part II.F.

<sup>284</sup> See *supra* Part II.P.

<sup>285</sup> *E.g.*, in Connecticut and Indiana. See *infra* Parts III.A.4, III.A.8.

<sup>286</sup> MODEL ACT § 125(a); compare RUA § 25.

a judgment of dismissal as a settled case, which might be desirable if privacy remains an issue.

A party seeking confirmation and conversion of an arbitral award to a judgment should append a copy of the award to a confirmation motion. In the case of reasoned awards,<sup>287</sup> this could be a lengthy document and might be a basis for court action years in the future if child custody or support issues are in a case. Costs of filing the motion “and subsequent judicial proceedings” may be awarded,<sup>288</sup> yet another incentive for earlier settlement, particularly where these costs are not available.

Award confirmation and conversion to a judgment for recording and enforcement purposes is subject to the record’s being clear of motions to correct, modify or vacate an award. However, if these proceedings are unsuccessful, a court may award reasonable attorney’s fees and “other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award.”<sup>289</sup> This is a disincentive to a party who might attempt to delay, through ill-founded motions to rehear, correct, vacate or modify an award.

Model Act § 125(d), empowering a court to redact or seal a final award or an arbitrator order, also applies to interim orders or awards.<sup>290</sup> A sealed or redacted award or order can be opened or resealed. This provision, not in the RUAA, allows a court to continue the privacy protection that is universal for arbitration proceedings.<sup>291</sup> The subsection was included to apply should a position be taken that although privacy might be a valid contract term in an agreement to arbitrate, a court does not have independent power to continue that protection. The statute gives a court good cause discretion to seal or redact, unseal or lift redaction, and reseal or again order redaction, perhaps leaving part of originally sealed or redacted material closed to the public or leaving part of unsealed material or material from which redaction has been removed open to public inspection as part of a court record. The subsection has several purposes. Findings of

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<sup>287</sup> See *supra* Part II.P.

<sup>288</sup> MODEL ACT § 125(b).

<sup>289</sup> *Id.* §§ 122, 125(c).

<sup>290</sup> See *supra* note 143 and accompanying text.

<sup>291</sup> *Cf.* Basic R. 11, MODEL ACT, at 118.

fact and conclusions of law in a reasoned award, the Act's default standard,<sup>292</sup> might involve infidelity or like issues that could haunt children of a marriage, and which would likely be part of a sealed record of findings of fact and conclusions of law incident to a final judgment in a divorce case. Findings and conclusions might involve descriptions, including Social Security numbers, bank numbers, trade secrets and the like, that would likely be the subject of redactions, sealing or perhaps a protective order in any case. There may be other reasons for ordering sealing or redaction. Conversely, there may be reasons for unsealing or removing redaction at a future time, *e.g.*, where a claimant has new counsel who does not have access to the complete award. In that situation a court might order resealing or a new redaction after a future court proceeding.<sup>293</sup> In any case sealing and redaction issues are addressed to a court's discretion under a good cause standard. The Act excludes other statutes governing sealing or redaction. If a jurisdiction has a standard other than discretionary good cause, or mandatory legislation on the issue, § 125(d) should be reworked to reflect those policies. The subsection is not designed to change substantive law but to carry forward arbitration privacy policy into the courthouse, and a jurisdiction's rules on sealing or redaction in family law litigation, subject to a court's authority to order changes under a jurisdiction's sealing or redaction law.<sup>294</sup>

### S. *Vacatur*

In the main the Model Act and its RUAA predecessor follow the UAA to recommend traditional statutory bases for a court's vacating an award. There is a major addition: *vacatur* because an arbitrator fails to disclose a conflict of interest as recited in the Act. The Act lists three reasons for *vacatur* that are not in the RUAA. There are also nonstatutory grounds for *vacatur* in some jurisdictions.

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<sup>292</sup> MODEL ACT § 119(c); *see also supra* Part II.P.

<sup>293</sup> This could happen far in the future if child support or custody issues arise in a modification claim under MODEL ACT § 124A. *See infra* Part II.S.1.

<sup>294</sup> *See also* 1 WALKER, 2006, *supra* note 4, at 37, reporting similar legislation, N.C. GEN. STAT. § 50-57(b) (2007), which copied the MODEL ACT formula; MODEL ACT, at 89-91.

### 1. *Model Act statutory vacatur grounds*

The Model Act lists nine grounds for vacating arbitral awards upon motion to a court by a party to the arbitration:

- (1) The award was procured by corruption, fraud or other undue means;
- (2) There was evident partiality by an arbitrator appointed as a neutral, corruption by an arbitrator, or arbitrator misconduct prejudicing the rights of a party to the arbitration proceeding;
- (3) An arbitrator refused to postpone a hearing upon sufficient cause being shown for postponement, refused to hear evidence material to the controversy, or otherwise conducted the hearing contrary to Model Act § 115, so as to prejudice substantially the rights of a party to the arbitration proceeding;
- (4) An arbitrator exceeded his or her powers;
- (5) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under § 115(c) no later than the beginning of the arbitration hearing;
- (6) The arbitration was conducted without proper notice of the initiation of an arbitration as Model Act § 109 requires so as to prejudice substantially the rights of a party to the arbitration proceeding;
- (7) The court determines that an award for child support or child custody is not in the best interest of the child. The burden of proof at a 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 an error of law prejudicing a party's rights.<sup>295</sup>

Vacatur motions must be filed within 90 days after a movant receives notice of the award or within 90 days after receiving notice of a modified or corrected award, unless the movant alleges the award was procured by corruption, fraud or other undue means, in which case a motion must be made within 90 days after this ground is known, or by exercising reasonable care the movant would have known about it.<sup>296</sup> If a court vacates an award on grounds other than a finding that there was no agreement to arbitrate, it may order a rehearing. The rehearing may be before the arbitrator who made the award, or a successor arbitrator, if vacatur is on grounds of failure to postpone a hearing, refusal to

<sup>295</sup> MODEL ACT § 123(a), referring to *id.* §§ 109, 115.

<sup>296</sup> *Id.* § 123(b), referring to *id.* §§ 119, 120; *see also supra* Parts II.P, II.Q.1.

consider evidence material to the controversy, so as to prejudice substantially a party's rights in the arbitration; an arbitrator exceeded his or her powers; or the arbitration was conducted without proper notice, prejudicing substantially the rights of a party. The old or new arbitrator must render a rehearing decision within the time under the statute for an award.<sup>297</sup> If a court denies a vacatur motion, it must confirm an award unless a motion to modify or correct the award is pending.<sup>298</sup>

The first six vacatur grounds come from the RUAA;<sup>299</sup> grounds (7), (8) and (9) are unique to the Act.

Arbitrator misconduct — evident partiality by an arbitrator appointed as a neutral, corruption by an arbitrator, or arbitrator misconduct prejudicing rights of a party to the arbitration proceeding — that prejudiced a party's rights in the arbitration, § 123(a)(2), is tied to the arbitrator disclosure statute, Model Act § 112. This part of the RUAA is new to general arbitration legislation.<sup>300</sup>

Part II.Q discussed Model Act § 123(a)(7), when a court may vacate an award for child support and child custody, in the context of standards for an arbitrator's modifying an award. The burden of proof under this subdivision is on the party seeking to vacate an award.<sup>301</sup> This comes from the North Carolina experience, where its Supreme Court denied use of the UAA for family law arbitrations because the UAA declared awards under it final, and family law legislation declared that child support and custody issues were always open to court review.<sup>302</sup> That state's Family Law Act superseded the decision.<sup>303</sup> The Act continues that policy in § 123(a)(7).

It has been argued that *Troxel v. Granville*, affirming a state supreme court's declaring a state statute unconstitutional under

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<sup>297</sup> MODEL ACT § 123(c), referring to *id.* §§ 119(b), 123(a)(1)-123(a)(6); see also *supra* Part II.P.

<sup>298</sup> *Id.* § 123(d).

<sup>299</sup> Compare *id.* §§ 123(a)(1)-123(a)(6) with RUAA §§ 23(a)(1)-23(a)(6); see also MODEL ACT, at 85.

<sup>300</sup> See *supra* Part II.K.

<sup>301</sup> MODEL ACT § 123(a)(7), a provision derived from North Carolina and Texas legislation; see *infra* note 568 and accompanying text.

<sup>302</sup> *Crutchley v. Crutchley*, 293 S.E.2d 793 (N.C. 1982).

<sup>303</sup> N.C. GEN. STAT. § 50-56 (2007), superseding *Crutchley*, 293 S.E.2d 793.

due process in a grandparent visitation context,<sup>304</sup> eliminates the need for legislation like § 123(a)(7), *i.e.*, that states' protection of children under the *parens patriae* doctrine is limited by due process.<sup>305</sup> That may be so under that case's facts and circumstances,<sup>306</sup> but the article does not take into account the strength of the doctrine in state courts under other situations, where the issue of custody (and therefore visitation) is at stake in a dispute between parents, as distinguished from a grandparent visitation case. Nor does it account for other doctrines, such as statutory construction, which resulted in the North Carolina Supreme Court's refusal to allow UAA standards because of specific family law legislation.<sup>307</sup> The result in that state was its Family Law Act, which § 123(a)(7) follows, on this issue.<sup>308</sup> Because *Troxel* dealt with a situation different from family law arbitration, and because other doctrines like statutory construction<sup>309</sup> may lurk to derail arbitrations, enactment of the Model Act should provide a valid statutory exception. The potential for trial court review and appeal protects the best interests of a child throughout the arbitration process.<sup>310</sup>

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<sup>304</sup> *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

<sup>305</sup> Zurek, *supra* note 11, at 363, 404-10, referring to the four-justice plurality opinion, 530 U.S. at 66, and Justice Thomas's concurring opinion. Justices Souter and Thomas concurred to provide a majority. Justice Souter agreed with the plurality, 530 U.S. at 76, noting the limited nature of the plurality opinion that affirmed invalidation of the state statute as a facial denial of due process; Justice Thomas agreed with the plurality but also noted the plurality opinion's limited scope. 530 U.S. at 80. Justice O'Connor's plurality opinion carefully limited its scope on the "sweeping breadth" of the Washington State statute at issue, and did "not consider the primary constitutional question passed upon by the [State of] Washington Supreme Court — whether the Due Process Clause requires all nonparental visitation statutes to including a showing of harm or potential harm to the child as a condition precedent to granting visitation." She was "hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter." 530 U.S. at 73. Subsequent family law cases, *e.g.*, *Keenan v. Dawson*, 739 N.W.2d 681 (Mich. Ct. App. 2007), declined to extend *Troxel* beyond the statute at issue.

<sup>306</sup> *I.e.*, grandparents' visitation rights. *See supra* note 304 and accompanying text.

<sup>307</sup> *Crutchley*, 293 S.E.2d 793.

<sup>308</sup> MODEL ACT, at 84.

<sup>309</sup> *See supra* note 307 and accompanying text.

<sup>310</sup> *See infra* note 312 and accompanying text; *infra* Part II.U.

Model Act § 123(a)(8) allows vacating a punitive damages award if the court finds that the award is clearly erroneous. Parties must specifically contract for punitive damages; an arbitrator must make specific findings for a punitive damages award.<sup>311</sup> Section 123(a)(8) links with this provision to assure court review of that issue.

If an agreement to arbitrate provides for court review of errors of law, Model Act § 123(a)(9) allows vacating an award on this ground if the arbitrator commits an error of law in rendering the award. Section 128(b) provides for appellate review of a trial court's decision.<sup>312</sup> Sections 123(a)(9) and 128(b) have no RUAA equivalents. As the RUAA § 28 Commentary points out, many jurisdictions deny parties an option of contracting into court review unless legislation allows it; this is consonant with the general policy of arbitration that findings of fact, and most decisions on law, are removed from the judicial system.<sup>313</sup> Parties may not contract to allow a court to generally review issues of fact. However, they can raise factual issues in modification, correction or vacatur proceedings.

If parties want judicial review, it is almost imperative that a reasoned award be a term in the agreement to arbitrate; a reasoned award is the default rule under the Act for this, among other, reasons.<sup>314</sup> The Model Act, however, hews to the traditional rule of no judicial review in Basic Rule 38 but offers an alternate rule to allow it.<sup>315</sup> Parties considering divorce arbitration in a jurisdiction new to this ADR option may find it more comfortable to contract for review, but they should be aware of a possibility that this may open a door to more expense in resolv-

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<sup>311</sup> MODEL ACT § 121(e); *see also supra* notes 248-52 and accompanying text.

<sup>312</sup> *See also infra* Part II.U.

<sup>313</sup> *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S.Ct. at 1402-09, held that parties cannot contract for court review of issues that are not among grounds for review listed in the FAA, 9 U.S.C. §§ 10-11, resolving a division among the courts on the issue. Grounds listed in the FAA, *id.* §§ 10-11, are the exclusive bases for vacating, modifying or correcting an award. *Hall* follows other courts' reasoning. *See also supra* notes 73, 75-76, *infra* note 324 and accompanying text.

<sup>314</sup> MODEL ACT § 119(a); *see also supra* Part II.P.

<sup>315</sup> MODEL ACT, at 131; *see also* Forms B, E, *id.* at 104-07.

ing a case beyond the extra expense of a reasoned award, almost a necessary predicate for judicial review.<sup>316</sup>

A legislature concerned about judicial review in all cases could revise §§ 123(a)(9) and 128(b) to allow vacatur and appellate review in all cases, whether parties agree to it or not. This is, in effect, the policy in Indiana, where a court must review awards.<sup>317</sup>

Model Act § 104(c) bars parties from agreeing to waive or vary the effect of § 123 vacatur rights.<sup>318</sup>

## 2. *Nonstatutory vacatur grounds; vacatur grounds under federal law*

Some jurisdictions have nonstatutory vacatur grounds beyond their arbitration legislation standards. There are also a few federal statutory grounds for vacatur, and a few federal common law bases for vacatur as well.

Besides statutory grounds for vacating arbitral awards, some state courts have developed non-statutory grounds for vacating awards, such as unconscionability<sup>319</sup> or public policy.<sup>320</sup> Other courts say that the only bases for nonarbitrability are in that state's legislation.<sup>321</sup> Nonarbitrability grounds might be eliminated by appropriate legislation, *e.g.*, the Model Act,<sup>322</sup> unless they are based on a state's constitution.

Federal statutes may limit arbitration, but only in specific cases; a general Congressional policy favoring arbitration other-

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<sup>316</sup> See also *supra* Part II.P.

<sup>317</sup> IND. CODE ANN. § 34-57-5-3 (Lexis/Nexis 2008 Cum. Supp.); see also *infra* Part III.A.7.

<sup>318</sup> See also *supra* Part II.F.

<sup>319</sup> See, *e.g.*, *Comment* to RUAA § 23; *supra* notes 43, 157-58 and accompanying text. There are many unconscionability decisions; they turn on particular facts, *e.g.*, disparity of economic circumstances.

<sup>320</sup> See, *e.g.*, MODEL ACT, at 18 n.11, *inter alia* citing *Masters*, 513 A.2d 104; *Spencer*, 494 A.2d 1279; *Cohoon v. Cohoon*, 770 N.E.2d 885, 890-95 (Ind. Ct. App. 2002); *Reynolds*, 663 N.E.2d 867; *Harvey*, 680 N.W.2d 835; *Schneider v. Schneider*, 216 N.E.2d 318, 319-20 (N.Y. 1966); *Kelm*, 749 N.E.2d 299; *Ex parte Messer*, 509 S.E.2d 486, 487-88 (S.C. Ct. App. 1998);

<sup>321</sup> *E.g.*, *Crutchley*, 293 S.E.2d 793, now superseded in North Carolina.

<sup>322</sup> The North Carolina Family Law Arbitration Act, N.C. GEN. STAT. §§ 50-41 - 50-62 (2007), does just that, superseding *Crutchley*, 293 S.E.2d 793; see also *supra* notes 303-04 and accompanying text.



wise rules.<sup>323</sup> Under the FAA, three nonstatutory grounds have been developed by the courts for vacating an award: (1) an award is arbitrary and capricious, (2) enforcement of an award is against public policy, or (3) an award was made in manifest disregard of law.<sup>324</sup> The FAA controls certain arbitration issues in cases involving interstate or foreign commerce;<sup>325</sup> while state courts must enforce its applicable provisions,<sup>326</sup> a typical family law arbitration will not involve interstate or foreign commerce. However, in consolidated arbitrations<sup>327</sup> involving breakup of a family business with interstate or international commercial connections and an arbitration clause in the business contract(s) alongside a family law arbitration, the problem could arise.

#### T. Court Modification or Correction of an Award

The Model Act follows the RUAA in recommending traditional bases for correcting or modifying an award. The Act also recommends a special statute for modifying awards granting alimony, postseparation support, child support or child custody. These correction and modification options are in addition to parties' options, or the court's option in some cases, to send correction modification issues to an arbitrator.

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<sup>323</sup> See, e.g., *Scherk v. Alberto-Culver Co.*, 418 U.S. 506, 510-11, 519-20 (1974) (strong federal policy for arbitration under FAA). The FAA will not usually apply in a family law case. However, if a family law arbitration is consolidated through MODEL ACT § 110 with arbitration of the breakup of a family-owned business otherwise subject to an arbitration clause, the federal policy will arise in what is otherwise a state law-governed arbitration. See *supra* Part II.J.

<sup>324</sup> *B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 910 (11th Cir. 2006) (citing cases); *Pinnacle Group, Inc. v. Shrader*, 412 S.E.2d 117, 121 (N.C. Ct. App. 1992) (case governed by FAA). *Hall St. Assocs., L.L.C. v. Mat-tel, Inc.*, 128 S. Ct. at 1402-09, appeared to characterize manifest disregard of law, first recited in *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), as maybe a collective ground taking into account all other FAA § 10 grounds, or perhaps as a new ground for vacating an award, as lower courts have held. The case is less than clear on the point; *Hall St.* was clear, however, in holding that parties may not increase by contract the scope of court review beyond FAA vacatur standards. See also *supra* note 313 and accompanying text.

<sup>325</sup> *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995), held the interstate commerce provisions of the FAA extend to constitutional limits.

<sup>326</sup> *Doctor's Assocs. v. Cassarotto*, 517 U.S. 681 (1996).

<sup>327</sup> See MODEL ACT § 110; *supra* Part II.J.

1. *Traditional bases for a judge's modifying or correcting an award*

Model Act § 124 allows a court to modify or correct an award, or an award corrected under § 120, if (1) there was an evident mathematical miscalculation or an evident mistake in the description of a person, thing or property referred to in the award; (2) the arbitrator made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision on claims submitted; or (3) if the award is "imperfect in a matter of form not affecting the merits of the decision on the claims submitted." Correction or modification motions must be submitted to the court within 90 days after a movant receives notice of the original award or notice of an award corrected or modified by the arbitrator.<sup>328</sup> The arbitrator may correct or modify an award, by court order, on grounds (1) or (3).<sup>329</sup> A motion to modify or correct an award may be joined with vacatur motions.<sup>330</sup> If a court grants a motion to correct or modify, the court must modify and confirm an award as modified or corrected. "Otherwise," *i.e.*, if the motion is denied, unless there is a pending motion to vacate, the court must confirm the award as originally rendered.<sup>331</sup> Model Act § 104(c) bars parties from agreeing to waive or vary the effect of rights under § 124.<sup>332</sup>

2. *Modifying awards for alimony, postseparation support, child support or child custody*

Model Act § 124A is a special provision without time limits for modifying awards for alimony, postseparation support, child support, or child custody, under conditions that a court could modify a judgment for these components of the judgment in a litigated case. This allows a court to consider these issues at any time if a state's substantive principles for amended alimony, etc., are met, such as a substantial change of circumstances.<sup>333</sup>

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<sup>328</sup> MODEL ACT § 124(a), referring to *id.* § 120, procedure for an arbitrator's correcting or modifying an award.

<sup>329</sup> *Id.* § 120(a)(1), referring to *id.* §§ 124(a)(1), 124(a)(3).

<sup>330</sup> *Id.* § 124(c).

<sup>331</sup> *Id.* § 124(b); *see also* MODEL ACT, at 86.

<sup>332</sup> *See also supra* Part II.F.

<sup>333</sup> MODEL ACT § 124A(a).

As analyzed in Part II.Q, a court has options under the Act to remit these issues to the arbitrator or a new arbitrator.<sup>334</sup> These provisions may not be appropriate in some states if there is a policy of court review of agreements for alimony, postseparation support, child support, or child custody, and therefore agreements that include an arbitration clause.<sup>335</sup> If so, a state might modify or delete them, retaining Model Act §§ 124A(a) and 124A(f). Model Act § 124A(f) incorporates § 124, dealing with modification or correction of arbitral awards on other grounds, by a court.<sup>336</sup>

#### U. Judgment Enforcement and Appeal

Once motions to correct, vacate or modify awards are resolved and judgment on an award has been filed, that judgment may be enforced like any other civil judgment.<sup>337</sup> At this point a judgment loser can file notice of appeal. There are two appeal tracks, the traditional grounds for appeal of judgments based on arbitral awards and special optional provisions for appealing an arbitrator's decisions on issues of law, if the parties have agreed to this.

The traditional grounds of appeal are relatively narrow: an order denying a motion to compel arbitration; an order granting a motion to stay arbitration; an order confirming or denying confirmation of an award; an order modifying or correcting an award; an order vacating an award without directing a rehearing; or a final judgment pursuant to the Model Act.<sup>338</sup>

The Act also allows appeal in a case where parties contract for judicial review of errors of law as provided in § 123(a)(9), on

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<sup>334</sup> *Id.* §§ 124A(b)-124A(e),

<sup>335</sup> *See, e.g., supra* note 317 and accompanying text.

<sup>336</sup> MODEL ACT § 124A(f), referring to *id.* § 124, which refers to *id.* § 120, listing grounds for an arbitrator's correcting or modifying an award, but which limits in *id.* § 124(a) these motions to 90 days after a movant receives notice of an award or a corrected award. Section 124(c) allows motions to a court to correct or modify an award to be joined with a vacatur motion. Section 124A motions carry no time limit; under § 104(c) parties cannot waive or vary the effect of § 124A rights. *See also* MODEL ACT, at 87-88; *supra* Part II.F.

