The New Arbitration and Collaborative Law Statute: New and Improved Methods of Alternative Dispute Resolution

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The 11/12/18 training will be from 9–11 a.m. The 2/11/19 and 2/12/19 dates do not have set times yet, but we are working with PBI on this and should have this shortly. We have contacted the PA Psychological Association and they plan to co-sponsor the training.

At the summer meeting in Hershey, a panel of our experienced colleagues discussed the need for ways to improve the efficient disposition of family law issues, which may include appointing a binding arbitrator to address whether child support or alimony should be modified; analyzing incomes and doing the support calculations for self-employed or commission-based wage earners; or resolving support and equitable distribution issues together, to keep the case on track, where there is issue overlap due to earning capacity and other financial considerations. Now that we have the Pennsylvania Supreme Court's ruling in *Hanrahan v. Bakker*, 2018 WL 3032674, requiring the court to conduct a separate needs analysis in high-income support cases, an arbitrator can also conduct this analysis and render an expedited and reasoned decision.

In almost every family law case, an arbitrator can be appointed to decide issues within a matter of days or weeks for which the same decisions could take months (and cost thousands more in attorneys' fees) if pursued through the court system. The arbitration award is generally binding on the parties, with few exceptions. In decisions regarding child custody and child support, the court will exercise its supervisory power in its *parens patriae* capacity, if the decision is challenged, to determine the best interest of the child.[1] Arbitration is favored by the courts, and parties are encouraged to settle their differences without the intervention of the court system.

The benefits of arbitration include the parties being able to select their decision-maker, identify the issues to be addressed, and choose the time and place of the arbitration (often sooner than a court hearing would be scheduled). Issues such as the choice of a child's preschool or extracurricular activities can be more efficiently handled in a single session with an arbitrator, rather than in multiple conferences and hearings in the family court. This expedient disposition is a win-win for the parties and the courts since it is cost-effective, reduces the backlog of cases, and limits cases that actually proceed to a hearing to those such as disputes over primary custody, which are probably best suited to the formality of a judicial hearing, along with its broader right of appeal. The decision to proceed with arbitration is purely voluntary, as the court cannot order the parties to arbitrate in the absence of agreement to arbitrate.

As Mark Ashton said in his recent article, "Making Family Law Practice Conform to the New Economic Order," "[t]he bench and the bar have a responsibility to themselves and the community at large to search for and implement efficiencies which preserve due process." In this climate of a desire to find innovative ways to serve our clients and improve the administration of justice, Governor Wolf signed the Revised Statutory Arbitration Act into law on June 28, 2018. The Act takes effect on July 1, 2019 and makes many changes to the existing arbitration law, which will streamline and clarify the process of arbitration. The existing law is patterned after the Uniform Arbitration Act and was adopted in 1958, 60 years ago. The revised Act updates and modernizes the existing law by adding new procedural provisions, conforming the statute more closely to the requirements of the Federal Arbitration Act, and including provisions to facilitate the use of electronic records in arbitration proceedings.

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Highlights of the revised Act include:

- **Notice.** Section 7321.3 defines notice for purposes of arbitration proceedings.
- **Freedom of Contract.** Section 7321.5 allows parties to waive or vary the Act's requirements, except as to certain minimum standards for statutory arbitration.
- **Validity of Arbitration Agreements.** Section 7321.7 provides for new rules to decide arbitrability disputes (i.e., whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate).
- **Provisional Remedies.** Section 7321.9 allows the court, before an arbitrator is appointed and able to act, to enter a provisional remedy to protect the effectiveness of the arbitration proceeding. After the arbitrator is appointed, she can issue orders for provisional remedies (including interim awards) to promote the fair and expeditious resolution of the controversy.
- **Disclosure of Conflicts.** Section 7321.13 sets forth detailed requirements of disclosure by the arbitrator, before and after his appointment, of any facts that a "reasonable person would consider likely to affect the impartiality of the arbitrator," including any financial or personal interest in the outcome of the proceeding and any existing or past relationship with the parties, their attorneys or other representatives, or a witness.
- **Arbitrator Immunity.** Section 7321.15 immunizes arbitrators from civil liability to the same extent as a judge acting in a judicial capacity. The arbitrator is also precluded from testifying or producing records of any statement, conduct, decision, or ruling during the arbitration proceeding (except in a claim by an arbitrator against a party, or a proceeding to vacate an award due to its procurement by corruption, fraud, or other undue means, or on account of the evident partiality, corruption, or misconduct of the arbitrator).
- **Arbitration Process.** Section 7321.16 gives arbitrators broad discretion to conduct arbitration proceedings in a manner appropriate for the fair and expeditious disposition of the matter, including conducting pre-hearing conferences, and making determinations regarding the admissibility, relevance, materiality, and weight of any evidence.
- **Discovery.** Section 7321.18 permits arbitrators broad authority, including to issue subpoenas for the attendance of a witness or for the production of other evidence at a hearing, to permit a witness to be deposed for use as evidence at the hearing, to permit discovery, to order a party to comply with the arbitrator's discovery-related orders, and to issue a protective order to prevent disclosure of privileged or confidential information.