<sup>337</sup> There may be consequences for frivolous motions to confirm or objections to the award. MODEL ACT § 125; *see also supra* Part II.R.

<sup>338</sup> MODEL ACT § 128(a); *compare* RUAA § 28(a). These track grounds in other arbitration legislation. MODEL ACT, at 93-94.

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the basis that the arbitrator failed to apply the law correctly.<sup>339</sup> These provisions are unique to the Act; they copy North Carolina statutes allowing court review and appeal of errors of law if parties contract for it.<sup>340</sup>

In other respects an appeal must be taken as from an order or a judgment in a civil action.<sup>341</sup> Parties cannot agree to waive or vary the effect of rights of appeal under the Model Act, which is a significant difference from the RUAA.<sup>342</sup>

For those jurisdictions not wishing to allow review and appeal of issues of law, Model Act §§ 123(a)(9) and 128(b) should be deleted.<sup>343</sup>

### V. *The Model Act: Summary*

Parts II.A-II.U demonstrate that the Model Act follows the RUAA most of the time. There are significant differences to effectuate policies unique to family law disputes. The broad opportunities to waive procedures under the RUAA, such as court action to vacate, correct or modify arbitral awards, or to appeal from an adverse trial court decision, do not exist as they do under the RUAA.<sup>344</sup> There are special provisions recognizing nonwaivable rights of emergency protection under state or federal law and requiring an arbitrator to report suspected child abuse.<sup>345</sup> There is a special statute, which may require rewriting in states requiring some or all support or custody agreements to be filed with a court, for modifying alimony, postseparation support, child custody or child support, that can be invoked at any time.<sup>346</sup> The Act has a special provision for redacting or sealing

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<sup>339</sup> MODEL ACT § 128(b).

<sup>340</sup> N.C. GEN. STAT. §§ 50-54(a)(8), 50-60(b) (2007).

<sup>341</sup> MODEL ACT § 128(c), tracking RUAA § 28(b). *See also* MODEL ACT, at 93-94; 1 WALKER, 2006, *supra* note 4, at 39.

<sup>342</sup> MODEL ACT § 104(c), referring to *id.* §§ 123, 128; *compare* RUAA § 4; *see also supra* Part II.F.

<sup>343</sup> Most courts, including the Supreme Court of the United States ruling on the FAA, 9 U.S.C. §§ 1-207, have held that there is no right to contract into rights that arbitration legislation does not give. *See supra* notes 313, 324 and accompanying text.

<sup>344</sup> *Compare* MODEL ACT § 104 with RUAA § 4; *see also supra* Part II.F.

<sup>345</sup> MODEL ACT §§ 108(c)-108(d); *see also supra* Part II.H.

<sup>346</sup> MODEL ACT § 124A; *see also supra* Parts II.Q.3, II.T.2.

awards that become part of a judgment.<sup>347</sup> There are optional provisions for court review and appeal of errors of law in arbitral awards if parties contract for this review.<sup>348</sup>

The online *Model Law* document also has suggested forms and rules for use with family law arbitrations. These were inspired by commonly-used arbitration rules, *e.g.*, the AAA commercial arbitration forms and rules and special rules published in other sources, including the AAML, for family law cases. *Model Law* attempted to synthesize these forms and rules in the light of the AAML Arbitration Committee's experience and the terms of the RUAA as modified in the Model Act.<sup>349</sup>

### III. Developments in Family Law Arbitration: Statutes, Rules and Cases

Several states have relatively new legislation or rules of court related to family law arbitration or have amended earlier statutes. Others have relatively longstanding, well-established programs, many tied to general alternative dispute resolution. Part III.A surveys these, along with jurisdictions reported earlier.<sup>350</sup> Some states are considering family law arbitration legislation. Part III.B discusses these jurisdictions. Some states, including those that now have family law arbitration by statute or rule, also have other ADR options that may interface with family law arbitration. Part III.C discusses these.

#### A. Legislation and Rules of Court Now in Force

Arizona, Connecticut, Georgia, Indiana, Michigan, Nevada, New Mexico and Pennsylvania have relatively new legislation or court rules related to family law arbitration. One state, North Carolina, has revised its family law arbitration legislation to reflect its RUAA enactment.

<sup>347</sup> MODEL ACT § 125(d); *see also supra* Part II.P.

<sup>348</sup> MODEL ACT §§ 123(a)(9), 128(b); *see also supra* notes 312-13 and accompanying text; *supra* Part II.U.

<sup>349</sup> The MODEL ACT and the forms and rules under it, also reflects research and legislation resulting in the North Carolina Family Law Arbitration Act, N.C. GEN. STAT. §§ 50-41 - 50-62 (2007) before its amendment in 2005. The North Carolina Act and its revised forms and rules reflect the work of the AAML Arbitration Committee.

<sup>350</sup> *See Walker, Arbitrating, supra* note 1, at 434.

### 1. *Arizona's Rule 67(c)*

As part of its family practice rules, Arizona has Rule 67(c), allowing

[P]arties . . . [to] agree to arbitrate any and all issues in accordance with the Arizona Arbitration Act . . . or any other law permitting arbitration. The parties or counsel, if any shall file with the court a written notice of their agreement to arbitrate some or all of the issues before the court, attaching their written agreement to arbitrate, stating the name of the arbitrator(s), and the date(s) of arbitration. The decision of the arbitrator(s) shall be submitted to the court for a determination that said decision conforms to statute for entry of a decree or other written orders in accordance therewith. The parties shall contract directly with the arbitrator(s) and be responsible for payment of any fees for such arbitration.<sup>351</sup>

The statute, in incorporating by reference the Arizona Arbitration Act but also referring to “any other law permitting arbitration,” looks to the future, if the state enacts the RUAA or a freestanding family law act. In incorporating its UAA version,<sup>352</sup> Arizona follows the Colorado, Georgia, Missouri and Wisconsin models.<sup>353</sup> The Arizona *Committee Comment* makes Rule 67(c)'s purpose clear:

It is the intention of these drafters to create rules that encourage the use of alternative dispute resolution to resolve disputes in family law matters to the greatest extent possible. . . . ADR will assist in the effective management of the caseloads of the family court divisions and facilitate the resolution of family disputes. ADR services are usually less expensive, less time consuming and less traumatic than litigation. This rule is intended to establish a framework in which the parties are required to attend and voluntarily participate in the ADR process. Through their participation it is hoped that a mutually satisfactory resolution of the issues can be achieved. This rule is not intended to create, encourage, or result in ancillary court proceedings involving the motives, conduct or communications of the parties, unless otherwise required by law.

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<sup>351</sup> ARIZ. R. FAM. L. PROC. 67(c), incorporating by reference ARIZ. REV. STAT. §§ 12-1501 - 12-1518 (2003).

<sup>352</sup> ARIZ. R. FAM. L. PROC. 67(c), incorporating by reference ARIZ. REV. STAT. ANN. §§ 12-1501 - 12-1518 (2003); *compare* UAA §§1-25.

<sup>353</sup> *See infra* Parts III.A.3, III.A.7, III.A.13, III.A.31.

AAML survey respondents report heavy Rule 67 use for family law arbitration.<sup>354</sup>

## 2. California arbitration procedure

Under California's family law statutes, arbitration can resolve property division, but only if a marital estate's value is over \$50,000.<sup>355</sup> There have been reports of use of the state's general arbitration statute<sup>356</sup> for family law cases.<sup>357</sup> However, parents cannot agree to resolve child support disputes in binding arbitration; an agreement to arbitrate is void to the extent it deprives a trial court of modification jurisdiction.<sup>358</sup>

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<sup>354</sup> My thanks to AAML survey respondents Barry L. Brody and Robert L. Schwartz for this information. Roselle L. Wissler & Bob Dauber, *Court-Connected Arbitration in the Superior Court of Arizona: A Study of Its Performance and Proposed Rule Changes*, 2007 J. DISP. RES. 65, 96-98, reports that cases sent to mandatory arbitration in Arizona were resolved a few months faster than those not subject to arbitration; the program impacted a court's workload in a small proportion of cases, reducing the use of pretrial resources; and lawyers with clients in arbitration favorably reported the process's fairness, including arbitrators and the award, but that most arbitrators seemed less than adequate in knowing issues, arbitration procedure and civil procedure, results in common with other court-annexed arbitration programs. The Arizona Supreme Court Committee on Compulsory Arbitration recommended increasing the jurisdictional amount, increasing arbitrator compensation, allowing arbitrators more discretion over evidence, redirecting dispositive motions back to the court, earlier information disclosure, and streamlining the post-hearing process. Its recommendations went to the state legislature and to the Court.

<sup>355</sup> CAL. FAM. CODE § 2554 (Deering 2006).

<sup>356</sup> CAL. CIV. PROC. CODE §§ 1281.1-1294.2 (Deering 1981, 2008 Pocket Supp.).

<sup>357</sup> See Alexandra Leichter, *Private Adjudication: The Good, the Bad, and the Cautionary*, 28:2 FAM. L. NEWS 21, 22, 28 (2000). My thanks to Ms. Leichter and these other AAML survey respondents, Margaret L. Anderson, Anthony S. Dick, Dianna J. Gould-Saltman, James A. Hennenhofer, Neal R. Hersh, Daniel J. Jaffe, Stephen A. Kolodny and Ronald A. Rosenfeld, for their comments.

<sup>358</sup> *In re Marriage of Berezna*, 2 Cal. Rptr. 351, 356-57 (Cal. Ct. App. 2003).

### 3. *Colorado and adoption of the RUAA*

Colorado enacted its version of the RUAA in 2004.<sup>359</sup> The state has special family law arbitration legislation<sup>360</sup> and had enacted the UAA, which was incorporated by reference into the special family law statutes.<sup>361</sup> A case decided during the UAA era held that while child custody, visitation, child support and other matters related to children are arbitrable, the court retains jurisdiction over these issues to review them de novo upon either party's request, echoing the special legislation.<sup>362</sup> The result should be the same when the family law arbitration statutes are read with the Colorado RUAA.<sup>363</sup>

### 4. *Connecticut amends its family law statutes*

In 2005 Connecticut amended its legislation governing agreements for custody, care, education, visitation, maintenance or support of children, or for alimony or disposition of marital property to allow agreements to arbitrate under its general arbitration statutes, provided

- (1) an arbitration pursuant to such agreement may proceed only after the court has made a thorough inquiry and is satisfied that (A) each party entered into such agreement voluntarily and without coercion, and (B) such agreement is fair and equitable under the circumstances, and
- (2) such agreement and an arbitration pursuant to such agreement shall not include issues related to child support, visitation and custody. An arbitration award shall be confirmed, modified or vacated in accordance with [the general arbitration statutes].<sup>364</sup>

Like general agreements to arbitrate, those relating to family law are "valid, irrevocable and enforceable, except when there exists

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<sup>359</sup> COLO. REV. STAT. ANN. §§ 13-22-201 - 13-22-230 (Lexis/Nexis 2006).

<sup>360</sup> *Id.* §§ 14-10-128.1, 14-10-128.3, 14-10-128.5 (Lexis/Nexis 2006).

<sup>361</sup> *Id.* §§ 14-10-128.5 (Lexis/Nexis 2006).

<sup>362</sup> *In re Marriage of Popack*, 998 P.2d 464, 468-69 (Colo. Ct. App. 2000) (Beth Din arbitration), citing COLO. REV. STAT. ANN. § 14-10-128.5(2) (Lexis/Nexis 2006).

<sup>363</sup> See also William L. Hunnicutt, *Arbitration and Special Master Proceedings: Overlooked Family Law Alternatives*, 13 AM. J. FAM. L. 15 (1999) (reporting longtime success with these ADR options). My thanks to Mr. Hunnicutt and these other AAML survey respondents for comments: Diane M. Carlton, Elaine G. Edinburg and Robert T. Hinds, Jr.

<sup>364</sup> CONN. GEN. STAT. § 46b-66(c) (West Cum. Ann. Pocket Pt. 2008), referring to *id.* §§ 52-408 - 52-424 (West 2005).



sufficient cause at law or in equity for the avoidance of written contracts generally.”<sup>365</sup>

### 5. Delaware Family Court Civil Rule 16.1

By Family Court Civil Rule 16.1, binding arbitration by agreement is available in Delaware family law disputes in litigation for property division, spouse support, alimony and attorney fees. Arbitration is not available in protection from abuse, custody and/or visitation proceedings.<sup>366</sup> Electing binding arbitration waives the right to trial on matters sent to arbitration. There are special provisions for choosing arbitrators, arbitrator compensation, deadlines for hearings, a pre-hearing conference, use of the Civil Rules for compelling witness attendance and production of documents, use of the Rules of Evidence as a guide, a reasoned award, and submission of the arbitrator’s Final Order to the Family Court as the parties’ Stipulation and Order. No party may collaterally attack the Stipulation and Order findings of fact and conclusions of law except as the Family Court civil rules provide.<sup>367</sup> Other issues related to family law cases, such as breakup of a family-owned business, would fall under the Delaware Uniform Arbitration Act.<sup>368</sup>

### 6. Family law arbitration in the District of Columbia

The District of Columbia now has its version of the RUAA,<sup>369</sup> to be fully effective in 2009.<sup>370</sup> Under its version of the UAA<sup>371</sup> its courts allowed arbitration of family law cases as a matter of contract, but following other jurisdictions’ law, denied

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<sup>365</sup> *Id.* § 52-408 (West 2005), excluding contracts for child support, visitation and custody. *See supra* note 364 and accompanying text. My thanks to AAML survey respondents Elaine S. Amendola, Dianne M. Andersen, Arthur Balbirer, Gaetano Ferro, William T. Fitzmaurice and Arnold H. Rutkin for their comments.

<sup>366</sup> DEL. FAM. CT. R. CIV. P. 16.1(a).

<sup>367</sup> *Id.* R. 16.1(b)-16.1(r).

<sup>368</sup> DEL. CODE ANN. tit. 10, §§ 5701-25 (1999). My thanks to AAML survey respondent H. Alfred Tarrant, Jr. for his comments.

<sup>369</sup> D.C. Code §§ 16-4401 (2001).

<sup>370</sup> *Id.* §§ 16-4403 (2001).

<sup>371</sup> *Id.* §§ 16-4301 - 16-4319 (2001).

finality to those parts of arbitral awards ruling on alimony, child custody and child support.<sup>372</sup>

### 7. *Georgia's family law arbitration bill*

In 2007 Georgia appeared to be on the verge of enacting family law arbitration legislation based on the Model Act.<sup>373</sup> The eventual result was overhaul of its legislation related to child custody and related matters. Effective January 1, 2008,

In all proceedings under this article [legislation governing general arbitration], it shall be expressly permissible for the parents of a child to agree to binding arbitration on the issue of child custody and matters relative to visitation, parenting time, and a parenting plan. The parents may select their arbiter and decide which issues will be resolved in binding arbitration. The arbiter's decisions shall be incorporated into a final decree awarding child custody unless the judge makes specific written findings that under the circumstances of the parents and the child the arbiter's award would not be in the best interests of the child. In its judgment, the judge may supplement the arbiter's decision on issues not covered by the binding arbitration.<sup>374</sup>

The result is that parties must use the Georgia Arbitration Code, which although not listed as a UAA or RUAA derivative, mostly parallels the UAA.<sup>375</sup> Georgia child custody arbitration, and presumably other issues committed to arbitration, will follow the general statutory format of North Carolina family law arbitration before the latter state committed to the RUAA and revised its Family Law Act to follow RUAA arbitration practice.<sup>376</sup> However, the 2008 amendment allows shunting custody and similar issues to an arbitrator with ultimate court review. In this regard Georgia follows the Indiana and Michigan models.<sup>377</sup> In North Carolina, by contrast, the arbitral award governs, subject to par-

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<sup>372</sup> *Spencer v. Spencer*, 494 A.2d 1279, 1284-85 (D.C. 1985) (reviewing cases).

<sup>373</sup> Compare Georgia Senate Bill 201, to amend 19 GA. CODE ANN. to provide for family law arbitration with the MODEL ACT discussed in Part II.

<sup>374</sup> GA. CODE ANN. § 19-19-1.1 (2007).

<sup>375</sup> Compare GA. CODE ANN. §§ 9-9-1 - 9-9-18 (2007) with UAA §§ 1-25. Georgia also has separate arbitration legislation for international disputes and medical malpractice claims. See GA. CODE ANN. §§ 9-9-30 - 9-9-43, 9-9-60 - 9-9-83 (2007).

<sup>376</sup> See *infra* Part III.A.19.

<sup>377</sup> See *infra* Parts III.A.8, III.A.11.

ties' action to bring best interests and other issues to court attention.<sup>378</sup>

### 8. *Indiana's 2005 legislation*

The 2005 Indiana legislature passed special family law arbitration statutes.<sup>379</sup> Appellate decisions under these statutes do not apply to other arbitration cases.<sup>380</sup> This legislative policy differs from the approach of the Model Act and some state statutes, which incorporate by reference general arbitration statutes, and hence decisional law under these statutes, into family law arbitration acts.<sup>381</sup> The Model Act and other state statutes do not address the issue of precedent or persuasive cases flowing from family law arbitration decisions, but courts may cite a family law act-based case if the statutory formula is the same.<sup>382</sup> The first Indiana case on appeal upheld all aspects of the arbitration proceeding; the award by a court-appointed, experienced arbitrator

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<sup>378</sup> See generally *infra* Part III.A.19. AAML survey respondents Edward E. Bates, Jr., Lynn L. Grogan, Joseph D. McGovern, Richard W. Schiffman, Jr. and Kice H. Stone reported scattered use of arbitration, sometimes in connection with enforcing a mediation agreement. My thanks to them for this information.

<sup>379</sup> IND. CODE ANN. §§ 34-57-5-1 - 34-57-5-13 (Lexis/Nexis Cum. Supp. 2008). Bruce M. Pennamped & Andrew Z. Soshnick, *Indiana's Family Law Arbitration Act 1-2* (2006) (copy on file with author) note that *Cphoon v. Cphoon*, 770 N.E.2d 885 (Ind. Ct. App. 2002), *aff'd in part, superseded in part*, 784 N.E.2d 904 (Ind. 2003), was a catalyst for family law arbitration legislation. This had been the North Carolina experience. See *Crutchley*, 293 S.E.2d 793 (N.C. 1982), superseded by N.C. GEN. STAT. § 50-56 (2007), and the rest of the North Carolina Family Law Arbitration Act; see also 1 WALKER, 2006, *supra* note 4, at 35-36; *supra* notes 268-69, 301-08, 320-21 and accompanying text; *infra* Part III.A.18. Pennamped & Soshnick, *supra* at 3-5, discuss the Indiana statute's legislative history; see also Joseph W. Ruppert & Michael G. Ruppert, *Recent Developments: Indiana Family Law*, in *2005 Survey of Recent Developments in Indiana Law*, 39 IND. L. REV. 995, 1014-15 (2006), a statutory survey. Besides Mr. Pennamped and Mr. Soshnick, my thanks to AAML survey respondents Melissa Avery and Monty K. Woolsey for their comments.

<sup>380</sup> IND. CODE ANN. § 34-57-5-1(a) (Lexis/Nexis 2008 Cum. Supp.).

<sup>381</sup> Compare MODEL ACT § 129; N.C. GEN. STAT. § 50-61 (2007); see also *supra* Part II.A.

<sup>382</sup> See, e.g., *Smith*, 606 S.E.2d at 175 (citing *Semon*, 587 S.E.2d 460, North Carolina Family Law Arbitration Act in North Carolina Uniform Arbitration Act-governed case on award modification issue where statutory language the same).

dealt with parenting time, marital estate division, and attorney fees payable to a spouse.<sup>383</sup>

The Indiana legislation has little to no relationship, in terms of language, to the Model Act or the RUAA. However, it reflects those Acts' central rule, *i.e.*, that an agreement to arbitrate is valid, irrevocable and enforceable unless parties agree to repudiate the agreement.<sup>384</sup> The Indiana law qualifies the rule. First, parties can agree to arbitrate if both spouses appear *pro se*, or if lawyers represent both. If one spouse has counsel and the other does not, the procedure cannot apply.<sup>385</sup> Second, a judgment ends the finality principle; *i.e.*, a court must review the award.<sup>386</sup> Third, the statute incorporates by reference the state's ADR rules, declaring that a case remains within the trial court's jurisdiction.<sup>387</sup> The Indiana statute thus falls into the category of those involving court supervision of family law arbitrations. At least one party must have been an Indiana resident or have been stationed at a U.S. military installation in Indiana for at least six months immediately before the filing of a petition or cause of action.<sup>388</sup>

This difference is accented by the act's requiring Indiana courts to maintain continued close watch over arbitration under the act. Although the statute broadly covers all aspects of dissolving a marriage, an agreement to arbitrate must be filed with the court. Upon filing, parties must designate an arbitrator. If they do not and so indicate to the court, the court must designate three attorneys who are qualified and willing to serve by court appointment. Plaintiff has the first strike of three; defendant then strikes a second nominee, and the third serves as arbitrator. The arbitrator has broader powers than under the Model Act; he or she can determine child support, custody, parenting time, and "any other matter over which a trial court would have jurisdic-

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<sup>383</sup> *In re Marriage of J.M. v. N.M.*, 844 N.E.2d 590, 597-604 (Ind. Ct. App. 2006); *see also* Pennamped & Soshnick, *supra* note 379, at 7-8.

<sup>384</sup> *Compare* IND. CODE ANN. § 34-57-5-3 (Lexis/Nexis 2008 Cum. Supp.), with MODEL ACT § 106(a); RUAA § 6(a); *see also* N.C. GEN. STAT. § 50-42(a) (2007).

<sup>385</sup> *Id.* § 34-57-5-1(b) (Lexis/Nexis 2008 Cum. Supp.).