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- **Modification of Awards.** Section 7321.21 expressly allows the arbitrator to modify or correct her award on a motion filed by a party within 20 days after receiving notice of the award, on account of an evident mathematical miscalculation or an evident mistake in the description of a person, thing or property, or because the form of the award is imperfect (not affecting the merits of the decision), or because of a lack of a final ruling on an issue, or to clarify the award.

- **Additional Remedies.** Section 7321.22 allows for the arbitrator to award reasonable attorneys' fees and expenses as authorized by law or by the parties' agreement, as well as to order those remedies the arbitrator deems just and appropriate under the circumstances. Significantly, the "fact that a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award...or to vacate an award[,]" such that the arbitrators have seemingly broad discretion in fashioning equitable remedies.

- **Vacating Awards.** Section 7321.24 sets forth the limited bases on which the arbitrator's award may be vacated, including:

  (1) the award was procured by corruption, fraud, or other means

  (2) there was evident partiality, corruption, or misconduct by the arbitrator

  (3) the arbitrator refused to postpone a hearing upon a showing of good cause, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 7321.16 (relating to arbitration process), so as to prejudice a party's rights

  (4) the arbitrator exceeded his powers

  (5) there was no agreement to arbitrate

  (6) or the arbitration was conducted without proper notice.

- **Compelling Compliance with or Vacating Awards.** Section 7321.26(c) allows a court, when ordering compliance with an arbitration award or vacating an improper award, to require the payment of attorneys' fees and costs to the prevailing party.

- **Electronic Records.** Section 7321.2 includes in the definition of "record" information that is stored in an electronic or other medium and is "retrievable in perceivable form." Section 7321.31 states that the provisions of this Act governing the legal effect, validity, and enforceability of electronic records conform to the requirements of the federal Electronic Signatures in Global and National Commerce Act.

The object of these rules is stated clearly throughout the Act: to make the proceedings fair, expeditious, and cost-effective. The new rules clarify the limited bases on which the arbitrator's award may be modified, and further delineate the narrow circumstances under which an award may be vacated. All these changes serve to ensure that the parties are afforded due process, while also promoting the global objective of closure (including as to payment of the ongoing costs of litigation) once the arbitration proceedings are concluded.

Care should be taken in choosing an arbitrator who is experienced in family law and who has the appropriate demeanor to serve as a calm and neutral decision-maker. The new Arbitration Act does not specify the qualifications of the arbitrator, but certification or training programs in arbitration specific to family law are available, such as the American Academy of Matrimonial Lawyers National Arbitration Training Institute (which trains arbitrators even if they are not AAML fellows). Extra training or certification in family law arbitration will add to the arbitrator's expertise and strengthen

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the participants' level of confidence in the selected arbitrator. The arbitrator should also make sure to disclose any potential conflicts before and during the arbitration process.

Some family law arbitrations are presently conducted under the principles of common law arbitration, for which there are few guidelines as to procedure, and a very limited standard of review. Under Section 7341 of the existing statute, a common law arbitration award may only be vacated or modified if it is "clearly shown that a party was denied a hearing or that fraud, misconduct, corruption, or other irregularity caused the rendition of an unjust, inequitable or unconscionable award." **The new Act eliminates common law arbitration after July 1, 2019.** Section 7321.4 provides that for agreements to arbitrate entered prior to July 1, 2019 (the effective date of the Act), the existing arbitration statute applies unless the parties agree to follow the revised statutory arbitration statute; and for agreements to arbitrate entered after July 1, 2019, the revised statutory arbitration statute only applies. If you are entering an arbitration agreement before July 1, 2019, you can choose common law arbitration, statutory arbitration, or revised statutory arbitration, so it is important to understand the differences and select the rules that you want to apply to your case.

The revised Statutory Arbitration Act goes a long way in offering a viable alternative dispute resolution for family law cases, but additional reforms are still needed. Fewer than a dozen jurisdictions have legislation specific to family law arbitration, including the North Carolina Family Law Arbitration Act, which permits all issues incident to a marriage, except for the absolute divorce itself, to be submitted to binding arbitration. The American Academy of Matrimonial Lawyers has adopted a Model Family Law Arbitration Act that is based on the Revised Uniform Arbitration Act, and includes specific standards for family law substance and procedure, including court review of arbitral awards for post-separation support, alimony, child support, and child custody. Further guidance in the form of statutory provisions specific to family law arbitration would serve not only to inform the parties about the process, but to also reduce litigation on account of confusion or lack of guidance on how to address particular family law issues in this context.

The Collaborative Law Act was enacted as part of the same legislation under Title 42 and became effective August 28, 2018. This Act applies to the procedure of resolving claims without intervention by a tribunal, pursuant to an agreement signed by the parties who are represented by counsel.[2] Collaborative law agreements may include disputes relating to: marriage, divorce, and annulment; property distribution, usage, and ownership; child custody, visitation, and parenting time; parentage; alimony, APL, spousal support, and child support; prenuptial, marital, and postnuptial agreements; adoption; termination of parental rights; trusts and estates; and corporations. A party's participation in the process is

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voluntary and cannot be compelled by a tribunal, and the process can be terminated at any time.

Section 7404 of the Act requires that before a party enters a collaborative law participation agreement:

- The party shall assess factors that the party's attorney reasonably believes relate to whether the process is appropriate for the matter and for the parties (including a prospective party or non-party participant's history of any violent or threatening behavior).

- The party shall review information that the attorney reasonably believes is sufficient for the prospective party to make an informed decision about the material benefits and risks of a collaborative law process, as compared to other alternatives.

- The party's attorney shall inquire whether the prospective party has a history of threatening of violent behavior toward any party or non-party participant who will be part of the collaborative law process.

- If an attorney learns or reasonably believes, before commencing or at any point in the collaborative law process, that a party or prospective party has engaged in or has a history of threatening or violent behavior toward any other party or non-party participant, the attorney may not begin the process unless the party or prospective party requests that the process commence/continue and indicates that the safety of all parties can be protected during the process. (An attorney's failure to protect a party under this section does not give rise to a private cause of action against the attorney).

Section 7405 of the Act sets forth specific requirements for the participation agreement, including that it is in writing, signed by the parties, describes the intention to proceed with a collaborative law process and the nature and scope of the matter to be addressed, identifies the lawyers representing each party, and includes a statement that the lawyers' representation is limited to the process, and they shall be disqualified from representing any party or non-party in a separate proceeding before a tribunal relating to the matter. The agreement may contain optional provisions, including an agreement to maintain confidentiality of collaborative communications, an agreement that all or part of the collaborative process will not be privileged in a separate proceeding before a tribunal, the scope of voluntary disclosure, the role of non-party participants (who may include support persons, mental health professionals, financial neutrals, and potential parties), the retention and role of non-party experts, and the manner and duration of the process.

Section 7406 of the Act provides that the collaborative law process shall be concluded by resolution of the matter, as evidenced by a signed record, or termination. Under Section 7409, a collaborative law communication shall be confidential as provided by law or in the parties' participation agreement; further, under Section 7410, a collaborative communication is generally privileged and may not be compelled through discovery or admissible as evidence in an action or proceeding, except if all parties waive the privilege. This privilege does not apply to protect information that is otherwise admissible and subject to discovery, solely because of its use in the collaborative process. A collaborative communication is not privileged if it is not covered by the terms of the participation agreement; is made during a session of the process that is open to the public; or is sought, obtained, or used to threaten or plan to inflict bodily injury, commit or attempt to commit a crime, or to conceal ongoing criminal activity.