<sup>386</sup> *Id.* § 34-57-5-3 (Lexis/Nexis 2008 Cum. Supp.).

<sup>387</sup> *Id.* § 34-57-5-13 (Lexis/Nexis 2008 Cum. Supp.), incorporating, *e.g.*, IND. ADR R. 1.7 by reference.

<sup>388</sup> IND. CODE ANN. § 34-57-5-4 (Lexis/Nexis 2008 Cum. Supp.).

tion concerning family law” matters, including dissolving the marriage.<sup>389</sup> The latter authority is more broad than what the Model Act contemplates, which reserves for a court the decision to dissolve a marriage.<sup>390</sup>

The Indiana act also establishes qualifications for family law arbitrators:

- (1) an attorney certified as a family law specialist in Indiana by an independent certifying organization . . . approved and monitored under Rule 30 of the [Indiana] Rules for Admission to the Bar;
- (2) a private judge qualified under Rule 1.3 of the Indiana Supreme Court Rules for Alternative Dispute Resolution;
- (3) an individual who is a former magistrate or commissioner of an Indiana court of record; or
- (4) an attorney who is a registered domestic relations mediator under Rule 2.5(B) of the Indiana Supreme Court Rules for Alternative Dispute Resolution.<sup>391</sup>

By contrast, apart from requiring arbitrator disclosure of possible conflicts of interest, the Model Act requires no special qualifications; the North Carolina statute lists qualifications only if parties cannot agree on an arbitrator, and a court must appoint one.<sup>392</sup> The Indiana statute requires an arbitrator to comply with child support and parenting time guidelines established by the Indiana Supreme Court if there is a child of both parties to the marriage. Before assuming duties, arbitrators must take an oath to faithfully perform their duties, and to support and defend the Constitution and laws of Indiana and the United States.<sup>393</sup>

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<sup>389</sup> *Id.* § 34-57-5-2 (Lexis/Nexis 2008 Cum. Supp.); *see also infra* note 395 and accompanying text.

<sup>390</sup> MODEL ACT § 101(a); *compare* N.C. GEN. STAT. § 50-41(a) (2007).

<sup>391</sup> IND. CODE ANN. § 34-6-2-44.7 (Lexis/Nexis 2008 Cum. Supp.), referring to *id.* § 34-57-5 (Lexis/Nexis 2008 Cum. Supp.).

<sup>392</sup> MODEL ACT §§ 111-12; N.C. Gen. Stat. §§ 50-45, 50-45.1 (2007); *see also* Part II.K *supra*.

<sup>393</sup> IND. CODE ANN. §§ 34-57-5-5 (Lexis/Nexis 2008 Cum. Supp.). There is no comparable MODEL ACT oath provision, but Basic R. 13, MODEL ACT, at 119, supplies a suggested form for oaths or affirmations. Pennamped & Soshnick, *supra* note 379, at 19; 2 BURLESON & WALKER, 2006, *supra* note 62, at 57-58 suggest arbitrator oath or affirmation forms. The Indiana statute does not cover a situation of an arbitrator who wishes to affirm and not take an oath, perhaps on religious grounds. Basic Rule 13, the Pennamped & Soshnick form and the North Carolina forms offer the option.

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Either party may request a record of an arbitration proceeding if 15 days' written notice is given to the arbitrator after the arbitrator has been appointed. The notice must specify the requested manner of recording and preserving the transcript. The arbitrator may select a person to record proceedings and administer oaths.<sup>394</sup>

If it is a marriage dissolution case, at least 60 days after the petition or cause of action is filed, the arbitrator may enter a summary dissolution decree without a hearing if verified pleadings have been filed with the arbitrator, and these pleadings, signed by the parties, have a written waiver of hearing and a statement that there are no contested issues in the action, or a written agreement that settles contested issues.<sup>395</sup>

Unless the parties agree on an extension of up to 90 days, an arbitrator must make written findings of fact and conclusions of law within 30 days after the hearing. A copy of the findings and conclusions must be sent to all parties and the court. After the court receives its copy, the court must enter a judgment and an order for a docket entry.<sup>396</sup> The arbitrator is given statutory directions on property division to be reflected in an award.<sup>397</sup> An arbitrator may modify an award after making findings and conclusions if a party has made fraudulent representations during the arbitration, the arbitrator is ordered by the court to modify the award, or both parties consent to modifications.<sup>398</sup>

Arbitrator fees are divided between the parties unless otherwise agreed in writing, or if the arbitrator orders a party to pay a reasonable amount for maintaining or defending a proceeding, or if the arbitrator orders payment attorney fees by a party.<sup>399</sup>

After the court enters judgment, appeals proceed as in other civil cases.<sup>400</sup>

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<sup>394</sup> IND. CODE ANN. § 34-57-5-6 (Lexis/Nexis 2008 Cum. Supp.)

<sup>395</sup> *Id.* § 34-57-5-9 (Lexis/Nexis 2008 Cum. Supp.).

<sup>396</sup> *Id.* § 34-57-5-7 (Lexis/Nexis 2008 Cum. Supp.).

<sup>397</sup> *Id.* § 34-57-5-8 (Lexis/Nexis 2008 Cum. Supp.).

<sup>398</sup> *Id.* § 34-57-5-10 (Lexis/Nexis 2008 Cum. Supp.).

<sup>399</sup> Arbitrator fees must be paid within 30 days after judgment entry. *Id.* § 34-57-5-12 (Lexis/Nexis 2008 Cum. Supp.).

<sup>400</sup> *Id.* § 34-57-5-11 (Lexis/Nexis 2008 Cum. Supp.).

### 9. *Kansas family law arbitration*

Correspondence reports that Kansas has family law arbitration,<sup>401</sup> but research did not disclose specific legislation or court rules. The state has its UAA version.<sup>402</sup> No cases citing it appear to involve family law issues; the procedure appears to have been little used.<sup>403</sup> Although Kansas ADR legislation defines binding or nonbinding arbitration,<sup>404</sup> mediation seems to be the primary Kansas ADR option.<sup>405</sup>

### 10. *Maine's referee procedure*

Maine does not have a family law arbitration statute, but a family law referee procedure, in force since 1995, is built on an older tradition of references:

1. . . . The court may appoint a referee in any proceeding for paternity, divorce, judicial separation or modification of existing judgments brought under [Maine family law legislation]:
  - A. When the parties agree the case may be tried before a referee; or
  - B. Upon motion demonstrating exceptional circumstances that require a referee.
2. . . . Payment for the services of the referees is the responsibility of the parties, as ordered by the court. If the court finds that either or both of the parties are indigent, the court may pay the reasonable costs and expenses of the referee.
3. . . . If all parties waive the right to object to acceptance of the referee's report, the court shall immediately enter judgment on the referee's report without a hearing.<sup>406</sup>

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<sup>401</sup> My thanks to AAML survey respondent Stephen J. Blaylock for his comments.

<sup>402</sup> KAN. STAT. ANN. § 5-401 - 5-422 (2001).

<sup>403</sup> See, e.g., LINDA D. ELROD & JAMES P. BUCHELE, KANSAS LAW AND PRACTICE: KANSAS FAMILY LAW § 16.13 (2008) (rare use of family law arbitration in Kansas, discussing cases from other states).

<sup>404</sup> KAN. STAT. ANN. § 5-502(g) (2001).

<sup>405</sup> See generally Art Thompson, *The Use of Alternative Dispute Resolution in Civil Litigation in Kansas*, 12 KAN. J.L. & PUB. POL'Y 351 (2003). Oakes v. Oakes, 104 P.3d 1024 (Kan. Ct. App. 2005) (per curiam), an unpublished case not entitled to precedent, reports use of a special master, authorized by KAN. STAT. ANN. 60-253 (2007 Cum. Supp.), in divorce litigation.

<sup>406</sup> ME. REV. STAT. ANN. tit. 19-A, § 252 (1998).

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Non-lawyers may serve as referees if confirmed by the court.<sup>407</sup> However, appointment of a referee will be allowed only by agreement of the parties; a new rule of court effective January 1, 2009, eliminates a court's ability to appoint referees for "exceptional circumstances."<sup>408</sup>

Long before the statute was adopted courts had enforced separation agreements based on a referee's report, so long as the agreement was fairly made and not against public policy.<sup>409</sup> Proceedings before referees are normally conducted like a trial,<sup>410</sup> with pretrial discovery available.<sup>411</sup> A referee must report the facts as he or she found them,<sup>412</sup> but greater specificity is necessary in cases involving children.<sup>413</sup> The court may accept, reject or recommit a referee's report. If recommitted, the referee must notify parties of the rehearing's time and place. If it is accepted, the court enters judgment. Either party may appeal from the judgment or from rejection of a report.<sup>414</sup>

When a report is offered for acceptance, the court must accept it if the legal conclusions are accurate and are based on facts having probative value.<sup>415</sup> The court reviews a referee's findings of fact for clear error and will affirm findings supported by any competent evidence on the record.<sup>416</sup> A party objecting to acceptance of a report has the burden of proving error by the refe-

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<sup>407</sup> Dana E. Prescott, *Parental Conflict and the Appointment of Referees in Child Custody Cases*, 15 ME. B.J. 44, 46-47 n.20 (Jan. 2000).

<sup>408</sup> ME. FAM. CT. DIV. R. 119 & *Rule 119 Advisory Notes*, which say Rule 119 differs slightly from ME. R. CIV. P. 53. Rule 53(a)(1) allows reference by agreement; Rule 53(a)(2) allows court reference without agreement by the parties, but this is "the exception and not the rule," which is now no longer an option under ME. FAM. CT. DIV. R. 119. However, in other respects Rule 53 governs referee practice.

<sup>409</sup> *Coe v. Coe*, 71 A.2d 514, 517 (Me. 1950); *see also* *Cloutier v. Cloutier*, 814 A.2d 979, 983 (Me. 2003) (same for tried case, following *Coe*).

<sup>410</sup> The referee is limited to determining only those issues submitted in the pretrial order. *Boothbay Harbor Condominiums, Inc. v. Department of Transp.*, 382 A.2d 848, 853 n.8 (Me. 1978).

<sup>411</sup> Prescott, *supra* note 407, at 47; *see also* ME. R. CIV. P. 53(d).

<sup>412</sup> *Bernard v. Spofford*, 31 Me. 39 (1849).

<sup>413</sup> Prescott, *supra* note 407, at 47; *see also* ME. R. CIV. P. 53(e).

<sup>414</sup> ME. REV. STAT. ANN., tit. 14, § 1155 (2003).

<sup>415</sup> *Mount Desert Yacht Yard, Inc. v. Phillips*, 348 A.2d 16, 20 (Me. 1975).

<sup>416</sup> *Savage v. Renaud*, 588 A.2d 724, 726 (Me. 1991).



ree.<sup>417</sup> A report can be accepted in part and rejected in part.<sup>418</sup> An award going beyond the parties' submission that decides matters not in the submission is valid for matters submitted and void for the rest.<sup>419</sup>

Availability of a referee under the statute to parents is an important protection for

children caught in remorseless conflict. A referee with special expertise in matters of parent/child relationships can ameliorate the harm that indecision or conflict may cause children. . . . [C]hildren will also benefit from the availability of a resource that includes the flexible involvement of therapists, guardians *ad litem* and educators who can assist the decision making process. The delegated authority to render a judgment immediately and to direct its implementation (and in emergencies to request contempt enforcement by the supervising court) provides children with an ongoing degree of protection otherwise unavailable through ordinary court processes. The availability of such services has the added advantage of encouraging meaningful resolution of disputes by agreement.<sup>420</sup>

When commentary on the legislation is coupled with the text of the statutes and case law, it is apparent that the Maine family law referee system is the functional equivalent of court-annexed family law arbitration elsewhere.

### 11. Michigan's Domestic Relations Arbitration Act

Michigan enacted comprehensive family law arbitration legislation in 2004, covering issues related to real property; child custody; child support "subject to the restrictions and requirements in other law and court rule as provided in this act;" parenting time; spousal support; costs, expenses and attorney fees; enforceability of prenuptial and postnuptial agreements; allocation of parties' responsibility for debt as between the parties; and other contested domestic relations matters that could arise in an

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<sup>417</sup> *Cunningham v. Cunningham*, 314 A.2d 834, 839 (Me. 1974).

<sup>418</sup> *Inhabitants of Norridgewuck v. Inhabitants of Hebron*, 128 A.2d 215, 218 (Me. 1957).

<sup>419</sup> *Boynton v. Frye*, 33 Me. 216, 219 (1851), *overruled in part*, *Wentworth v. Lord*, 39 Me. 71 (1854). *See also* *Sawyer v. Freeman*, 35 Me. 542 (1853) (citing *Boynton* for its holding on partial acceptance of a referee's award).

<sup>420</sup> *Prescott*, *supra* note 407, at 47-48. My thanks, also, to Mr. Prescott, an AAML survey respondent, for his comments.

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action for divorce; annulment; separate maintenance; or child support, custody or parenting time.<sup>421</sup>

A court may order parties to arbitrate but only if each party acknowledges in writing or on the record that he or she has been informed “in plain language . . . :”

- (a) Arbitration is voluntary.
- (b) Arbitration is binding and the right of appeal is limited.
- (c) Arbitration is not recommended for cases involving domestic violence.
- (d) Arbitration may not be appropriate in all cases.
- (e) The arbitrator’s powers and duties are delineated in a written arbitration agreement that all parties must sign before arbitration commences.
- (f) During arbitration, the arbitrator has the power to decide each issue assigned to arbitration under the arbitration agreement. The court will, however, enforce the arbitrator’s decisions on those issues.
- (g) The party may consult with an attorney before entering into the arbitration process or may choose to be represented by an attorney throughout the entire process.
- (h) If the party cannot afford an attorney, the party may wish to seek free legal services, which may or may not be available . . . [and]
- (i) A party to arbitration will be responsible, . . . solely or jointly . . . , to pay . . . cost of the arbitration, including fees for the arbitrator’s services. In comparison, a party does not pay for the court to hear and decide an issue, except for payment of filing and other court fees prescribed by statute or court rule for which the party is responsible regardless of the use of arbitration.<sup>422</sup>

Child abuse or neglect matters are excluded from arbitration.<sup>423</sup>

A single arbitrator or a panel of three hears the case by court appointment. If parties choose an arbitrator, the court must

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<sup>421</sup> MICH. COMP. LAWS SERV. § 600.5071 (LexisNexis 2004 Rev.).

<sup>422</sup> *Id.* § 600.5072(1) (Lexis/Nexis 2004 Rev.). If a party is subject to a personal protection order involving domestic violence or if there are domestic violence allegations in the pending domestic relations matter, the court must not refer the case to arbitration unless each party waives this exclusion. A party cannot waive it unless represented by counsel throughout the action, including arbitration and is informed on the record concerning the arbitration process, suspension of the formal rules of evidence and arbitration’s binding nature. *Id.* 600.5072(2) (Lexis/Nexis 2004 Rev.). If after receiving this information, a party decides to waive the domestic violence exclusion, the court and that party’s attorney must ensure the waiver is informed and voluntary. If the court finds the waiver is informed and voluntary, the court must place these findings and the waiver on the record. *Id.* § 600.5072(3) (Lexis/Nexis 2004 Rev.).

<sup>423</sup> *Id.* § 600.5072(4) (Lexis/Nexis 2004 Rev.).

appoint him/her if he/she is qualified under the Act and accepts appointment. Arbitrators must be attorneys in good standing with the Michigan state bar, have practiced as a lawyer for not less than five years and demonstrate expertise in domestic relations law, and have received training in the dynamics of domestic violence and in handling domestic relations matters that have a history of domestic violence. A court official maintains a list of qualified arbitrators, including summaries of their qualifications and experience.<sup>424</sup> Like the Model Act and the RUAA, the Michigan Act requires arbitrator conflict of interest disclosure by arbitrators, counsel and parties; this may subject an arbitrator to disqualification.<sup>425</sup>

Like powers of arbitrators generally, the Michigan arbitrator must hear each issue and make an award on those submitted for arbitration under the agreement. Arbitrators may administer oaths or issue subpoenas as a court rule provides. They can issue discovery orders. Subject to the agreement, they can issue orders allocating arbitration fees and expenses between the parties or to one party, including fees or expenses on parties or attorneys as sanctions. They can issue orders requiring parties to produce information that the arbitrator considers relevant to, and helpful in resolving, issues related to the arbitration. If the arbitrator considers it relevant to an issue, he or she may order filing sworn statements identifying each party's place of employment and other sources of income and that list each party's assets and liabilities.<sup>426</sup>

The Act has a mandatory comprehensive administrative conference, analogous to the discretionary call of such a conference by an arbitrator under the Model Act or the RUAA.<sup>427</sup>

Apart from declaring that no record of hearings may be made unless the case involves child support, child custody or parenting time, a court rule provides for it, or the agreement to

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<sup>424</sup> *Id.* § 600.5073 (Lexis/Nexis 2004 Rev.).

<sup>425</sup> *Id.* § 600.5075 (Lexis/Nexis 2004 Rev.); *compare* MODEL ACT § 112; RUAA § 12.

<sup>426</sup> MICH. COMP. LAWS SERV. § 600.5074 (Lexis/Nexis 2004 Rev.) (statute includes comprehensive, all-inclusive list of assets, liabilities).

<sup>427</sup> *Id.* § 600.5076 (Lexis/Nexis 2004 Rev.).

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arbitrate stipulates for recording a hearing,<sup>428</sup> the Act says little about hearing procedure.<sup>429</sup>

The Act provides, in effect, for a reasoned award, unless the parties and the arbitrator agree otherwise in writing and on the record, within 60 days after the hearing ends or 60 days after an arbitrator receives proposed findings of fact and conclusions of law, if the arbitrator has requested them. If, during the arbitration, the parties agree on child support, custody or parenting time, the agreement must be placed on the record under oath and included in the arbitral award.<sup>430</sup> The arbitrator retains jurisdiction to correct errors and omissions in an award until the court confirms it.<sup>431</sup>

The award then goes to the court, which may enforce an arbitral award or other order issued under the Act like orders a circuit court issues. Parties may move the court to enforce an award or order. The plaintiff has 21 days to file a judgment, order or motion to settle the judgment after the award has been rendered unless otherwise agreed in writing, or unless the arbitrator or the court grants an extension. If the plaintiff does not follow the 21-day rule, another party may file the judgment, order or motion to settle.<sup>432</sup>

Like the Model Act, the Michigan statute has two provisions for vacating or modifying awards. For child support, custody or parenting time, a court must not vacate or modify an award unless it finds that award is adverse to the best interest of the child. Review of these awards is subject to standards and procedures provided in other statutes, in other applicable law, and by court rule applying to support amounts, child custody or parenting

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<sup>428</sup> Arbitrators may make a record to be used by him or her to help in reaching a decision. Parties may agree to a partial or full recording. *Id.* § 600.5077 (Lexis/Nexis 2004 Rev.).

<sup>429</sup> *Miller v. Miller*, 707 N.W.2d 341, 344-45 (Mich. 2005), stressed that hearings under the Act need not be formal proceedings like trials.

<sup>430</sup> The award may not deviate from child support amount formulas developed by the Michigan friend of the court bureau unless the arbitrator complies with the same deviation requirements prescribed for the court under the law applying to the domestic relations dispute. Mich. Comp. Laws Serv. §§ 600.5078(1)-600.5078(2) (Lexis/Nexis 2004 Rev.).

<sup>431</sup> There is a 14-day turnaround time for motions to correct. *Id.* § 600.5078(3) (Lexis/Nexis 2004 Rev.).

<sup>432</sup> *Id.* § 600.5079 (Lexis/Nexis 2004 Rev.).

time. Other standards and procedures for arbitral award review under this statute are governed by court rule.<sup>433</sup> For other issues, *e.g.*, alimony, a separate statute, incorporating by reference the special legislation for child custody, support and parenting time, follows the pattern of general arbitration legislation for vacatur or modification. In other respects, other standards and procedures for arbitral awards review under this statute are subject to court rule. If a court grants vacatur, it may order rehearing before a new arbitrator chosen as specified in the agreement or, if there is no agreement clause, by the court.<sup>434</sup>

Appeals from awards that the court confirms, vacates, modifies or corrects are taken in the same manner as from orders or judgments in other civil actions. This differs from Model Act appellate procedure, which copies the RUAA but adds a provision for appellate review of judgments after a trial court reviews an arbitrator's conclusions of law in an award. The parties must agree to this.<sup>435</sup>

The Michigan Supreme Court has made it clear that a trial judge must make independent findings in matters related to children.<sup>436</sup>

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<sup>433</sup> *Id.* §§ 600.5080 (Lexis/Nexis 2004 Rev.).

<sup>434</sup> If the defect involves procuring an award through corruption, fraud or undue means, or if an arbitrator exceeds his or her powers, the same arbitrator may conduct the rehearing; the court may order rehearing by another arbitrator for any vacatur ground. *Id.* § 600.5081 (Lexis/Nexis 2004 Rev.); compare MODEL ACT §§ 123; RUAA § 23; see also *supra* Part II.S.

<sup>435</sup> Compare MICH. COMP. LAWS SERV. § 600.5082 (Lexis/Nexis 2004 Rev.), with MODEL ACT § 128; RUAA § 28; see also *supra* Part II.U.

<sup>436</sup> *Harvey*, 680 N.W.2d at 838-39 (per curiam) (although state's Domestic Relations Arbitration Act allows arbitrating child custody, child support or parenting issues, circuit court retains authority to modify award to insure best interests of child); See also *Miller*, 701 N.W.2d at 344-45 (upholding arbitration procedure as long as MICH. COMP. LAWS SERV. §§ 600.5071, 600.5072(1)(e), 600.5072(a)-600.5072(d) documents on the record); Mark A. Snover, *Recent Case Law's Impact on Family Law Arbitration*, 85 MICH. B.J. 20 (Feb. 2006). My thanks to AAML survey respondents Ronald M. Bookholder, Henry S. Gornbein, Margaret J. Nichols, Kurt E. Schnelz and Richard S. Victor for their comments; Mr. Bookholder's article, *Arbitration — Doing It Right, Making It Work*, 85 MICH. FAM. L. SEC. 42 (special ed. 2006), was also very helpful.