In addition, an exception to the rule providing for privilege of collaborative communications is applied in the following circumstances:

- It is sought or offered to prove or disprove facts relating to a claim or complaint of professional misconduct or malpractice or a fee dispute.

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- It is sought or offered to prove facts relating to the abuse, neglect, abandonment, or exploitation of a child or abuse of an adult.
- It is sought or offered in a criminal proceeding or an action to enforce, void, set aside, or modify a settlement agreement where a tribunal finds that the evidence is not available, and the need for the evidence substantially outweighs the interest in protecting privilege.

In these instances, only the part of the collaborative communication necessary for the application of the exception may be disclosed or admitted, and the disclosure for the limited purposes stated above does not make any other evidence or collaborative communication discoverable or admissible for any other purpose.

The Collaborative Law Act is another welcome option for alternative dispute resolution in family law cases. The success of the process depends, in large part, on the good faith of the parties to provide the information needed and to participate in negotiations to resolve the matter fairly, with the assistance of any third-party professionals, including financial or mental health experts, whose expertise can help to analyze the issues and provide guidance as to options for resolution. The process requires that both parties be represented, so as to avoid any concern that a self-represented party is being manipulated or controlled to his/her disadvantage by the other party. The collaborative process can help family litigants successfully resolve a variety of issues in their divorce or custody cases without the need for judicial intervention. Further, if there is no agreement on some or all of the issues, the parties can arbitrate or take to court just the unresolved issue(s). The attorney who has represented the party in the collaborative process, and any law firm with which the attorney is affiliated, are disqualified under the new law from representing a party (or a non-party participant) in that proceeding.

[1] *Miller v. Miller*, 620 A.2d 1161 (Pa. Super. 1993)(while arbitration proceedings in custody disputes are not void as against public policy, an arbitrator's decision regarding custody will be subject to close scrutiny by the court and is subject to being set aside as the courts will not be bound by such agreements). *See also, Knorr v. Knorr*, 527 Pa. 83, 588 A.2d 503 (1991) (parties cannot bargain away their right to receive less child support than what is required to provide for the best interest of the children).

[2] The Act does not affect the professional responsibility obligations and standards applicable to an attorney or other person professionally licensed or certified under state law.

Carolyn Moran Zack *is a partner with the Philadelphia firm of Momjian Anderer LLC. She is trained as an arbitrator by the American Academy of Matrimonial Lawyers, June 2018. She is also a certified mediator. She began practicing family law in 1987 under the mentorship of Albert Momjian, Esquire, first at the firm of Abrahams and Lowenstein and later at Schnader Harrison Segal & Lewis, LLP. She was a member of Mr. Momjian's family law practice group for a total of 15 years. In addition, Ms. Zack gained experience serving as the Chief Law Clerk for the Honorable Berle M. Schiller when he was a judge of the Superior Court of Pennsylvania in 1998 and 1999. Ms. Zack practiced with the Chester County firm of Lamb McErlane, PC where she practiced for three years before being appointed Special Master for the Chester County Family Court in 2008. Ms. Zack was a Family Court Master for eight years, Ms. Zack also regularly served as a Custody Conciliator for Chester County during that time period. Ms. Zack was a Family Court Master until December, 2016 and then joined Momjian Anderer in January, 2017. Ms. Zack has served on the Board of the West Chester Area Child Access Center and as an active member of the Chester County Bar Association Pro Bono Committee. She has co-authored, with the Honorable Katherine B. L. Platt, the chapter on "Alternative Dispute Resolution: Co-Parenting Counseling and Parenting Coordination" in PBI's Custody Law & Practice in Pennsylvania. Ms. Zack is a member of the Doris Jonas Freed Inn of Court, the PBA Family Law Section Rules Committee, and past chair of the Family Law Section of the Philadelphia Bar Association.*
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