### 12. *Minnesota family law arbitration*

A Minnesota statute and the state practice rules authorize binding or nonbinding family law arbitration as an ADR option, except in domestic abuse cases or cases involving maltreatment of vulnerable adults, or maintenance, support and parentage actions when the public agency responsible for child support enforcement is a party or is providing services to a party to the action.<sup>437</sup> Apart from standard UAA vacatur grounds,<sup>438</sup> there seem to be no special rules for vacating awards involving child support and the like. There has been little use of family law arbitration thus far.<sup>439</sup>

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<sup>437</sup> MINN. STAT. ANN. § 484.76 (West 2002), referring to *id.* §§ 518B.01, 626.557 (West 2008 Cum. Ann. Pocket Pt.); MINN. PRAC. R. 111.01, 114.02, 114.09, 114.13, 310.01.

<sup>438</sup> Cf. Gary A. Weissman, *A Lawyer's View of the Family Law Amendments to Rule 114*, 18 *HAMLIN J. PUB. L. & POL'Y.* 394, 405 & n. 40 (1997), *inter alia* referring to MINN. STAT. ANN. § 572.19 (West 2002). *Volkman v. Volkman*, 688 N.W.2d 347 (Minn. Ct. App. 2004), reversed a judgment on an award in issues related to a divorce where the arbitrator did not hold a hearing, declaring that this affected a party's substantial rights as § 572.19 provides. *State Off. of St. Auditor v. Minnesota Ass'n of Prof'l Employees*, 504 N.W.2d 751, 756-58 (Minn. 1993) (en banc), recognized the possibility of a nonstatutory public policy exception for vacatur, but found none in the case. It seems to be an open question whether Minnesota courts would find a public policy exception for vacating awards for child custody, child support and spousal support under a best interests analysis as some jurisdictions do. Cases like *Volkman* suggest that Minnesota has a very strong policy for upholding agreements for binding arbitration except where statutory or practice rules give exceptions. There is no statutory exception in MINN. STAT. ANN. § 572.08 (West 2002), part of the state's UAA.

<sup>439</sup> My thanks to AAML survey respondents Deborah N. Dewalt, Susan M. Lach, Larry M. Nord, Dan C. O'Connell, Nathalie S. Rabuse, Laura J. Seaton and Thomas W. Tuft for their comments.

### 13. *Missouri ties family law arbitration to the UAA*

Missouri apparently allows family law arbitration through its UAA version.<sup>440</sup> A court must review child custody and support awards, however.<sup>441</sup>

### 14. *Nevada enacts the RUAA*

In 2007 Nevada enacted its RUAA version.<sup>442</sup> Family law arbitrations are going forward under the new statutes. Nevada has also adopted mandatory mediation in its two largest counties, Clark, whose county seat is Las Vegas, and Washoe, whose county seat is Reno.<sup>443</sup> Family law cases are excluded under the state's mandatory court-annexed arbitration programs,<sup>444</sup> but parties may agree to arbitrate after a dispute arises, *i.e.*, there can be no pre-dispute agreements. Agreements must be in writing and "entered into knowingly and voluntarily."<sup>445</sup>

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<sup>440</sup> There is no explicit statutory incorporation by reference, but MO. ANN. STAT. § 435.350 (West 1992) recites: "A written agreement to submit any existing controversy to arbitration or a provision in a written contract [*i.e.*, a pre-dispute agreement to arbitrate]" is "valid, enforceable and irrevocable . . . , " close to the standard UAA § 1 language. When coupled with *id.* § 435.405.5 (West 2008 Cum. Ann. Pocket Pt.), a 1998 amendment that is not in the standard UAA § 12, which declares vacatur standards, the inference is that family law cases can go to arbitration under general Missouri arbitration law. Presumably § 435.350's general language means agreements to arbitrate family law issues, whether pre-dispute or not, may be arbitrated, subject to § 435.405 vacatur and other limitations in the Missouri arbitration legislation.

<sup>441</sup> *Id.* § 435.405.5 (West 2008 Cum. Ann. Pocket Pt.); *see also id.* § 452.110 (West 2003) (review of orders, judgments touching alimony and maintenance of spouse, and care, custody, maintenance of children). My thanks to AAML survey respondents Sheldon Bernstein and John W. Dennis, Jr. for their comments.

<sup>442</sup> Compare NEV. REV. STAT. §§ 38.206-38.248 (Lexis/Nexis 2006), with RUAA §§ 1-29.

<sup>443</sup> Mediation takes place through local rules of court in these counties, with divorce cases, involving all issues, custody, child support, spousal support and property division, subject to pretrial, mandatory settlement conferences normally conducted by sitting trial judges. My thanks to AAML survey respondents Mary Anne Decaria and Richard W. Young for their comments.

<sup>444</sup> NEV. REV. STAT. § 38.255.3(h) (Lexis/Nexis 2006).

<sup>445</sup> Agreements entered into under *id.* § 38.250.2 (Lexis/Nexis 2006) that do not comply with these requirements are void. Mr. Young reports successful completion of arbitration under the Nevada RUAA before a three-arbitrator panel; the award was confirmed by the trial court. Child custody and support

15. *New Hampshire's domestic relations arbitration statute*

New Hampshire refers to its general arbitration statute with respect to validity of arbitration agreements,<sup>446</sup> supplementing it with rules for family law arbitration. Parties and counsel, if any, in a contested case can agree to arbitrate with superior court approval. Filing a stipulation stays trial pending arbitration.<sup>447</sup> Parties must select an arbitrator licensed to practice law in New Hampshire; the stipulation must recite his or her name.<sup>448</sup> The stipulation must recite all outstanding issues not resolved by prior court order or court-approved arbitration.<sup>449</sup> Parties can end arbitration by written agreement, or the arbitrator can end it; then a case returns to court.<sup>450</sup> Parties must pay arbitration fees and costs.<sup>451</sup>

Certain general arbitration legislation provisions apply: stay of proceedings; defaults; jurisdiction; proceedings in arbitration; and depositions.<sup>452</sup> General provisions related to witnesses and awards also apply, but there can be only one arbitrator.<sup>453</sup> “Unless inconsistent with [the arbitration statute], all provisions of law relative to domestic relations . . . apply to a proceeding” under the statute.<sup>454</sup> A superior court continues to have authority to enforce existing orders in a case or to grant and enforce emergency orders.<sup>455</sup>

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issues went to mediation, incidental to the parties' prenuptial agreement. The MODEL ACT and its rules would allow this kind of bifurcated procedure. See *supra* Part II.M.

<sup>446</sup> N.H. REV. STAT. ANN. § 542:11(VII) (Lexis/Nexis 2006), referring to *id.* § 542:1 (Lexis/Nexis 2006) for validity of arbitration agreements.

<sup>447</sup> *Id.* § 542:11(I) (Lexis/Nexis 2006), referring to *id.* § 542:1 (Lexis/Nexis 2006).

<sup>448</sup> *Id.* § 542:11(II) (Lexis/Nexis 2006).

<sup>449</sup> *Id.* § 542:11(IV) (Lexis/Nexis 2006).

<sup>450</sup> *Id.* § 542:11(X) (Lexis/Nexis 2006).

<sup>451</sup> *Id.* § 542:11(III) (Lexis/Nexis 2006).

<sup>452</sup> *Id.* § 542:11(VIII) (Lexis/Nexis 2006), referring to *id.* §§ 542:2, 542:3, 542:6 (Lexis/Nexis 2006).

<sup>453</sup> *Id.* § 542:11(IX) (Lexis/Nexis 2006), referring to *id.* §§ 542:5, 542:7 (Lexis/Nexis 2006).

<sup>454</sup> *Id.* § 542:11(XI) (Lexis/Nexis 2006).

<sup>455</sup> *Id.* § 542:11(XI) (Lexis/Nexis 2006).



An arbitrator must issue written findings on questions of law and fact;<sup>456</sup> they must be submitted to the court and “have the same effect as the report of a marital master.”<sup>457</sup>

#### 16. *New Jersey and its UAA version*

New Jersey has no special family law arbitration statute, but its Supreme Court has held that its Uniform Arbitration Act<sup>458</sup> may be used in family law cases with a qualification for awards in litigation involving children. A trial court must first review a child support award under standards applying to all arbitral awards. Second, the court must conduct a *de novo* review unless it is clear on the record that the award could not adversely affect the “substantial best interests of the child.”<sup>459</sup> A later case upheld an alimony award where the agreement did not call for comprehensive findings but returned the award for findings on ability to pay alimony.<sup>460</sup> The New Jersey courts’ relying on the Uniform Act, with a qualification in cases involving children, might be contrasted with that of North Carolina, whose Supreme Court had ruled that statutory construction principles forbade applying the Uniform Act for child custody and support awards.<sup>461</sup>

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<sup>456</sup> *Id.* § 542:11(V) (Lexis/Nexis 2006).

<sup>457</sup> *Id.* § 542:11(VI) (Lexis/Nexis 2006). My thanks to AAML survey respondents Honey C. Hastings and L. Jonathan Ross for their comments.

<sup>458</sup> N.J. STAT. ANN. § 2A:24-1 - 2A:24-11 (West 2000, 2008 Cum. Ann. Pocket Pt.).

<sup>459</sup> *Faherty v. Faherty*, 477 A.2d 1257, 1261-63 (N.J. 1984), citing N.J. STAT. ANN. § 2A:24-8 (West 2000) (public policy for arbitration competes with policies protecting best interests of children.) *Compare* *Chen v. Chen*, 688 A.2d 480, 488 (N.J. Super. Ct. App. Div. 1997) (arbitrator “imperfectly” exercised N.J. STAT. ANN. § 2A:24-8d (West 2000) powers).

<sup>460</sup> *Lopresti v. Lopresti*, 788 A.2d 951, 953-54 (N.J. Super. Ct. Ch. Div. 2001); *see also* *Crews v. Crews*, 751 A.2d 524, 526-37 (N.J. 2000) (providing standards for court’s, and therefore arbitrator’s, findings); GARY N. SKOLOFF & LAURENCE J. CUTLER, *NEW JERSEY FAMILY LAW PRACTICE* § 1.8L(3) (Bari Z. Weinberger, assoc. ed., 13th ed. 2008). My thanks to Laurence Cutler for bringing these materials to my attention.

<sup>461</sup> *Compare* *Crutchley*, 293 S.E.2d 793 (N.C. 1982), superseded by N.C. GEN. STAT. § 50-56 (2007), *with* *Faherty*, 477 A.2d 1257; *see also* 1 WALKER, 2006, *supra* note 4, at 35-36; *supra* notes 269-70, 302-09, 321-22 and accompanying text; *infra* Part III.A.18.

If New Jersey enacts the RUAA, since its modification provisions are the same as in the UAA,<sup>462</sup> presumably the same construction will apply to family law arbitrations involving child support and custody under the RUAA. AAML members report attempts to get passage of family law legislation.<sup>463</sup>

#### 17. *New Mexico's family law arbitration statute*

New Mexico has a comprehensive family law arbitration statute modeled to a certain extent on the UAA, as North Carolina's was before 2005. The New Mexico legislation is similar to the Michigan Domestic Relations Arbitration Act.<sup>464</sup>

In actions for divorce, separation, custody or parental time-sharing, child support, spouse support, marital property and debt division or attorney fees related to these, including post-judgment proceedings, parties may contract for binding arbitration in a signed agreement providing for an award for one or more of these issues:

- (1) real property valuation and division;
- (2) child support, custody, time-sharing or visitation;
- (3) spousal support;
- (4) costs, expenses and attorney fees;
- (5) enforceability of prenuptial and postnuptial agreements;
- (6) determining and allocating debt responsibility as between the parties;

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<sup>462</sup> Compare N.J. STAT. ANN. § 2A:24-8 (West 2000), with RUAA § 24. MODEL ACT § 124 tracks the RUAA, adding *id.* § 124A to provide for awards involving alimony, postseparation support, child support or child custody; see *supra* Parts II.Q.3, II.T.2. If *Faherty*, 477 A.2d 1257, continues to be the law, there may be no reason to enact § 124A's equivalent in New Jersey. On the other hand, a case can be made for using the MODEL ACT as a benchmark for add-on or comprehensive legislation for family law arbitration. The same could be said for using MODEL ACT forms and rules as guides. See *supra* Part II.B, *infra* Part IV.D.

<sup>463</sup> My thanks to AAML survey respondents Robert T. Corcoran and Laurence Cutler for comments.

<sup>464</sup> Compare N.M. STAT. ANN. § 40-4-7.2 (Lexis/Nexis 2004), with MICH. COMP. LAWS SERV. §§ 600.5070-600.5081 (Lexis/Nexis 2004 Rev.); N.C. GEN. STAT. §§ 1-567.1 - 1-567.20 (2001), 50-41 - 50-62 (2003), no longer published in the General Statutes, but reprinted in 3 WALKER, 2006, *supra* note 4, at B-1 - B-7, C-1 - C-13. William P. Lynch, *Problems with Court-Annexed Mandatory Arbitration: Illustrations from the New Mexico Experience*, 32 N. MEX. L. REV. 181 (2002), discusses and comments generally on the New Mexico ADR program.

- (7) civil tort claims related to (1)-(6); or
- (8) other contested domestic relations matters.<sup>465</sup>

The agreement to arbitrate “may set forth any standards on which an award should be based, including the law to be applied.” However, the agreement must “provide that in deciding child support issues, the arbitrator shall apply [New Mexico law] when setting or modifying a child support order.”<sup>466</sup> The agreement may provide for a broader scope of vacatur review of custody, time-sharing or visitation.<sup>467</sup> An arbitrator cannot decide issues of a criminal nature or decide petitions under the state’s Family Violence Protection Act.<sup>468</sup> Needless to say, parties cannot agree to arbitrate these issues.

A court cannot direct arbitration unless a party agrees to it. If a party is a minor, a parent must consent to arbitration; if the minor has a guardian ad litem, the guardian must consent. If the party is a minor who does not have a guardian, the court must find that arbitration is in the best interest of the minor.<sup>469</sup> Parties may agree on an arbitrator. If they cannot agree, the court must appoint an arbitrator who

- (1) is an attorney in good standing with the New Mexico state bar;
- (2) has practiced for not less than five years immediately preceding appointment and has “actively practiced in . . . domestic relations during three of those five years.” Persons serving as judges, special masters or child support officers are considered in active domestic relations practice; or
- (3) is “another professional licensed and experienced in the subject matter of the dispute.”<sup>470</sup>

Arbitrator immunity is the same as for the judge with jurisdiction of the case submitted to arbitration.<sup>471</sup> Objections to arbitrator qualifications must be raised in connection with the appointment within 10 days of an appointment, or they are waived. Parties agreeing on an arbitrator waive objection to

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<sup>465</sup> N.M. STAT. ANN. § 40-4-7.2(A) (Lexis/Nexis 2004).

<sup>466</sup> *Id.* § 40-4-7.2(N) (Lexis/Nexis 2004), referring to *id.* § 40-4-11.1 (Lexis/Nexis 2004).

<sup>467</sup> *Id.* § 40-4-7.2(T) (Lexis/Nexis 2004); *see also infra* notes 474, 484 and accompanying text.

<sup>468</sup> N.M. STAT. ANN. § 40-4-7.2(Y) (Lexis/Nexis 2004).

<sup>469</sup> *Id.* § 40-4-7.2(B) (Lexis/Nexis 2004).

<sup>470</sup> *Id.* §§ 40-4-7.2(C), 40-4-7.2(D) (Lexis/Nexis 2004).

<sup>471</sup> *Id.* § 40-4-7.2(E) (Lexis/Nexis 2004).

qualifications.<sup>472</sup> An arbitrator, attorney or party must disclose in writing circumstances that may affect an arbitrator's impartiality, "including bias, financial interests, personal interests or family relationships." After disclosure a party may request disqualification of an arbitrator. If the arbitrator does not withdraw within seven days after the request, a party may move the court for disqualification. If the court finds an arbitrator is disqualified, the court may appoint another one subject to the provisions of the agreement.<sup>473</sup> This seems to mean that if an agreement provides for choosing the arbitrator(s), parties must follow it for a replacement arbitrator. Unlike Model Act § 112, which makes failure to disclose a vacatur ground, the New Mexico statutes do not tie failure to disclose to its vacatur provisions.<sup>474</sup>

Arbitrators may hear a case and make an award on issues submitted to arbitration under the agreement. They have these powers and duties: administering oaths; subpoenaing witnesses as provided by court rule; discovery orders, including appointing experts; and allocating fees and expenses between parties, including sanctions on parties or lawyers for failing to provide information, subject to the arbitration agreement.<sup>475</sup>

The New Mexico statute, like the Model Act, provides for an administrative conference. However, the New Mexico conference is mandatory. Conference topics include scope of issues; a hearing's date, time and place; witnesses, including experts, who may testify; appointment of experts and a schedule for exchange of experts' reports or a summary of their testimony; exhibits, documents and other information that a party considers material to the case; a schedule for producing or exchanging information. Objections not made before the hearing for production or lack of it are waived. The arbitrator must order reasonable access to information, including current complete, sworn financial disclosure statements if there are financial issues; a copy of court orders concerning issues to be arbitrated; other relevant documents related to the issues; a proposed award by each party for each is-

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<sup>472</sup> *Id.* § 40-4-7.2(F) (Lexis/Nexis 2004).

<sup>473</sup> *Id.* §§ 40-4-7.2(H), 40-4-7.2(I) (Lexis/Nexis 2004).

<sup>474</sup> *Compare id.* §§ 40-4-7.2(H), 40-4-7.2(T) - 40-4-7.2(W) (Lexis/Nexis 2004) with MODEL ACT §§ 112, 123(a)(2); see also *supra* Parts II.K, II.S.

<sup>475</sup> N.M. REV. STAT. ANN. § 40-4-7.2(G) (Lexis/Nexis 2004).

sue; and opinions of experts to be used by either party or appointed by the arbitrator.<sup>476</sup>

The New Mexico statute says little about the hearing. Although no record of it is required unless a court rule or the agreement provides for it, the arbitrator may make a record for his or her use in helping reach a decision. Unless the parties waive it, a record must be made of those parts of a hearing concerning child custody, visitation or time-sharing.<sup>477</sup>

Unless an arbitrator and the parties agree otherwise in writing or on the record, the arbitrator must issue a written award on each issue within 60 days after a hearing and after receiving proposed findings of fact and conclusions of law if the arbitrator requires them.<sup>478</sup> Thus although it does not specifically say so, the New Mexico legislation contemplates a reasoned award, the Model Act default rule.<sup>479</sup> If parties agree on child custody, time-sharing or visitation, that agreement must be placed on the record by the parties under oath and included in an award.<sup>480</sup>

As in Michigan, an arbitrator may correct errors or omissions in an award upon a party's motion within 20 days after an award issues or upon the arbitrator's motion. Another party may respond to the motion within seven days. The arbitrator must rule on the motion within seven days after the response.<sup>481</sup>

Although it does not specifically say so, presumably the arbitrator does not file an award with the court. The court must enforce the award or other arbitrator order in the same manner as a court order. A party may move the court to enforce the award or order.<sup>482</sup> Any party must file a stipulated order with the court or a motion to enforce the award within 21 days after the award's

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<sup>476</sup> Compare *id.* §§ 40-4-7.2(J), 40-4-7.2(K) (Lexis/Nexis 2004), with MODEL ACT § 115(a); see also MODEL ACT, at 70-71.

<sup>477</sup> N.M. REV. STAT. ANN. §§ 40-4-7.2(L), 40-4-7.2(M) (Lexis/Nexis 2004).

<sup>478</sup> *Id.* § 40-4-7.2(O) (Lexis/Nexis 2004); see also *id.* § 40-4-7.2(K)(4) (Lexis/Nexis 2004); *supra* note 476 and accompanying text.

<sup>479</sup> MODEL ACT § 119(c); see also *supra* Part II.P.

<sup>480</sup> N.M. STAT. ANN. § 40-4-7.2(P) (Lexis/Nexis 2004).

<sup>481</sup> Compare *id.* § 40-4-7.2(Q) (Lexis/Nexis 2004), with MICH. COMP. LAWS SERV. § 600.5078(3) (Lexis/Nexis 2004 Rev.); see also *supra* note 431 and accompanying text.

<sup>482</sup> N.M. STAT. ANN. § 40-4-7.2(R) (Lexis/Nexis 2004).

issuance unless the parties otherwise agree in writing or unless the arbitrator or the court grant an extension.<sup>483</sup>

Like the Michigan and North Carolina statutes and the Model Act, the New Mexico legislation has two vacatur statutes, one for traditional vacatur grounds, and a second for child custody, time-sharing or visitation.<sup>484</sup> The first is like Model Act §§ 123(a)(1)-123(a)(4) to allow vacatur if an award was procured by corruption, fraud or other undue means; there was evident partiality by an arbitrator, or misconduct prejudicing a party's rights; the arbitrator exceeded his or her powers; or the arbitrator refused to postpone a hearing on a showing of sufficient cause or refused to hear evidence substantial and material to the controversy.<sup>485</sup> New Mexico does not tie its arbitrator disclosure rules to its general vacatur statute.<sup>486</sup> The child custody, time-sharing and visitation vacatur statute requires the court to review the award based on the record of the arbitration hearing and factual matters that have arisen after the arbitration hearing that are relevant to the claim. A custody, time-sharing or visitation award may be vacated if a court finds circumstances have changed since the award that are adverse to the best interests of the child, upon a finding that an award will cause harm or be detrimental to a child, or pursuant to a finding that the award should be vacated on traditional grounds.<sup>487</sup>

Neither statute sets a time limit for vacatur motions, unlike the Model Act, which limits assertion of traditional vacatur grounds to 90 days<sup>488</sup> but leaves open motions to modify or correct awards on issues related to alimony, postseparation support, child custody or child support. The Model Act incorporates traditional grounds indirectly insofar as they may relate to these issues.<sup>489</sup> The New Mexico statute requires the court to hear va-

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<sup>483</sup> *Id.* § 40-4-7.2(S) (Lexis/Nexis 2004).

<sup>484</sup> These are the only vacatur grounds that may be presented. *Id.* § 40-4-7.2(U) (Lexis/Nexis 2004).

<sup>485</sup> *Id.* § 40-4-7.2(V) (Lexis/Nexis 2004); *see also supra* Part II.S.

<sup>486</sup> Compare MODEL ACT §§ 112, 123(a)(2); *see also supra* Parts II.K, II.S.

<sup>487</sup> N.M. REV. STAT. ANN. § 40-4-7.2(T) (Lexis/Nexis 2004), referring to *id.* §§ 40-4-7.2(U), 40-4-7.2(V) (Lexis/Nexis 2004).

<sup>488</sup> MODEL ACT § 123(b) (allowing vacatur motions for 90 days after corruption, fraud or other undue means is known or should have become known by reasonable care of the movant); *see also supra* Part II.S.

<sup>489</sup> MODEL ACT § 124A; *see also supra* Parts II.Q.3, II.T.2.

catur and modification motions; it may order rehearing before the same arbitrator if the vacatur grant relates to an arbitrator's exceeding his or her powers, or refusal to postpone a hearing.<sup>490</sup>

Appeals from a judgment that confirms, vacates, modifies or corrects an award must be taken in the same manner as from an order or judgment in other domestic relations matters. This differs substantially from the Model Act's comparatively narrow appellate policy.<sup>491</sup> Because of the relatively open-ended opportunity for trial court review under the legislation for child custody, time-sharing and visitation, and absence of time limits for setting aside these awards, the statute serves to protect the best interests of a child throughout the New Mexico judicial review process.<sup>492</sup>

#### 18. *New York family law arbitration*

New York cases hold that child support and child custody may be arbitrable, subject to the best interest of the child. Decisions have upheld or have denied effect to arbitral awards for spousal support, support of a spouse and child, support of a child

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<sup>490</sup> N.M. REV. STAT. ANN. § 40-4-7.2(W) (Lexis/Nexis 2004); *compare* MODEL ACT § 123(c); *see also supra* Part II.S.

<sup>491</sup> N.M. REV. STAT. ANN. § 40-4-7.2(X) (Lexis/Nexis 2004); *compare* MODEL ACT § 128; *see also supra* Part II.U.

<sup>492</sup> My thanks to AAML survey respondent Virginia R. Dugan for her comments.

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alone, or child custody and visitation rights.<sup>493</sup> The state has no special family law arbitration legislation.<sup>494</sup>

19. *North Carolina's amended Family Law Arbitration Act*

In 2005, following the Model Act and the RUAA in force in North Carolina,<sup>495</sup> the legislature amended the state's Family Law Arbitration Act. The General Assembly kept the same numbering for the 2005 amendments, sandwiched in new statutes, replaced one entirely, modified several, and added provisions to others.

Rules on waivers, notice and disclosure paralleling the Model Act and the RUAA<sup>496</sup> were added. The state's provisional remedies legislation remained the same but added the Model Act and RUAA subsection that a party seeking provisional remedies does not waive a right to arbitration.<sup>497</sup> The General Assembly followed the Model Act and the RUAA in

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<sup>493</sup> *Hirsch v. Hirsch*, 333 N.E.2d 371, 373 (N.Y. 1975) (citing cases); *Frieden v. Frieden*, 802 N.Y.S.2d 727, 728 (N.Y. App. Div. 2005), *leave to appeal denied*, 849 N.E.2d 971 (N.Y. 2006); *but see, e.g., Hirsch v. Hirsch*, 774 N.Y.S.2d 48, 49 (N.Y. App. Div. 2004); *Lipsius v. Lipsius*, 673 N.Y.S.2d 458 (N.Y. App. Div. 1998); *Glauber v. Glauber*, 600 N.Y.S.2d 740, 742-43 (N.Y. App. Div. 1993) (court must determine custody, visitation in best interests of the child under *parens patriae* principles, citing N.Y. DOM. REL. LAW §§ 70 (McKinney 1999), 240 (McKinney 2008 Cum. Ann. Pocket Pt.) as requiring courts to review custody, visitation orders) although child support, visitation can be arbitrated, according to the Court of Appeals' *Hirsch* decision). New York, like many states, recognizes a public policy exception to arbitrability, but it is narrow. Statutes are another exception. *Port Jefferson Station Tchrs. Ass'n v. Brookhaven-Cornsewogue Union Free Sch. Dist.*, 383 N.E.2d 553, 554 (N.Y. 1978). New York arbitration legislation, N.Y.C.P.L.R. 7501 (McKinney 1998), has no statutory exception for family law cases.

<sup>494</sup> My thanks to AAML survey respondents David C. Boysen, Bruno Colapietro, Carol Eisenberg, Charles P. Inclima, Paul D. Pearson, Kieth I. Rieger, Irvin H. Rosenthal, Stephen W. Schlissel, Elaine R. Sheps, Bruce J. Wagner and Adam J. Wolff for their comments.

<sup>495</sup> N.C. GEN. STAT. §§ 1-569.1 - 1-569.31 (2007).

<sup>496</sup> *Compare id.* §§ 50-42.1, 50-42.2, 50-45.1 (2007), *with id.* §§ 1-569.2, 1-569.4, 1-569.12 (2007); MODEL ACT §§ 102, 104, 112 and RUAA §§ 2, 4, 12; *see also* 1 WALKER, 2006, *supra* note 4, at 8-12, 19-21; Parts II.E, II.F, II.K.

<sup>497</sup> *Compare* N.C. GEN. STAT. § 50-44(j) (2007), *with id.* § 1-569.8(c) (2007); MODEL ACT § 108(e); RUAA § 8(e); *see also* 1 WALKER, 2006, *supra* note 4, at 13-16.



replacing the consolidation statute.<sup>498</sup> Provisions for who decides on arbitrability, arbitrators' changing an award, a court's modification or correction of an award, sealing or redacting awards, the definition of "person," and the effect of electronic records or signatures, reflect the Model Act.<sup>499</sup> A subsection providing for construction rules incorporates by reference the state's former UAA, its RUAA version, its International Commercial Arbitration and Conciliation Act, and state statutory provisions governing North Carolina family law.<sup>500</sup> The Family Law Act makes explicit what should be good practice, requiring various agreements to be in writing.<sup>501</sup> An award must recite the place where the arbitration was conducted in addition to where the award was made.<sup>502</sup>

After the amendments were in force, the North Carolina Bar Association Family Law Section revised its *Handbook* to reflect legislative changes and to publish revised forms and rules to take into account the amendments and practice experience.<sup>503</sup> The Section conducted a continuing legal education program in

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<sup>498</sup> Compare N.C. GEN. STAT. § 50-50.1 (2007), with *id.* § 1-569.10 (2007); MODEL ACT § 110; RUAA § 10; former N.C. GEN. STAT. § 50-50 (2003); see also 1 WALKER, 2006, *supra* note 4, at 25-27; *supra* Part II.J.

<sup>499</sup> Compare N.C. GEN. STAT. §§ 50-43(b), 50-52, 50-55, 50-57(b), 50-59(b), 50-62(b) (2007), with *id.* §§ 1-569.1, 1-569.6(c), 1-569.6(d), 1-569.20, 1-569.24, 1-569.26; MODEL ACT §§ 101, 106(c), 106(d), 120, 124, 125(d), 126; RUAA §§ 1, 6(c), 6(d), 20, 24, 26; see also 1 WALKER, 2006, *supra* note 4, at 12-13, 29-30, 34-38.

<sup>500</sup> Compare N.C. GEN. STAT. § 50-62(a) (2007) with MODEL ACT § 120; RUAA § 29; former N.C. GEN. STAT. § 50-62 (2003); see also 1 WALKER, 2006, *supra* note 4, at 40-41; *supra* Part II.A.

<sup>501</sup> N.C. GEN. STAT. §§ 50-45(a), 50-45(d), 50-45(e), 50-46, 50-51(a) - 50-51(c), 50-51(e), 50-51(f)(1), 50-51(f)(2)(b), 50-53(a), 50-54(d), 50-56(b), 50-56(d), 50-56(e), 50-58 (2007); see also 1 WALKER, 2006, *supra* note 4, at 17-19, 21-22, 27-36, 38.

<sup>502</sup> N.C. GEN. STAT. § 50-51(a) (2007); see also 1 WALKER, 2006, *supra* note 4, at 27-29.

<sup>503</sup> See generally 1 WALKER, 2006, *supra* note 4. The new handbook also published suggested documents for use in family law arbitrations, 2 BURLISON & WALKER, *supra* note 4; 3 WALKER, 2006, *supra* note 4, reprints family law legislation and the UAA version previously in force and the 1999 handbook edition to assist parties in arbitrations under the former law and rules.

2005<sup>504</sup> and a seminar for General District Court Judges on the new legislation in 2006.<sup>505</sup>

20. *Ohio: Possibility of arbitration through rule of court*

The state Supreme Court has held that child custody and visitation matters in a divorce may not be resolved through arbitration because of the state's *parens patriae* policy; spouse and child support can be arbitrated.<sup>506</sup> However, Rule 15(B) of the Rules of Superintendence for the Courts of Ohio gives domestic relations or juvenile jurisdiction courts authority to refer a case or a designated issue to arbitration at the request of all parties. Arbitration is by agreement; the award and report must be filed with the court and can be reviewed by the court for trial *de novo*.<sup>507</sup> Rule 15(B) apart, the state does not have legislation for family law arbitration.<sup>508</sup>

21. *Oklahoma: statutory authorization for custody arbitration*

An Oklahoma statute allows joint custody to be arbitrated by agreement; the award is final until a court orders otherwise.<sup>509</sup>

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<sup>504</sup> North Carolina Bar Foundation, *supra* note 176, chs. 1-5.

<sup>505</sup> See George K. Walker, *Family Law Arbitration from the Court Perspective: A Paper prepared for the North Carolina Association of District Judges' Summer Conference, June 13-16, 2006, Wrightsville Beach, N.C.*, available on the North Carolina Bar Association Family Law Section and North Carolina Institute of Government websites. My thanks to AAML survey respondents Marcia High Armstrong; Joslin Davis; A. Doyle Early, Jr.; Howard L. Gum; Wade Harrison; Robert A. Ponton, Jr.; Robert E. Riddle; Robin J. Stinson and Mark E. Sullivan for their comments.

<sup>506</sup> *Kelm v. Kelm*, 749 N.E.2d 299, 301-04 (Ohio 2001) (noting Ohio legislation allowing courts to modify their custody and visitation orders and a trial court's continuing statutory responsibility to protect the best interests of children). *Kelm v. Kelm*, 623 N.E.2d 39, 41-43 (Ohio 1993), had decided support issues could be arbitrated by consent. The 2001 appeal emerged from a 1993 divorce and a shared parenting plan for arbitrating future disputes.

<sup>507</sup> OHIO R. SUPERINTENDENCE FOR CTS. 15(B), referring to *id.* R. 15(A).

<sup>508</sup> OHIO REV. CODE ANN. § 2711.01 (West 2000), part of Ohio's general arbitration legislation, has no exception for family law cases. My thanks to AAML survey respondents Phyllis G. Bossin, Harold R. Kemp, James R. Kirkland and David E. Lowe for their comments.

<sup>509</sup> OKLA. STAT. ANN. tit. 43, § 109H (West 2001).

Oklahoma does not otherwise provide for family law arbitration.<sup>510</sup>

## 22. Oregon's mandatory property division arbitration

As part of comprehensive court-ordered arbitration legislation,<sup>511</sup> Oregon provides for mandatory domestic relations arbitration if the only contested issue is division or other disposition of property between parties.<sup>512</sup> These cases may be exempted or removed from arbitration by the court and must not be assigned to arbitration if a court has a mediation program for these cases, and parties agree to mediate and complete that process.<sup>513</sup> If parties appear and stipulate arbitration, the court must refer the case to arbitration. In a referred case an arbitrator may grant any relief a judge can.<sup>514</sup> If parties agree on arbitration before filing suit, the procedure does not apply to that case.<sup>515</sup>

Unlike Model Act arbitrations, Oregon proceedings and records are open to the public to the same extent as a trial and its records.<sup>516</sup> Except for authority given an arbitrator, a court must determine all issues. The court retains jurisdiction over a case<sup>517</sup> but once it goes to arbitration, the arbitrator must decide mo-

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<sup>510</sup> Oklahoma now has a version of the RUAA; *see* OKLA. STAT. ANN. tit. 12, §§ 1851-81 (West Cum. Ann. Pocket Pt. 2008), with no family law cases exceptions. My thanks to AAML survey respondent Jon Hester for his comments.

<sup>511</sup> OR. REV. STAT. ANN. § 46.400 (2007) (requiring every circuit court to establish a mandatory arbitration program).

<sup>512</sup> *Id.* § 36.405 (1)(b) (2007).

<sup>513</sup> *Id.* §§ 36.405(2), 36.405(3) (2007); *see also* OR. UNIF. TR. CT. R. 13.070 (parties have 14 days after assignment to arbitration to move to exempt from arbitration). Cases assigned to arbitration are subject to pretrial settlement conferences. *Id.* 13.300.

<sup>514</sup> OR. REV. STAT. ANN. § 36.410 (2007).

<sup>515</sup> *Cf.* OR. UNIF. TR. CT. R. 13.010(1)(a), 13.010(1)(b) (rules not applicable to arbitrations by private agreement or under statute other than OR. REV. STAT. ANN. §§ 36.400 - 36.425 (2007)). Supplementary local rules not inconsistent with Rule 13 may also apply. *See, e.g.,* Monroe v. Harmon, 973 P.2d 392, 393 (Or. Ct. App. 1999).

<sup>516</sup> *Compare* OR. REV. STAT. ANN. § 36.420(2) (2007), with Basic R. 11, MODEL ACT, at 118; *see also supra* Parts II.H, II.R. If adopted by parties in an agreement to arbitrate apart from the Oregon legislation, a privacy rule would prevail.

<sup>517</sup> OR. UNIF. TR. CT. R. 13.040(1).

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tions and the like. If parties file for trial de novo, these matters may be raised again. If a party believes an arbitrator pretrial motion decision will prejudice that party, an appropriate motion can be filed with the court.<sup>518</sup>

Unless parties agree otherwise, arbitrators must be Oregon State Bar members who have been admitted to any bar for at least five years. They can be retired or senior judges. Parties can agree on nonlawyer arbitrators. Arbitrators who are not judges must be in good standing with the State Bar when appointed at the time of each appointment. They must follow the Code of Judicial Conduct, except for certain rules.<sup>519</sup> Unless parties agree otherwise, disclosures of offers or settlement may not be made to an arbitrator before announcement of an award. Counsel and parties may not communicate with an arbitrator on a case's merits except in the presence of, or on reasonable notice to, other parties.<sup>520</sup> The court may hear challenges to an arbitrator's qualifications on grounds that could not be discovered before assigning the arbitrator to a case.<sup>521</sup>

Arbitrators have broad authority while seised of a case. They may:

- (1) Decide procedural issues arising before or during a hearing, except issues related to arbitrability or arbitrator qualifications.
- (2) With reasonable notice, invite parties to submit briefs;
- (3) After notice to parties, examine sites or objects relative to the case;
- (4) Issue subpoenas, enforceable under the legislation;
- (5) Administer oaths or affirmations to witnesses;
- (6) Rule on admissibility of evidence in accordance with the arbitration rules;
- (7) Determine facts, apply the law and make an award; and perform other acts authorized by the arbitration rules;
- (8) Determine the place, time and procedure for motions to the arbitrator, including summary judgment motions;
- (9) Require a party, an attorney advising a party or both to pay reasonable expenses, including attorney fees, caused by the failure of the party, attorney or both, to obey an arbitrator's order; and

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<sup>518</sup> *Id.* 13.040(3).

<sup>519</sup> If arbitrators are suspended from practice or disbarred, they must be removed from a court's arbitrator list. They may reapply upon reinstatement or readmission. *Id.* 13.090, 13.130, omitting compliance with Rules 3-5.

<sup>520</sup> *Id.* 13.130.

<sup>521</sup> *Id.* 13.100(1).

(10) Award attorney fees as authorized by the arbitration rules, by contract or by law.<sup>522</sup>

When the court appoints an arbitrator, he or she must take an oath in writing.<sup>523</sup>

An arbitration commission establishes an arbitrator compensation schedule. If an arbitrator suggests that “extraordinary conditions justify a different fee, and the parties concur,” a fee may be adjusted. If the parties do not concur, the arbitrator must inquire of the court for an appropriate fee. Within 14 days of an arbitrator’s appointment, the parties must tender pro rata shares of a preliminary payment to the arbitrator. Regardless of whether a hearing is conducted, parties must pay a proportionate share of the fee. Arbitrators must submit itemized statements to each party. Parties must apply for relief from fee payments immediately upon a case’s becoming eligible for arbitration. The court must provide an arbitrator with a copy of an order waiving or deferring fees. Disputes on fees must be submitted to the court. Fees may be considered recoverable costs. At the end of the arbitration, the court may enter a judgment in the arbitrator’s favor and against a party who has not paid fees in accordance with the compensation schedule.<sup>524</sup>

Arbitrators supervise discovery under the civil procedure rules, and they decide discovery motions. Arbitrators must balance discovery benefits against the burdens and expense, considering a case’s complexity, amount in controversy and a possibility of unfair surprise resulting from restricting discovery.<sup>525</sup> Besides arbitrators’ subpoena power, lawyers of record may subpoena

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<sup>522</sup> *Id.* 13.100, citing OR. REV. STAT. ANN. § 36.340 (2007), OR. R. CIV. P. 56. *See also* OR. UNIF. TR. CT. R. 13.150 (attorneys of record may also issue subpoenas). *Foust v. American Std. Ins. Co.*, 74 P.3d 1111, 1117 (Or. Ct. App. 2003), citing OR. UNIF. TR. CT. R. 13.010(2), emphasizes arbitrator discretion in conducting arbitration within the statutes and rules.

<sup>523</sup> OR. UNIF. TR. CT. R. 13.110.

<sup>524</sup> OR. UNIF. TR. CT. R. 13.120, referring to OR. REV. STAT. ANN. § 36.420(3) (2007) (compensation of arbitrator, other expenses are the obligation of the parties or any of them, as provided in the Uniform Trial Court Rules, which must provide for waiver). *See also* OR. TR. CT. R. 13.030, requiring an arbitration commission in each court, to include judge and attorney members and the court administrator ex officio.

<sup>525</sup> *Id.* 13.140.

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witness attendance at hearings or to produce documents at a hearing.<sup>526</sup>

At least 14 days before a hearing, parties must submit to the arbitrator and serve parties: lists of exhibits, which upon request must be available for other parties' inspection and copying; witness lists and matters about which the witness will testify; and time estimates for the hearing. Parties must submit copies of their pleadings and documents in the court file they consider relevant to the arbitrator. Failure to comply with these rules or a discovery order will result in a party's being denied an opportunity to present any witness or exhibit required to be disclosed or made available, unless the arbitrator rules otherwise.<sup>527</sup>

The arbitrator sets the date, time and place of a hearing, which usually comes within 14 to 49 days after assignment to arbitration. With the parties' agreement, an arbitrator may continue or postpone a hearing within the 49-day limit; extensions beyond that require judicial approval. The practice rules contemplate that the process should take no more than two months.<sup>528</sup>

Hearings must be "informal and expeditious." A party or the arbitrator may record the hearing; this expense is not a recoverable cost. The arbitrator determines the extent to which the rules of evidence apply. Arbitrators may question witnesses.<sup>529</sup> The hearing is open to the public like trials.<sup>530</sup> If a party is absent without due notice and does not get a postponement or continuance, a hearing may go forward to award. If a defendant is not present, the arbitrator must require the plaintiff to submit evidence sufficient to support an award. For good cause shown, an arbitrator may give an absent party a chance to appear at a later hearing before making an award.<sup>531</sup>

The award must be in writing on a court-prescribed form and signed by the arbitrator. Findings of fact, conclusions of law and written opinions are not required. The arbitrator must deter-

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<sup>526</sup> *Id.* 13.150; *see also id.* 13.100(4), referring to OR. REV. STAT. ANN. § 36.340 (2007).

<sup>527</sup> OR. UNIF. TR. CT. R. 13.170; *see also id.* 13.190.

<sup>528</sup> Court administrators must be given notice of continuances. *Id.* 13.160.

<sup>529</sup> *Id.* 13.160.

<sup>530</sup> OR. REV. STAT. ANN. § 36.420(2) (2007).

<sup>531</sup> OR. UNIF. TR. CT. R. 13.200.

mine issues the pleadings raise, including damages, costs and attorney fees if allowed by law. Within seven days after the hearing, the arbitrator must send the award to the parties without filing it with the court. In dissolution cases the arbitrator must also direct a party to prepare and submit a form of judgment. If a party requests it, the arbitrator must give parties an opportunity to be heard on the form of the judgment. The arbitrator must then approve a judgment and file the award with the approved form of judgment.<sup>532</sup>

The arbitrator must file an award and proof of service of it with the trial court administrator within 21 days in a dissolution case and within 14 days for others. An arbitrator may file an amended award to correct obvious errors during the filing period. After filing the award, the administrator must return documents and exhibits to the parties offering them. Other documents and materials must be delivered to the trial court administrator. Parties must retain exhibits the arbitrator returns until there is a final judgment in a case.<sup>533</sup>

If no one requests trial de novo, the arbitration decision and award will be entered as a judgment and cannot be appealed.<sup>534</sup> A party may obtain trial de novo by completing service, filing and fee payments and deposit requirements.<sup>535</sup> The award is sealed if trial de novo is requested and will not be opened until after a jury verdict or a judge's decision in the case.<sup>536</sup>

Given the time limits, *i.e.*, completion of court-ordered arbitration within two months and no requirement of findings of fact and conclusions of law,<sup>537</sup> the Oregon statutory formula for arbitration contemplates relatively simple, straightforward property division cases. More complex cases may require more time; if children are involved, there is a problem of no findings upon

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<sup>532</sup> *Id.* 13.210.

<sup>533</sup> The trial court administrator rules on an arbitrator's request for a time extension to file an award, subject to presiding judge review. The arbitrator must notify parties of extensions. *Id.* 13.220. *See also* OR. REV. STAT. ANN. § 36.425(1) (2007).

<sup>534</sup> OR. REV. STAT. ANN. § 36.425(3) (2007); OR. UNIF. TR. CT. R. 13.240.

<sup>535</sup> OR. REV. STAT. ANN. § 36.425(2) (2007); OR. UNIF. TR. CT. R. 13.250. Parties who do not participate in the arbitration hearing may appeal and request trial de novo. *Monroe*, 973 P.2d at 394.

<sup>536</sup> OR. UNIF. TR. CT. R. 13.260.

<sup>537</sup> *See supra* notes 528-33 and accompanying text.

which a court could conduct meaningful review. It is well, therefore, that the associated practice rules exclude disputes to be arbitrated by the parties' agreement, and those subject to other legislation.<sup>538</sup> It is another question whether Oregon would benefit from separate family law arbitration legislation.<sup>539</sup>

23. *Pennsylvania family law arbitration under its UAA*

In Pennsylvania, all family law issues except child support and custody may be arbitrated by agreement<sup>540</sup> under the Pennsylvania Uniform Arbitration Act.<sup>541</sup>

24. *South Carolina: Arbitrating all issues except child custody and support*

In South Carolina all issues other than child custody and support may be arbitrated.<sup>542</sup> Cases may begin in mediation and move to binding arbitration if there is impasse.<sup>543</sup>

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<sup>538</sup> See *supra* note 515 and accompanying text.

<sup>539</sup> My thanks to AAML survey respondents John C. Gartland and Mark Johnson for their comments.

<sup>540</sup> See, e.g., *Miller v. Miller*, 620 A.2d 1161, 1163-64 (Pa. Super. Ct. 1993), *inter alia* citing *Knorr v. Knorr*, 588 A.2d 503, 505 (Pa. 1991), which declared that arbitration cannot take away from the court its right to inquire as to the best interests of the child in a custody award. *Ferguson v. McKiernan*, 940 A.2d 1236, 1247-48 (Pa. 2007) (3-2) cited *Knorr*, reaffirmed the best interests principle but declined to apply it in an artificial insemination contract case where the donor relinquished visitation rights and the mother sought support.

<sup>541</sup> *Kennedy v. Kennedy*, 865 A.2d 878 (Pa. Super. Ct. 2004) is an example of family law arbitration under the Pennsylvania UAA, 42 PA. STAT. ANN. §§ 7301-20 (West 2007); *Kennedy* involved decided issues related to marital property and equitable distribution and held the trial court had authority to modify the award under *id.* § 7315 (West 2007) vacatur provisions. My thanks to AAML survey respondents Frederick Cohen, Mary Cushing Doherty, Michael E. Fingerman, Lynne Z. Gold-Bikin, Neil Hurowitz, Albert Momjian and Michael R. Sweeney for their comments.

<sup>542</sup> *Swentor v. Swentor*, 520 S.E.2d 330, 334-38 (S.C. Ct. App. 1999), applying S.C. CODE ANN. §§ 15-48-10 - 15-48-240 (1999).

<sup>543</sup> My thanks to AAML survey respondents Ken H. Lester and Robert N. Rosen for their comments.



25. *South Dakota's arbitration provision for medical services*

South Dakota legislation allows natural parents with custody of a minor child to enter into a binding arbitration agreement on behalf of the child for medical services.<sup>544</sup> In other respects the state does not have family law arbitration statutes, although a task force has examined the issue.<sup>545</sup>

26. *Tennessee*

Although Tennessee statutes recite a possibility of court-appointed arbitrators for child custody and visitation purposes, the emphasis may be on other dispute resolution techniques, *e.g.*, mediation. No reported case cites arbitration as being used.<sup>546</sup> No other legislation governs family law arbitrations.<sup>547</sup>

27. *Texas' Alternative Dispute Resolution Act*

Texas' Alternative Dispute Resolution Procedures Act,<sup>548</sup> in force since 1987,<sup>549</sup> allows family law arbitration. Like the North Carolina Act, the Texas statute has a policy statement favoring "peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship," including mediation involving conservatorship, possession and child support, and early settlement of pending litigation through voluntary settlement procedures.<sup>550</sup> The state "strongly encourages alternative dispute resolution, particularly in family law mat-

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<sup>544</sup> S.D. CODIFIED LAWS § 21-25B-2 (2004).

<sup>545</sup> My thanks to AAML survey respondent Linda Lea M. Viken for her comments.

<sup>546</sup> TENN. CODE ANN. §§ 36-6-402(1), 36-6-409 (Lexis/Nexis 2005).

<sup>547</sup> Tennessee arbitration statutes do not provide for excluding family law cases. *See* TENN. CODE ANN. §§ 29-5-101, 29-5-302 (2000). My thanks for comments from AAML survey respondents David E. Caywood and Lewis H. Conner, Jr., who indicated Tennessee may not be ready for matrimonial arbitration.

<sup>548</sup> Texas Alternative Dispute Resolution Procedures Act, TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.001 - 154.073 (Vernon 2005) (hereinafter Texas ADR Act).

<sup>549</sup> John Compere, *Texas Alternative Dispute Resolution Procedures and Family Law* 1 (2006) (copy on file with author), surveys the Texas ADR Act, with emphasis on family law ADR options.

<sup>550</sup> Texas ADR Act, TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (Vernon 2005).

ters.”<sup>551</sup> Texas courts and court administrators are responsible for carrying out this policy.<sup>552</sup>

On its own or a party’s motion, a court can refer a pending dispute to an ADR procedure, including an ADR system, a dispute resolution organization or an independent third party qualified under the Texas ADR Act. The court must confer with the parties to determine the most appropriate procedure.<sup>553</sup> If a court decides a dispute is appropriate for referral, the court must notify the parties. After receiving notice, a party has 10 days to file written objection to referral. If the court finds a reasonable basis for the objection, the court may not refer the dispute.<sup>554</sup> Litigants can be forced to participate in ADR, but they cannot be forced to make good-faith efforts to settle their case during the procedure. The Act contemplates mandatory referral but not mandatory negotiation.<sup>555</sup> The ADR options are mediation, mini-trial, moderated settlement conference, summary jury trial and arbitration.<sup>556</sup>

If the court refers a pending dispute for ADR, it may appoint an impartial third party to facilitate the chosen procedure. The parties may agree on the impartial third party if he or she is qualified under the Texas Act.<sup>557</sup> To qualify, a person must com-

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<sup>551</sup> *Mason v. Mason*, 256 S.W.3d 716, 717 (Tex. Civ. App. 2008) (per curiam), citing TEX. CIV. PRAC. & REM. CODE § 154.002 (Vernon 2005), TEX. FAMILY CODE §§ 6.601, 153.0071 (Vernon 2005 & Supp. 2007) (trial court order confirming binding arbitration order during pendency of a divorce, other proceedings may not be challenged during pendency of divorce).

<sup>552</sup> Texas ADR Act, TEX. CIV. PRAC. & REM. CODE ANN. § 154.003 (Vernon 2005). See also *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 268 (Tex. 1992) (supporting use of arbitration as voluntary settlement procedure, inter alia citing Tex. ADR Act, TEX. CIV. PRAC. & REM. CODE ANN. § 154.003).

<sup>553</sup> A court may not refer a case if a venue transfer or special appearance motion is pending. Texas ADR Act, TEX. CIV. PRAC. & REM. CODE ANN. § 154.021 (Vernon 2005).

<sup>554</sup> *Id.* § 154.022. The court or counsel may recommend that a case be referred to ADR, but the court may refuse referral if it determines that the proposed referral would not benefit the court or parties and would delay orderly disposition of a case. *Downey v. Gregory*, 757 S.W.2d 524, 525 (Tex. Civ. App. 1988).

<sup>555</sup> *Decker v. Lindsey*, 824 S.W.2d 247, 250-51 (Tex. Civ. App. 1992).

<sup>556</sup> Texas ADR Act, TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.023-154.027 (Vernon 2005).

<sup>557</sup> *Id.* § 154.051.

plete a 40-hour minimum of classroom training in dispute resolution techniques in a course conducted by an ADR system or other dispute resolution organization approved by the appointing court. To qualify for cases involving parent-child relationship disputes, 24 more hours of training in family dynamics, child development and family law is necessary. In its discretion a court may appoint an impartial third party not qualified under the Act “in appropriate circumstances when the appointment is based on legal or other professional training or experience and, particularly, dispute resolution processes.”<sup>558</sup> These third parties must encourage and assist settlement but may not compel or coerce settlement. They may not disclose to either litigant information given in confidence by the other unless the disclosing litigant expressly authorizes it. They must maintain confidentiality for communications related to the dispute. All matters, including parties’ and counsel’s conduct and demeanor during the process, are confidential and may never be disclosed to anyone, including an appointing court, unless parties agree otherwise.<sup>559</sup> The court may set a reasonable fee for services of a third party appointed under the Act; the court taxes the fee as costs unless the parties agree otherwise.<sup>560</sup> Third parties have qualified immunity from civil liability for acts or omissions within the course and scope of duties of a volunteer impartial third party who does not receive compensation in excess of reimbursement of expenses.<sup>561</sup>

Parties retain the right to settle by signed, written agreement, which is enforceable in the same manner as any other written contract. The court has discretion to incorporate its terms in a final decree or order disposing of the case. A settlement does not affect outstanding court orders unless its terms are incorporated into a later decree or order.<sup>562</sup>

Arbitration under the Texas ADR Act can be binding or nonbinding, depending on the parties’ agreement. If there is no

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<sup>558</sup> *Id.* § 154.052.

<sup>559</sup> *Id.* § 154.053; *see also id.*, § 154.073.

<sup>560</sup> *Id.* § 154.054.

<sup>561</sup> *Id.* § 154.055.

<sup>562</sup> *Id.* § 154.071. Settlements may also be made in open court and entered of record. TEX. R. CIV. P. 11.

advance stipulation, the agreement is nonbinding and serves only as a basis for the parties' further settlement negotiations.<sup>563</sup>

There are four Texas family law ADR procedures: mediation, arbitration, collaborative law and informal settlement conference. These can be modified, combined and specifically tailored for a case.<sup>564</sup> Many family law attorneys successfully use mediation/arbitration, resolving most issues by mediating and ending by arbitrating remaining issues. This option is accomplished through appropriate clauses in the agreement.<sup>565</sup>

Upon the parties' written agreement,<sup>566</sup> a court may refer cases under the Texas Family Code to arbitration. The agreement must recite whether the arbitration is binding or nonbinding.<sup>567</sup> If parties agree on the former, the court must render an order reflecting the arbitral award unless the court determines in a non-jury hearing that the award is not in the best interest of the child. The burden of proof is on a party seeking to avoid rendering of an order based on the award.<sup>568</sup> Because the Family Code is silent on options available to the court if there is a motion to vacate, the trial court does not have discretion to rule on a claim or controversy that the parties agreed to submit to arbitration; its only options are rendering an order reflecting the award or re-

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<sup>563</sup> TEX. ADR ACT, TEX. CIV. PRAC. & REM. CODE ANN. § 154.027 (Vernon 2005). Prenuptial agreements can include arbitration clauses. *See Koch v. Koch*, 27 S.W.3d 93, 95 (Tex. App. 2000). Parties can agree to resolve marital disputes by religious arbitration under the Texas General Arbitration Act, TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.001-171.098 (Vernon 2005). *See Jabri v. Qaddura*, 108 S.W.3d 404 (Tex. App. 2003). They can agree to arbitrate after mediation impasse. *See generally Pettus v. Pettus*, 237 S.W.3d 405 (Tex. Civ. App. 2007).

<sup>564</sup> Compere, *supra* note 549, at 7. The ensuing analysis concentrates on arbitration; for discussion of the others, see *id.* 8-12, 13-15.

<sup>565</sup> *Id.* 13.

<sup>566</sup> *See supra* note 562 and accompanying text.

<sup>567</sup> *See also supra* note 563 and accompanying text.

<sup>568</sup> TEX. FAM. CODE ANN. §§ 6.601 (Vernon 2006), 153.0071 (Vernon 2008 Supp.), referring to *id.* titles 1, 5 (Vernon 2005); *see also Cooper v. Bushong*, 10 S.W.3d 20, 25 (Tex. App. 1999) (limited power of court to change award, *e.g.*, only for evident mistake or miscalculation, arbitrator decided issue not submitted to arbitration, or form of the award). MODEL ACT § 123(a)(7) and N.C. GEN. STAT. § 50-54(a)(6) (2007), follow TEX. FAM. CODE ANN. § 153.0071 on the burden of proof rule. *See also supra* Part II.Q; *supra* note 301 and accompanying text.

mitting the issue to the arbitrator for rehearing.<sup>569</sup> Under the Model and North Carolina Acts, the court may decide on the best interest of the child itself, remit the issue to the arbitrator, or refer it to another arbitrator if the parties agree on this option.<sup>570</sup>

### 28. Vermont's use of its general arbitration act

Vermont's Arbitration Act is modeled on the UAA.<sup>571</sup> A provision, not in the UAA, says agreements to arbitrate are valid only if there is a written acknowledgment signed by each party or a party representative.<sup>572</sup> One reported case notes that the Vermont Act has been used to arbitrate distribution of a marital estate and for spousal maintenance after divorce. No children were involved.<sup>573</sup>

### 29. Virginia uses its UAA for family law cases

In Virginia, the Commonwealth's UAA version has been used to arbitrate a family law case, even with respect to findings to support a divorce decree; spousal support and division of marital property were also issues;<sup>574</sup> child support and custody were not.<sup>575</sup> No separate statute provides for family law arbitration.<sup>576</sup>

<sup>569</sup> Stieren v. McBroom, 103 S.W.3d 602, 606 (Tex. App. 2003).

<sup>570</sup> MODEL ACT §§ 124A(c)-124A(f), referring to *id.* §§ 111, 120, 122-24A; N.C. GEN. STAT. §§ 50-56(c) - 50-56(f) (2007), referring to *id.* §§ 50-13.7, 50-45, 50-52 - 50-56 (2007); *see also supra* Parts II.Q.3, II.T.2. My thanks to AAML survey respondents Leota H. Alexander, Steve A. Bavousett, Martha Flowers Bourne, John Compere, William A. Dudley, Michael P. Geary, Thomas A. Greenwald, Ellen E. Grimes, Charles E. Hardy, Joan F. Jenkins, Larry L. Martin, Susan Myres, Gary L. Nickelson, Barbara D. Nunneley, Barbara K. Runge, Larry H. Schwartz and Norma Levine Trusch for their comments.

<sup>571</sup> VT. STAT. ANN. tit. 12, §§ 5651-81 (2002).

<sup>572</sup> *Id.* tit. 12, § 5652(b).

<sup>573</sup> Brinckerhoff v. Brinckerhoff, 889 A.2d 701, 704 (Vt. 2005) (repeating "strong [Vermont] tradition of upholding arbitration awards wherever possible"). My thanks to Debra R. Schoenberg for comments.

<sup>574</sup> *Bandas v. Bandas*, 430 S.E.2d 706, 707-12 (Va. Ct. App. 1993) (case of first impression).

<sup>575</sup> *Patin v. Patin*, 45 Va. Cir. 519, 1998 WL 972221 (Fairfax Co. Cir. Ct. 1998) distinguished *Bandas*, declaring the best interests of a minor child was a public policy factor against finality of an award for child support and custody, citing *Kelley v. Kelley*, 449 S.E.2d 55, 56-57 (Va. 1994), which had held null and void an agreement in which a husband attempted to contract away his legal duty to support his minor children.

30. *Washington State legislation for parenting plan cases*

In Washington State arbitration is allowed through special legislation for parenting plan cases.<sup>577</sup> If the Superior Court judges so vote in a county authorizing mandatory arbitration of civil cases, cases involving establishment, termination or modification of maintenance or child support payments may be arbitrated. Awards in these cases are subject to trial de novo and the traditional appeal route.<sup>578</sup> Arbitration in parenting plan disputes and establishment, termination or maintenance modification or child support cases cannot be binding, however. Parties must have access to a court for a final ruling.<sup>579</sup>

31. *Wisconsin: Arbitration subject to judicial review*

Binding matrimonial law arbitration by agreement under that state's ADR statute is permitted in Wisconsin; child custody and support and related issues are among those subject to judicial confirmation of an award, which must include detailed findings of fact.<sup>580</sup> Awards under Wisconsin's UAA in marital property division cases are also subject to judicial review.<sup>581</sup>

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<sup>576</sup> My thanks to AAML survey respondents Iona E. (Freedman) Grenadier, Nan M. Joseph, David D. Masterman, Burke F. McCahill and Carl J. Witmeyer, II for their comments.

<sup>577</sup> WASH. REV. CODE § 26.09.184(4) (West 2008 Cum. Ann. Pocket Pt.).

<sup>578</sup> *Id.* §§ 7.06.020(2), 7.06.050 (West 2007); *see also id.* § 26.09.175 (West 2005).

<sup>579</sup> *In re Smith-Bartlett*, 976 P.2d 173, 176-79 (Wash. Ct. App. 1999) (distinguishing parenting plan and establishment, termination or maintenance modification or child support, and voluntary binding arbitration under UAA predecessor to WASH. REV. CODE §§ 7.04A.010-7.04A.903 (West 2007), that state's version of the RUAA). My thanks to AAML survey respondent Lawrence R. Besk for his comments.

<sup>580</sup> WIS. STAT. ANN. § 802.12(3) (West 2007 Cum. Ann. Pocket Pt.).

<sup>581</sup> *Franke v. Franke*, 674 N.W.2d 832, 836-52 (Wis. 2004), *inter alia* referring to WIS. STAT. ANN. §§ 788.10, 788.11, 788.14 (part of the Wisconsin Arbitration Act, *id.* §§ 788.01-788.18 (West 2001, 2007 Cum. Ann. Pocket Pt.), which is similar to the UAA §§ 1-25, 802.12(3)(c) (West 2007 Cum. Ann. Pocket Pt.), and Wisconsin case law and general marital property division legislation. My thanks to AAML survey respondents C. Michael Hausman, Gregg M. Herman and Carlton D. Stansbury for their comments.

32. *Wyoming: A possibility of family law arbitration*

Wyoming's UAA, modeled on the UAA,<sup>582</sup> can be used to arbitrate family law cases,<sup>583</sup> but decisions interpreting settlement agreements where arbitration was not a factor suggest that a Wyoming court will consider the best interests of the child when custody, visitation, child support are at issue, and spousal needs if alimony is an issue.<sup>584</sup> A family business dispute intertwined with a previous divorce and committed to arbitration is not subject to these limitations, however.<sup>585</sup> Mediation usually resolves family law disputes.<sup>586</sup>

B. *Recent Statutes and Initiatives for Legislation*

New family law legislation governing arbitration has passed in Connecticut, Georgia, Indiana and New Mexico since publication of the Model Act.<sup>587</sup> None follows the Model Act. North Carolina's Family Law Arbitration Act was overhauled in 2005 to reflect that state's RUAA version and the Model Act.<sup>588</sup> Initiatives for new legislation may result in bills in the Kentucky, Massachusetts, New Jersey, South Dakota and perhaps other legislatures.<sup>589</sup>

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<sup>582</sup> Compare WYO. STAT. ANN. §§ 1-36-101 - 1-36-119 (2007), with UAA §§ 1-25.

<sup>583</sup> *Scherer v. Scherer*, 931 P.2d 251, 253-54 (Wyo. 1997), *overruled on other grounds*, *Vaughn v. State*, 962 P.2d 149, 151-53 (Wyo. 1998), held that an "informal" divorce proceeding which included child custody and property division issues was not binding arbitration controlled by the UAA where the parties and the trial court never invoked the Act, the record did not refer to an arbitration agreement, and the court acknowledged that issues were appealable.

<sup>584</sup> *Cf. Eickbush v. Eickbush*, 171 P.3d 509, 511-14 (Wyo. 2007), *inter alia* citing *Scherer*, 931 P.2d at 253-54.

<sup>585</sup> *Welty v. Brady*, 123 P.2d 920, 924-29 (Wyo. 2005), applying Wyoming Uniform Arbitration Act vacatur and appellate review standards.

<sup>586</sup> WYO. R. CIV. P. 40(b). *Id.* Rule 40(c) retains the arbitration option. My thanks to AAML survey respondent John A. Thomas for his comments.

<sup>587</sup> *See supra* Parts III.A.4, III.A.7, III.A.8, III.A.17.

<sup>588</sup> *See supra* Part III.A.19.

<sup>589</sup> In Georgia an initiative for separate family law legislation following the MODEL ACT resulted in a statute incorporating the state's general arbitration code. *See supra* Part III.A.7.

1. *AAML initiative in Kentucky*

Kentucky AAML members plan to promote a bill to allow family law arbitration, perhaps based on the Model Act.<sup>590</sup>

2. *Draft bill to enact the Model Act in Massachusetts*

Although mediation is the hot topic in Massachusetts today,<sup>591</sup> there is a possibility that legislation based on the Model Act may be enacted in a future legislative session with Massachusetts AAML Chapter support.<sup>592</sup>

Massachusetts courts have ruled on family law arbitration issues. Although a court may order parties to arbitrate personal property division, the resulting award cannot bind the parties. The award is recommendatory, since the parties did not agree to arbitrate, but the court may use it as a basis for its decision.<sup>593</sup> If the parties do agree to arbitrate disputes arising from a separation agreement, the courts will enforce the arbitral award.<sup>594</sup> Agreements to arbitrate are not against Massachusetts public policy, and an award for child support, alimony and a spouse's interest in a trust is enforceable, although a court must review the support and alimony aspects of the award to determine that they are fair and reasonable.<sup>595</sup>

This Part compares this draft legislation with the Model Act and follows the Part II Model Act analysis, to which references are made.

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<sup>590</sup> See Scaggs, *supra* note 11; my thanks, also to Diana L. Scaggs and Bonnie M. Brown, AAML survey respondents.

<sup>591</sup> My thanks to AAML survey respondents Stephen D. Fried, who reports mediation is the hot topic in the Commonwealth, and Rudolf A. Jaworski for their comments.

<sup>592</sup> My thanks to outgoing AAML Arbitration Committee chair William M. Levine for sending a copy of a Massachusetts Family Law Arbitration Act (hereinafter Draft Massachusetts Act), proposed by the Massachusetts AAML Chapter. Letter from William M. Levine to the author, Oct. 16, 2008, enclosing Draft Massachusetts Act, *supra*, copy in author's file.

<sup>593</sup> *Gustin v. Gustin*, 420 N.E.2d 610, 612 (Mass. 1995).

<sup>594</sup> *Kutz v. Kutz*, 341 N.E.2d 682 (Mass. 1976).

<sup>595</sup> *Reynolds*, 663 N.E.2d at 868-71.



a. *Policy of the Act; linkage to substantive family law statutes and other arbitration legislation*

The Draft Massachusetts Act's policy statement and jurisdictional provision track the Model Act. The Massachusetts venue provision copies only the first sentence of the Model Act venue statute. The Draft Massachusetts Act does not include Model Act § 129's provision for uniformity of interpretation.<sup>596</sup>

b. *Forms, rules and documents to be used with family law arbitrations*

Since forms and rules to be used with arbitration are not part of arbitration legislation, the Massachusetts draft does not touch upon them. If the Draft Act becomes law, consideration might be given to the Model Act forms and rules.<sup>597</sup>

c. *When the Act applies*

The Draft Massachusetts Act tracks the Model Act on when the legislation applies to an arbitration.<sup>598</sup>

d. *Definitions*

The Draft Massachusetts Act follows Model Act on definitions but substitutes a definition for "agreement" for the Model Act definition of "record," which is based on the RUAA.<sup>599</sup>

e. *Notice*

The Draft Massachusetts Act tracks the Model Act notice rules.<sup>600</sup>

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<sup>596</sup> Compare Draft Massachusetts Act, *supra* note 590, §§ 101(a), 126, 127, with MODEL ACT §§ 101(a), 126, 127, 129; *see also supra* Part II.A.

<sup>597</sup> *See supra* Part II.B.

<sup>598</sup> Compare Draft Massachusetts Act, *supra* note 592, § 103, with MODEL ACT § 103; *see also supra* Part II.C.

<sup>599</sup> Compare Draft Massachusetts Act, *supra* note 592, § 101(b), with MODEL ACT § 101(b); *see also supra* Part II.D.

<sup>600</sup> Compare Draft Massachusetts Act, *supra* note 592, § 102, with MODEL ACT § 102; *see also supra* Part II.E.

f. *Waivers of or varying the effect of the Act's provisions and protections*

Aside from omitting a Model Act waiver provision dealing with waiving counsel in a labor dispute, a RUAA provision carried over into the Model Act on the odd chance of a consolidated proceeding, the Draft Massachusetts Act copies the Model Act's waiver rules.<sup>601</sup>

g. *Validity of an agreement to arbitrate*

Massachusetts' draft provision for the scope of an agreement to arbitrate omits the possibility of a prenuptial agreement for arbitration. In other respects, the Draft Act is the same as the Model Act.<sup>602</sup>

h. *Provisional remedies*

The Draft Massachusetts Act and the Model Act have the same rules for provisional remedies.<sup>603</sup>

i. *Beginning arbitration*

The Draft Massachusetts Act and Model Act provisions for initiating arbitration are the same.<sup>604</sup>

j. *Consolidating arbitrations*

The Draft Massachusetts Act and Model Act provisions for consolidating arbitrations are the same.<sup>605</sup> The Massachusetts UAA has a special consolidation provision,<sup>606</sup> which does not spell out the result if parties contract to opt out of consolidation, which is allowed under the RUAA, the Model Act and the Draft Act. The Draft Act has a much better provision.

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<sup>601</sup> Compare Draft Massachusetts Act, *supra* note 592, § 104, with MODEL ACT § 104; see also *supra* Part II.F.

<sup>602</sup> Compare Draft Massachusetts Act, *supra* note 592, § 106, with MODEL ACT § 106; see also *supra* Part II.G.

<sup>603</sup> Compare Draft Massachusetts Act, *supra* note 592, § 108, with MODEL ACT § 108; see also *supra* Part II.H.

<sup>604</sup> Compare Draft Massachusetts Act, *supra* note 592, § 109, with MODEL ACT § 109; see also *supra* Part II.I.

<sup>605</sup> Compare Draft Massachusetts Act, *supra* note 592, § 110, with MODEL ACT § 110; see also *supra* Part II.J.

<sup>606</sup> MASS. GEN. LAWS ANN. ch. 251, § 2A (2004).

k. *The arbitrator(s)*

The Draft Massachusetts Act provisions for arbitrator appointment, service as a neutral arbitrator, disclosure of conflicts of interests involving arbitrators, arbitrator voting, and arbitrator immunity are the same as those in the Model Act.<sup>607</sup>

l. *Arbitration site*

No Draft Massachusetts Act or Model Act provision recites rules for the site of a family law arbitration; however, Part II.L strongly counsels parties to conduct all parts of an arbitration within the territory of the state where the underlying family law case is in the courts.

m. *Administrative conference; discovery; summary disposition*

Except for specific reference to Massachusetts Rule for Domestic Relations Procedure 56, summary judgment standards in connection with summary disposition of a matter by an arbitrator, the Draft Massachusetts Act follows Model Act provisions for administrative conferences, discovery and summary disposition.<sup>608</sup>

n. *Evidence and procedure*

Like the Model Act, the Draft Massachusetts Act says little about evidence rules and procedure, which must be covered by arbitration rules in a particular case. The Draft Act follows the Model Act policy for a reasoned award, however.<sup>609</sup>

o. *The hearing*

Likewise, the Draft Massachusetts Act copies the Model Act and says little about the principal hearing, *i.e.*, the “trial” in an arbitration proceeding. That is a matter for arbitration rules the parties choose for the procedure.<sup>610</sup>

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<sup>607</sup> Compare Draft Massachusetts Act, *supra* note 592, §§ 111-14, with MODEL ACT §§ 111-14; *see also supra* Part II.K.

<sup>608</sup> Compare Draft Massachusetts Act, *supra* note 592, §§ 115, 117, with MODEL ACT §§ 115, 117; *see also supra* Part II.M.

<sup>609</sup> Compare Draft Massachusetts Act, *supra* note 592, § 119(c), with MODEL ACT § 119(c); *see also supra* Part II.N.

<sup>610</sup> *See supra* Part II.O.

p. *The award*

The Draft Massachusetts Act provisions for the arbitral award and remedies and fees and expenses of arbitration are the same as in the Model Act, except that the Model Act subsections §§ 121(b) and 121(e) on attorneys' fees and punitive damages are omitted.<sup>611</sup>

q. *Arbitrator modification or correction of an award*

The Draft Massachusetts Act follows the Model Act on traditional grounds for an arbitrator's modifying or correcting an award. It also tracks the Model Act on circumstances when a court may remit an award to an arbitrator for correction or modification. The Draft Act follows Model Act §§ 124A(a), which provides that an arbitral award for alimony, child custody or child support may be modified by a court or an arbitrator if a court could do so notwithstanding arbitration. Draft Act § 124A(c) essentially follows Model Act § 124A(c), although in different language. Draft Act §§ 124A(d) and 124A(e) track Model Act §§ 124A(d) and 124A(e), omitting reference to post-separation support. The Draft Act also follows Model Act § 124A(f), which says that the standard grounds for modifying or correcting an award also apply to § 124A modification procedures. Following Massachusetts law, Draft Act § 124A(b) flatly says that an award by arbitrators for alimony may be modified by a court upon a complaint for modification; Model Act § 124A(b) contemplated situations where parties could lawfully agree to nonmodifiable postseparation support or alimony.<sup>612</sup> This variance is not surprising; rules and language governing custody and support of children or spouses vary greatly, including provisions for court review of agreements. This is an illustration of a point made earlier, that the Model Act is just that, *i.e.*, suggested legislation; it is not a monument immutably cast in concrete.

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<sup>611</sup> Compare Draft Massachusetts Act, *supra* note 592, §§ 119, 121, with MODEL ACT §§ 119, 121; *see also supra* Part II.P.

<sup>612</sup> Compare Draft Massachusetts Act, *supra* note 592, § 124A, with MODEL ACT § 124A; *see also supra* Part II.Q.

r. *Confirming an award; judgment on an award*

Aside from changes in wording and a reworked Model Act § 125(d) to reflect the Massachusetts law of impoundment, as distinguished from Model Act usage of sealing and redacting judgments, which is reflective of North Carolina law and perhaps the law of other states, the Draft Massachusetts Act and the Model Act are the same.<sup>613</sup> This is another example of good drafting to account for a state's variants on the law while preserving the essential features of family law arbitration.

s. *Vacatur*

The Draft Massachusetts Act varies from Model Act vacatur standards in several respects. Section 123(a)(2)(A) is shortened to "evident partiality by an arbitrator"; omitted is the qualification for arbitrators appointed as neutrals. This omission might cause problems if a family law arbitration is consolidated under § 110 with a business arbitration whose agreement allows appointment of non-neutral arbitrators. Admittedly this phenomenon might be rare in practice, but keeping the Model Act § 123(a)(2)(A) language might account for this rare case. On the other hand, under the Massachusetts draft parties would be required to reconsider and perhaps renegotiate the business arbitration agreement to remove provisions for non-neutral arbitrators.<sup>614</sup> Provisions governing an arbitrator's failure to postpone a hearing upon showing of sufficient cause and vacating an award for punitive damages are not in the Massachusetts draft. Significantly, the Draft Massachusetts Act follows the Model Act in allowing vacatur for errors of law if parties contract for it.<sup>615</sup>

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<sup>613</sup> Compare Draft Massachusetts Act, *supra* note 592, § 106, with MODEL ACT § 106; see also *supra* Parts II.G, II.R.

<sup>614</sup> See also *supra* Parts II.J, III.2.j.

<sup>615</sup> Compare Draft Massachusetts Act, *supra* note 592, § 123, with MODEL ACT § 123; see also *supra* Part II.S, which also discusses nonstatutory vacatur grounds.

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t. *Court modification or correction of an award*

As analyzed in Part II.B.3.q, Draft Massachusetts Act §§ 124 and 124A differ in some respects from Model Act §§ 124 and 124A.<sup>616</sup>

u. *Judgment enforcement and appeal*

After all motions to correct, vacate or modify an award have been resolved, a judgment under the Draft Massachusetts Act, like the Model Act, would be ready for noting and prosecuting appeal. Model Act § 128 and Draft Massachusetts Act § 128 are identical, including a provision for appeal from errors of law if parties have agreed on review of them under § 123.<sup>617</sup>

v. *The Draft Massachusetts Family Law Arbitration Act: Summary*

The Draft Massachusetts Act thus generally follows the Model Act, with variants reflecting family law and practice in the Commonwealth. Since the Model Act derived its format and language from the RUAA, which carries forward some UAA provisions, Massachusetts cases involving the same language in the Draft Act, the RUAA and the UAA, and perhaps cases under other states' versions of this legislation and comparable language in family law acts like North Carolina's, should be helpful in Massachusetts cases.<sup>618</sup> Massachusetts law has a version of the UAA.<sup>619</sup> If the Draft Act is enacted, it may precede enactment of the RUAA in Massachusetts; this was the initial history of the North Carolina Family Law Act, which used an early RUAA draft but followed the North Carolina UAA in format. After the North Carolina General Assembly enacted the RUAA in 2003, the Family Law Act was amended in 2005 to conform to the RUAA's content but kept the UAA sequence for the family

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<sup>616</sup> Compare Draft Massachusetts Act, *supra* note 592, §§ 124, 124A, with MODEL ACT §§ 124, 124A; see also *supra* Parts II.T. III.2.q.

<sup>617</sup> Compare Draft Massachusetts Act, *supra* note 592, §§ 123, 125, 128, with MODEL ACT §§ 123, 125, 128; see also *supra* Part II.U.

<sup>618</sup> The Massachusetts Draft Act, *supra* note 592 does not follow MODEL ACT § 129, which supplies rules of construction. See also *supra* Parts II.A, III.B.2.a. Consideration might be given to adding a similar provision to promote uniformity of construction.

<sup>619</sup> MASS. GEN. LAWS ANN. ch. 251, §§ 1-19 (2004).

law statutes.<sup>620</sup> On the other hand, the same session of the Massachusetts legislature may be asked to consider separate bills for the RUA and family law arbitration. If so, there should be coordination between the two bills as to language if possible.

Another issue related to legislation is the relationship between family law arbitration and other ADR methods. Other states' experience reflects good statutory coordination and gaps. State law may allow a judge to defer to parties' contracted preference for arbitration and bypass otherwise mandatory mediation. The problem can also arise in newer ADR techniques, *e.g.*, collaborative law and parent coordinators. One state solved a collaborative law issue by allowing counsel in failed collaborative law procedures to remain as counsel for family law arbitration; the same state's family law arbitration *Handbook* publishes rules to try to ameliorate problems of arbitrator-coordinator conflicts if they arise.<sup>621</sup> The latter issue might be resolved by legislation or court rule.

Future steps for implementation of the Massachusetts Draft Act, if it becomes law, might include drafting standard forms and rules; the Model Act might be a useful guide in this respect.<sup>622</sup> Thereafter, establishing a central site, perhaps on the Internet for these documents, and perhaps a handbook to help lawyers and continuing education programs, might be undertaken.

### 3. AAML initiative in New Jersey

Although New Jersey has family law arbitration, AAML members report an initiative to get new legislation for family law arbitration.<sup>623</sup>

### 4. Legislative task force study in South Dakota

South Dakota has statutes allowing natural parents to contract to arbitrate medical services disputes. A legislative task force is studying the possibility of enacting legislation like the Model Act.<sup>624</sup>

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<sup>620</sup> See *supra* notes 25-26 and accompanying text.

<sup>621</sup> See *supra* Part II.M, *infra* Part III.C.

<sup>622</sup> MODEL ACT, at 100-135; see also *supra* Part II.B, III.B.2.b, *infra* Part IV.D.

<sup>623</sup> See *supra* Part III.A.16.

<sup>624</sup> See *supra* Part III.A.25.

### C. *Other Family Law ADR Techniques and Their Possible Impact on Arbitration*

Agreeing to resolve family law disputes by arbitration has not been, and is not now, the only option to litigation. Negotiated settlement has long been, and should be, a preferred way to resolve issues related to family law disputes. Some states require that some or all settlement agreements be referred to a court for approval, even if parties agree to arbitrate.<sup>625</sup> Most judges will not insist on litigation if parties represent in good faith that they will try to settle a matter, perhaps to return to court with an agreement as required by law. Some legislation or court rules mandate settlement conferences.<sup>626</sup> Mediation in family law cases is available (sometimes mandated) in many states, but here too the courts ultimately must approve the agreement.<sup>627</sup>

Two relatively new ADR techniques have emerged: collaborative law and parental coordination. An issue that may arise is how to interface these alternatives with family law arbitration. One option is a rule, if a state's law allows it, in an agreement to arbitrate, on a procedure allowing and setting terms for one of the two procedures. Standard rules for consideration with the Model Act recognize the possibility of combining ADR techniques within a family law dispute. Model Act Basic Rule 6(e) sets standards for mediation within an arbitration (arb-med). Basic Rule 15(h) allows a separate professional opinion on the best interests of a child, a procedure like conciliation. Optional Rule 104 allows independent experts' nonbinding reports, also

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<sup>625</sup> See, e.g., *Masters v. Masters*, 513 A.2d at 110-14 (custody, support arbitrable, but court has final responsibility for child's best interests); *Spencer v. Spencer*, 494 A.2d at 1285 (same); *Reynolds v. Whitman*, 663 N.E.2d at 868-69 (arbitral award subject to judicial review); *Harvey v. Harvey*, 680 N.W.2d at 838-39 (per curiam) (although state's Domestic Relations Arbitration Act allows child custody, child support or parenting issues, circuit court retains authority to modify award to insure best interests of child); *Kelm v. Kelm*, 749 N.E.2d at 302-04 (parties cannot agree to contractually waive, by agreeing to arbitrate, court's *parens patriae* right to protect child's best interest in custody, visitation decisions); *Miller v. Miller*, 620 A.2d at 1163-64 (court can review arbitral award to determine if custody award in child's best interests); see also *supra* Parts III.A.4, III.A.11, III.A.20, III.B.2 (same).

<sup>626</sup> See, e.g., *supra* Part III.A.14.

<sup>627</sup> See, e.g., *supra* Part III.A.27.



like conciliation.<sup>628</sup> In some states legislation provides for these kinds of combinations, *e.g.*, mediation statutes or rules allowing exemptions for cases subject to arbitration.<sup>629</sup> For states with statutory or rule directives, they must be followed.

### 1. Collaborative law legislation

The states have begun enacting statutes or promulgating court rules for collaborative law procedures.<sup>630</sup> Under this ADR option parties and counsel agree to be committed to a voluntary, good faith effort toward settlement. They meet away from the courthouse; they must voluntarily disclose all information, including tax returns, and verify it during meetings. Court proceedings are suspended during the procedure. Settlement is binding on the parties and must be reported to the court. The court must be notified by status reports and may dismiss a case without prejudice or set it for trial if there is no settlement. Some collaborative law statutes require counsel to withdraw from a case if the procedure fails; parties then hire new lawyers for trial of the case. Other jurisdictions allow a case to go forward with, *e.g.*, arbitration, with the same lawyers.<sup>631</sup>

<sup>628</sup> MODEL ACT, at 115, 120, 132.

<sup>629</sup> North Carolina has statutes and rules allowing arbitration, instead of mediation, to go forward. *See supra* note 184 and accompanying text.

<sup>630</sup> *E.g.*, N.C. GEN. STAT. §§ 50-70 - 50-79 (2007); TEX. FAM. CODE ANN. §§ 6.603, 153.0072(a), 156.401(a) (Vernon 2006); UTAH CODE ANN. § 30-3-11.4(5)(f)(ii) (2008 Supp.); VT. FAM. PROC. R. 4(h). The National Conference of Commissioners on Uniform State Laws (hereinafter NCCUSL) has begun a Collaboration Law Act drafting project. Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289, 307 & nn.81, 82 (2007). NCCUSL is the UAA and RUAA sponsor.

<sup>631</sup> *See generally* Rebecca A. Koford, *Conflicted Collaborating: The Ethics of Limited Representation in Collaborative Law*, 21 GEO. J. LEGAL ETHICS 827 (2008) (discussing technique, differing bar opinions on ethics of collaborative law); Schneyer, *supra* note 630 (same); Elizabeth K. Strickland, *Putting "Counselor" Back in the Lawyer's Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N.C.L. REV. 979 (2006). On the last point, employing the same lawyers for collaborative law and litigation, *compare, e.g.*, Compere, *supra* note 549, at 14, commenting on Texas procedure, with N.C. GEN. STAT. § 50-78 (2007), allowing the same lawyers to go forward with other settlement methods, *e.g.*, arbitration. Having two lawyers per side in a failed collaborative law case can result in higher fees for parties.

## 2. *Parent(ing) coordinator legislation*

Some states, including those with collaborative law legislation or rules, have statutes or rules to regulate parent coordinators, sometimes styled parenting coordinators, in connection with family law disputes.<sup>632</sup> Under this procedure, in high-conflict divorces courts may appoint a special master or a parent coordinator to make binding decisions if parents cannot reach agreement. Most participating parents report satisfaction with the programs and less conflict with the other parent. However, custody or support problems may remain, and a judge might decide, in his/her discretion, not to follow a coordinator's recommendation.<sup>633</sup>

This article does not debate the merits of arbitrators vs. coordinators. The question is what can or should be done if parties or a court wants some issues resolved by arbitration (*e.g.*, property division) and others through a parent coordinator. The Model Act does not address the issue. Unlike some collaborative law legislation declaring a legislative interface policy,<sup>634</sup> no parent coordinator statute appears to do so. In states with court-annexed family law arbitration, a court can issue appropriate orders. For jurisdictions with freestanding arbitration, a court can issue coordination orders, leaving other issues to an arbitrator if parties agree on arbitration after the complaint is filed. Suppose,

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<sup>632</sup> *E.g.*, COLO. REV. STAT. ANN. §§ 14-10-128.1 - 14-10-128.5 (West 2006); FLA. 4 TH JUD. CIR. R. 92-1 (A-1), 92-1(A-2), implementing FLA. STAT. ANN. § 44.102 (West 2008 Cum. Ann. Pocket Pt.), FLA. FAM. L. R. PROC. 12.740-12.741; IDAHO CODE ANN. § 32-71D (2007); LA. REV. STAT. ANN. §§ 9:358.1-9:358.9 (2008); ME. REV. STAT. ANN. tit. 19-A, § 252 (1998) & ME. R. CIV. P. 53 (referees); N.C. GEN. STAT. §§ 50-90 - 50-100 (2007); OKLA. STAT., tit. 43, §§ 120.1-120.5 (2008 Cum. Ann. Pocket Pt.) (held constitutional in *Barnes v. Barnes*, 107 P.3d 560 (Okla. 2005)); TEX. FAM. CODE §§ 153.0071, 153.601-153.612 (Vernon 2008 Supp.); VT. FAM. PROC. R. 4(s). The equivalent of parent (or parenting) coordinators may have different titles around the country, *e.g.*, Arizona's family court advisors, California's special masters; Hawaii's custody commissioners; New Mexico's "wisepersons." Christine A. Coates et al., *Parenting Coordination for High-Conflict Families*, 42 FAM. CT. REV. 246, 247 n.9 (2004).

<sup>633</sup> Coates et al., *supra* note 632, at 247, 259-60; Solangel Maldonado, *Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce*, 43 WAKE FOREST L. REV. 441, 476-77 (2008); *see also* Prescott, *Parenting*, *supra* note 407; Dana E. Prescott, *When Co-Parenting Falters: Parenting Coordinators, Parents-in-Conflict, and the Delegation of Judicial Authority*, 20 ME. B.J. 240 (2005).

<sup>634</sup> *See supra* note 631 and accompanying text.

however, parties to a prenuptial agreement want to include a clause to arbitrate disputes incident to a divorce, and a court orders parent coordination after the complaint for divorce is filed. What should the agreement to arbitrate recite under these circumstances? The Model Act handbook is silent on the issue. However, the North Carolina *Handbook* publishes Basic Rules 15(i)-15(k) as suggested standards on how to cover this situation.<sup>635</sup> Those Rules attempt to preserve a court's authority under state law to order parent coordinator action, declaring parties' agreement that court authority must prevail, while reciting arbitration as the preferred way to resolve other issues.

The best solution is positive legislation or court rules, as some states have for collaborative law,<sup>636</sup> to declare how the two procedures intertwine. Until that happens in jurisdictions with parent coordinator and arbitration legislation, the watchword for counsel and the courts is careful coordination of the two procedures through appropriate court orders.

If other alternatives to litigation emerge, parties and counsel should be alert to the options and, unless an option is a complete alternative to arbitration, craft appropriate clauses for the agreement to arbitrate, with court approval if state law requires the alternative procedure.

#### **IV. The Model Act and Current Law on Arbitration**

Jurisdictions adopting arbitration by agreement as an ADR option for family law disputes fall into several categories. Some states enacted statutes incorporating their version of the UAA by reference, perhaps with limitations or other controls to assure protection of spouses and children. Limitations or other controls include requiring that some or all agreements to arbitrate be subject to court review and excluding certain issues from arbitration, notably support and custody. In other cases states have free-standing family law arbitration legislation.<sup>637</sup> Many states do not provide for arbitrating family law issues.<sup>638</sup> To date no state has

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<sup>635</sup> 1 WALKER, 2006, *supra* note 4, at 64.

<sup>636</sup> See *supra* note 631 and accompanying text.

<sup>637</sup> See generally *supra* Part II.A for state-by-state analysis.

<sup>638</sup> See *infra* Part IV.C.

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followed North Carolina to enact a comprehensive family law arbitration statute (“soup to nuts”) based on uniform arbitration acts but tailored to family law cases,<sup>639</sup> which is the Model Act approach, although Massachusetts bar members are considering advocacy of one.<sup>640</sup> Several states have comprehensive statutes, *e.g.*, Indiana, Michigan, New Mexico and Texas, that are close to the uniform acts in content, with special statutes tailored to family law practice.<sup>641</sup>

Part IV.A discusses issues that may arise for jurisdictions that incorporate standard general arbitration legislation by reference into family law arbitration statutes, with suggestions for use of the Model Act. Part IV.B summarizes the approaches of states that have limitations or controls on family law arbitration that are not tied to that jurisdiction’s general arbitration legislation and offers suggestions for use of the Model Act, or provisions within it, as supplemental law. Part IV.C offers thoughts for those states that do not have any family law arbitration legislation. Part IV.D analyzes use of the Model Act forms and rules for any family law arbitration regardless of the statutory model.

A. *The Model Act and States Incorporating General Arbitration Statutes by Reference into Family Law Arbitration*

A few states that have enacted family law arbitration legislation deny use of this ADR procedure for certain issues, typically support and custody. Some of these jurisdictions incorporate their general arbitration legislation, to date usually the UAA, by reference. Arizona,<sup>642</sup> Georgia,<sup>643</sup> Missouri,<sup>644</sup> New Hampshire,<sup>645</sup> New Jersey<sup>646</sup> and Pennsylvania<sup>647</sup> are in this category.

The Model Act may be useful to these jurisdictions in several ways. First, it may serve as a checklist of provisions, *e.g.*, standards for waiver or non-waiver, pre-award assets protection,

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<sup>639</sup> *See supra* Part III.A.19.

<sup>640</sup> *See supra* Part III.B.2.

<sup>641</sup> *See supra* Parts III.A.8, III.A.11, III.A.17, III.A.27.

<sup>642</sup> *See supra* Part III.A.1.

<sup>643</sup> *See supra* Part III.A.5.

<sup>644</sup> *See supra* Part III.A.13.

<sup>645</sup> *See supra* Part III.A.15.

<sup>646</sup> *See supra* Part III.A.16.

<sup>647</sup> *See supra* Part III.A.23.

arbitrator appointment if one is needed, arbitrator disclosure, arbitrator immunity standards, consolidation, discovery, requiring reasoned awards unless parties opt out, redaction or sealing awards converted to judgments, and more modern options for modifying or correcting awards among them.<sup>648</sup> For states that have enacted a version of the RUAA, or which have the RUAA under consideration for adoption, to replace the UAA or other general arbitration legislation, the Model Act is an excellent guide.

*B. The Model Act and States with “Freestanding” Family Law Arbitration Statutes or Rules*

Like the states with family law arbitration statutes tied to general arbitration legislation, those jurisdictions with separate family law statutes deny use of the procedure for certain issues, typically support and custody. Some of these jurisdictions tuck the statutes into substantive family law legislation. Pennsylvania is one of these.<sup>649</sup> In other cases the family statutes are truly “freestanding,” *i.e.*, they appear as entirely separate legislative packages. These include Indiana,<sup>650</sup> Michigan,<sup>651</sup> New Mexico,<sup>652</sup> North Carolina<sup>653</sup> and Texas.<sup>654</sup>

These states might “cherry-pick” the Model Act for acceptable provisions to augment current legislation. They might consider, as North Carolina did, replacing existing family law arbitration statutes with a variant on the Model Act, tailored to a particular jurisdiction’s procedures, policies and needs. Examples have been given in Part II.A.<sup>655</sup>

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<sup>648</sup> See MODEL ACT §§ 104, 108, 110, 111 & Commentary; 114, 115, 117, 119(c), 123(a)(9), 124, 124A, 125(d), 128(b).

<sup>649</sup> See *supra* Part III.A.23.

<sup>650</sup> See *supra* Part III.A.8.

<sup>651</sup> See *supra* Part III.A.11.

<sup>652</sup> See *supra* Part III.A.13.

<sup>653</sup> See *supra* Part III.A.19.

<sup>654</sup> See *supra* Part III.A.27.

<sup>655</sup> See *supra* note 648 and accompanying text.

646 *Journal of the American Academy of Matrimonial Lawyers*C. *The Model Act and States with No Family Law Arbitration Provisions*

Some states may wish to consider enacting family law arbitration legislation for the first time. Based on correspondence and research, Alabama, Alaska, Arkansas, the District of Columbia, Hawaii, Idaho, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Mississippi, Montana, Nebraska, North Dakota, Rhode Island, South Dakota, Tennessee, Utah, the Virgin Islands and West Virginia appear not to have statutes or court rules for arbitrating these cases by agreement,<sup>656</sup> although Massachusetts has a draft bill under consideration.<sup>657</sup> Some have different ADR procedures, commonly mediation, for family law cases, or special arbitration statutes related to families, *e.g.*, for medical services, and some states allow arbitration for some but not all family law issues.<sup>658</sup> Florida law prohibits voluntary

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<sup>656</sup> My thanks to AAML survey respondents Wendy B. Crew; G. John Durward, Jr.; Randall W. Nichols; Donna Wesson Smalley, for Alabama; Janet D. Platt, for Alaska; Armin U. Kuder, for the District of Columbia (reporting arbitrations but no governing legislation); William C. Darrah and Thomas L. Stirling, for Hawaii (reporting discussion of the possibility); Jeffrey R. Christenson, for Idaho; Joy M. Feinberg (reporting failed attempts to get the procedure started), Steven H. Klein, Robin R. Miller, Sandra Murphy and Barry M. Schatz, for Illinois; Steven H. Lytle, for Iowa (reporting rare use of arbitration); Kenneth Rigby, for Louisiana; Glenn M. Cooper and Stephen E. Moss (reporting both div arbitral award enforced but court reserved right to custody, support), for Maryland; Jeffrey A. Abber (reporting one arbitration, costs too high), Stephen D. Fried (reporting that mediation is the hot topic in the Commonwealth), Rudolf A. Jaworski, for Massachusetts; William R. Wright (reporting use of arbitration that “worked”), for Mississippi; Virginia A. Albers and John S. Slowiaczek, for Nebraska; Brian R. Florence and Ellen M. Maycock, for Utah; James Wilson Douglas, Jo Lynne Nugent and Delby B. Pool, for West Virginia, for their comments.

<sup>657</sup> See *supra* Part III.B.2.

<sup>658</sup> *E.g.*, New York cases allow arbitrating child support, but not custody, issues. See *supra* Part II.A.18. An Ohio rule of court allows family law arbitration in court-annexed ADR; child custody and support awards must have court review. See *supra* Part II.A.20. Oklahoma allows joint custody parents to arbitrate custody issues. See *supra* Part II.A.21. South Dakota legislation allows natural parents of children to sign binding arbitration agreements for medical services but for no other purpose. See *supra* Part II.A.25. The Tennessee Code publishes a possibility of court-supervised arbitration of parenting disputes, but AAML survey respondents say the State is not ready for family law arbitration. See *supra* Part II.A.26.

arbitration of child custody, visitation or child support disputes.<sup>659</sup>

For those jurisdictions considering adding the arbitration option, the first step is careful research of current legislation and cases, including policies behind the legislation and cases. Some states have had good or bad experiences with pro se litigation; others would favor more court control and approval of agreements and awards. Subjects that may be arbitrated may be more limited in one state. Animuses and policies for or against arbitration or other forms of private dispute resolution are also factors.

If the decision is to advocate separate comprehensive family law arbitration legislation like the Model Act, a further question is whether the state has UAA-based arbitration legislation, legislation based on the RUAA, a different model entirely, or no arbitration legislation, the last perhaps an indicator of policy against the procedure. Whether that state may be moving toward new legislation, *e.g.*, replacing the UAA with the RUAA, should be considered. If the trend is toward the RUAA, the Model Act is a ready analogue. On the other hand, if a legislature is content with its UAA, enacting the Model Act may be seen to pose difficulties for members of the bar, who would be faced with two seemingly conflicting statutes. Besides the consolidation statute,<sup>660</sup> there are over a dozen improvements, some major and some minor, that the RUAA offers over the UAA.<sup>661</sup> A state might decide to enact family law arbitration legislation based on the Model Act - RUAA format as a trial balloon for consideration by, *e.g.*, the general business community as a possible prelude to future enactment of the RUAA.<sup>662</sup> A state with

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<sup>659</sup> FLA. STAT. ANN. § 44-104(14) (West 2003). My thanks to AAML survey respondents Jorge M. Cestero, Maurice J. Kutner, David L. Manz and Thomas J. Sasser for the information they gave.

<sup>660</sup> RUAA § 10; *compare* MODEL ACT § 110; *see also supra* Part II.J.

<sup>661</sup> *See generally* MODEL ACT, at 19-20. A UAA-based Model Act is available. *See supra* note 26 and accompanying text.

<sup>662</sup> North Carolina first followed the opposite route, enacting its original Family Law Arbitration Act with its UAA version as the model, primarily because there was no final RUAA text available at the time. The General Assembly then enacted a RUAA version; a revised Family Law Act, based on the RUAA, followed. *See supra* Part II.A.18.

the UAA, and no prospect of RUAA adoption, could elect to enact family law arbitration legislation on the UAA model.<sup>663</sup>

*D. Model Act Forms and Rules in a Jurisdiction That Has Family Law Arbitration*

The forms and rules, published in Model Act on line, are designed as suggested terms for agreements to arbitrate under the Model Act.<sup>664</sup> The key word is “suggested.” Even as their wording is not mandatory for Model Act-governed cases, the draft forms and rules might be considered for agreements under other states’ procedures, keeping in mind that the Model Act is based on the RUAA, not the UAA. That should make little difference for jurisdictions with UAA-based arbitration statutes, but the distinction must be kept in mind.<sup>665</sup> State statutes, court rules and case law must be consulted, including legislative amendments that can change the result of a case. Client needs in a particular case must be considered. Family law practitioners must be careful with forms or rules derived from practice sources that have the UAA, the RUAA or the FAA as their origin; in some cases these terms can fly in the face of mandatory state legislation, *e.g.*, review requirements for custody and support issues.

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<sup>663</sup> The AAML Arbitration Committee proposed two MODEL ACT versions, one based on the RUAA and the other on the UAA. The final decision was to publish a RUAA-based MODEL ACT, but the AAML has hard copy of the UAA-based proposal, now aging in terms of legislative and case law developments. A commentary on the original North Carolina Family Law Arbitration Act, based on the UAA, was available on line and has been withdrawn but has been republished in 3 WALKER, 2006, *supra* note 4; it may still linger in some libraries in hard copy. These sources may be useful for states contemplating UAA-based comprehensive legislation.

<sup>664</sup> MODEL ACT, at 100-35; *see also supra* Part II.B.

<sup>665</sup> A critical difference between the UAA and the RUAA, *supra* note 2 and accompanying text, is that the UAA has no statutory provision for preaward assets protection. RUAA § 8 does. MODEL ACT § 108 follows the RUAA. *See supra* Part II.H. Given the unfortunate possibility that an errant spouse may try to run off with marital estate assets, including protections in the agreement can be critical.



Good drafting practice also dictates including standard provisions, not among the forms and rules, *e.g.*, severability and integration clauses.<sup>666</sup>

## V. Conclusions and Projections for the Future

Arbitration by agreement under federal and state law was once a reasonably discrete practice, mostly confined to business transactions, maritime law issues, construction contracts involving builders and architects, agreements among professionals, labor disputes, international commercial matters, and the like. There was little call to arbitrate disputes at consumer or small business levels. The idea of using arbitration in fields like family law was in force in only a few jurisdictions, and has come to the fore for many states only recently.

The prevalence of family law arbitration has changed dramatically in the past decade. Factors that may have influenced the rise of arbitration by agreement include the popularity of ADR (primarily mediation, but also court-annexed arbitration and other modes and today for family law, collaborative law and parent coordinators<sup>667</sup>); civil litigation's increasing cost, complexity and delay;<sup>668</sup> time to litigate to a result in an era of instant gratification and busy client schedules that place premiums on time spent awaiting a family law case that must be postponed for good reason, such as speedy trial issues in criminal cases or cases

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<sup>666</sup> Optional Rule 105, MODEL ACT, at 133, offers a draft choice of law clause. Ordinarily this is not necessary; the case is usually governed by local substantive law, *i.e.*, the law of the state where a divorce case is filed. SCOLES ET AL., *supra* note 48, § 15.4.

<sup>667</sup> See *supra* Part III.C.

<sup>668</sup> Arbitration can be more or less expensive than litigation. Counsel and their clients must consider this issue in choosing arbitration over litigation. Another ADR method, *e.g.*, mediation, may be more economical. More recently collaborative law seems to have achieved good results in family law disputes. Arbitration does have an advantage of forcing a decision, *i.e.*, an award, by the arbitrator, whereas mediation or collaborative law can result in impasse and a return to the courthouse. Unless legislation, court rules or rules for the ADR procedure require otherwise, there is nothing to stop parties from arbitrating after failure at mediation or collaborative law. In some cases parties have successfully resolved some but not all issues by mediation and agreed to arbitrate what is left.

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going over from a previous day that must be completed first;<sup>669</sup> the increasing complexity of family law cases that invite specialization within the bar, while many judges, except those with family court duties, are generalists;<sup>670</sup> and possible publicity surrounding cases in the courthouse.<sup>671</sup>

If a jurisdiction is considering adoption of arbitration by agreement as an option for resolving family law disputes, several questions must be asked.

First, is it better to enact arbitration legislation in connection with existing or projected ADR programs? If this is the choice, will it be binding arbitration, nonbinding arbitration, or both?

Second, is it better to have a freestanding arbitration statute tied to general arbitration legislation like the UAA or the RUAA? If so, if a state has general arbitration legislation on the UAA model, should family law arbitration be tied to this,<sup>672</sup> or should it be part of a general legislative transition to the RUAA, now in force in a few more states? Should family law arbitration advocates await action by the legislature on general legislation, maybe modeled on the RUAA and then seek an appropriate tie-in statute? This last consideration would seem to promise a delay of several years.

Third, should family law arbitration legislation be entirely separate from general arbitration legislation, which is the Model

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<sup>669</sup> Arbitration can be scheduled at mutually convenient days and times among the arbitrator, counsel and their clients, *e.g.*, Saturdays when courts are usually not in session.

<sup>670</sup> There is, of course, nothing “wrong” with having a generalist judge hear a complex family law case. The problem may lie primarily with recent appointees or electees to the bench who bring with them relatively specialized expertise in field(s) in which they practiced but who may have a steep (but not impossible) learning curve in hearing a complex family law case, unless that happens to have been part of their practice.

<sup>671</sup> To be sure, family law case records can be sealed or redacted, many courts have rules requiring that discovery materials and the like not be filed as a space conservation matter, and judges have discretion to close a courtroom for sensitive matters (*e.g.*, testimony affecting children). The general philosophy of arbitration is that it is a private adjudication; the MODEL ACT includes provisions for sealing and redacting awards confirmed as judgments. *See supra* Part II.R.

<sup>672</sup> This is, for example, the Georgia and Missouri model. *See* Parts III.A.5, III.A.13 *supra*.

Act format?<sup>673</sup> Should the Model Act be a guide?<sup>674</sup> Should this legislation track the present general arbitration legislation, perhaps modeled on the UAA,<sup>675</sup> or should it be forward-leaning to anticipate what the legislature may do in the near future,<sup>676</sup> perhaps using the family law statutes and experience under them as a guide? Should the independent legislation be developed in cooperation with legislative drafting efforts to enact new general arbitration, *e.g.*, in a state with the UAA model that would transition to the RUAA? Should family law arbitration legislation await enactment of a general arbitration statute?<sup>677</sup>

There are variables outside possible enactment sequences.

First, how should the legislation interact with other ADR alternatives, such as mediation, collaborative law or parenting coordinator programs?<sup>678</sup> Should new legislation or rules anticipate developing issues, *e.g.*, what to do about judge-made rules on class actions, consumer complaints about arbitration agreements, unconscionability, and the like?<sup>679</sup>

Second, particularly if arbitration by agreement is the chosen option, what about standard forms and rules fitting a state's procedural and arbitration matrixes? Who will draft and publish a uniform set of forms and rules to guide counsel in a particular state, a bar association, a family law specialty group, the courts, or perhaps a combination of these options?<sup>680</sup>

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<sup>673</sup> Several states follow this model, *e.g.*, Indiana, Michigan, New Mexico, North Carolina and Texas. *See supra* Parts II.A.8, II.A.11, II.A.17, II.A.19, II.A.27.

<sup>674</sup> North Carolina follows this model, and Massachusetts may do so. In Georgia, the MODEL ACT was the guide for a bill, but in the end Georgia tacked its family law statute to existing statutes. *See supra* Part II.A.5.

<sup>675</sup> This was the initial North Carolina experience. *See supra* Part II.A.19.

<sup>676</sup> Essentially this was the decision of the AAML. Its Arbitration Committee prepared two drafts, one based on the UAA and a second based on the RUAA, *supra* note 2 and accompanying text.

<sup>677</sup> In North Carolina this was the last sequence. The General Assembly enacted its RUAA version to replace the UAA; two years later it enacted amendments to the family law statutes to conform it to the RUAA. However, the state had been under the UAA for nearly 40 years, and the family law act, based on the UAA, went into force in 2003. *See supra* Part II.A.19.

<sup>678</sup> *See supra* Part III.C.

<sup>679</sup> *See supra* note 8 and accompanying text; Part II.J.

<sup>680</sup> In North Carolina a set of proposed forms and rules went with the legislative package to the General Assembly to show legislators what the new

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Third, what should be the education and promotion program among the bar and other groups, both before legislative or court action, and afterward?<sup>681</sup>

Arbitration, whether binding or nonbinding, court-annexed or freestanding by the parties' agreement, is not "the" solution for every family law case. Many can be resolved by the oldest ADR option, settlement, perhaps with court approval if state law requires it. Others can be best resolved by traditional litigation. Mediation, collaborative law or parent coordinating and other methods, or a combination of them, may be the preferred choice(s) for many cases. Arbitration, although it does not guarantee to cure all marital dispute ills or warts, does have a place in the spectrum of choices for family law attorneys.

The Model Act stands, as its title suggests, as a model, a benchmark, for the option of arbitration by agreement. Its forms and rules<sup>682</sup> may help in jurisdictions that already have family law arbitration. States should consider the Act as a guide for enactment of a separate family law arbitration act, a checklist for their existing legislation, forms or rules, or as a sidebar commentary on the RUAA if it is under study for possible enactment.

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procedure would look like. This had been part of a similar package that was made available to the legislature and for public comment when the Assembly considered, and passed, court-ordered arbitration legislation.

<sup>681</sup> In North Carolina, the North Carolina Bar Association (NCBA), for a century associated with law reform and law improvement, carried the ball through lobbying, public meetings, continuing education for lawyers and judges, research and publication. Handbooks on the Family Law Arbitration Act are available on line at the NCBA website. The North Carolina Institute of Government, connected with the University of North Carolina (Chapel Hill) conducted statistical research on the earlier court-annexed arbitration program to promote its expansion from pilot judicial districts toward statewide acceptance. The Institute, cooperating with the North Carolina Conference of District Court Judges, recently held a continuing education program on the Family Law Act. *See supra* notes 504-05 and accompanying text. Needless to say, this meant expenditure of much pro bono time by the courts; judges, some of whom taught at lawyer CLE; lawyers; and academic lawyers. *See* <http://www.sog.unc.edu/>. It is my judgment that the success these ADR programs have enjoyed would not have been achieved without this continuing joint effort.

<sup>682</sup> *See supra* Part II.B.