

DOMESTIC RELATIONS ARBITRATION

House Bill 4552 as passed by the House
Sponsor: Rep. Michael Switalski

House Bill 4615 as passed by the House
Sponsor: Rep. Marc Shulman

Second Analysis (10-19-00)
House Committee: Family and Civil Law

THE APPARENT PROBLEM:

Although both Michigan court rules and recent case law allow arbitration in domestic relations matters, neither the court rules or the case law provide standards or guidelines for such arbitration. While Michigan does have a Uniform Arbitration Act, the statute doesn't specifically address domestic relations situations and, as a result, provides no guidelines for practitioners or participants. While many feel that arbitration can be a useful tool to deal with domestic relations matters, the lack of adequate guidelines limits the full and effective use of this tool. Without rules relating to domestic situations, many do not use arbitration as a means of settling a domestic dispute, and without more specific rules to protect the participants, many would argue that arbitration should not be used to settle such disputes. Legislation has been introduced that would put guidelines for domestic relations arbitration into statute.

THE CONTENT OF THE BILLS:

The bills, which are tie-barred together, would amend the Revised Judicature Act to add a new chapter that would provide a statutory framework for the arbitration of domestic matters.

Under the bills, the parties in an action for divorce, annulment, separate maintenance, or child support, custody, or parenting time, or a post-judgment proceeding relating to such an action, would have the option of having their domestic relations matters arbitrated. Any domestic relations arbitration proceeding governed by the bills' provisions would also be governed by court rules, except to the extent that the rules were modified by the arbitration agreement or the bills. Any conflicts between the bills' provisions and the provisions of the uniform arbitration act would be resolved in favor of the bills' provisions.

In order to have a domestic matter arbitrated, the parties would have to stipulate that they wanted to have their dispute subjected to binding arbitration by signing an agreement that specifically provided for one or more of the following issues to be resolved through arbitration:

- * real and personal property division;
- * child custody;
- * child support, subject to the restrictions and requirements in other law and court rule as provided for in the bill;
- * parenting time;
- * spousal support;
- * costs, expenses, and attorney fees;
- * enforceability of prenuptial and postnuptial agreements;
- * allocation of the parties' responsibility for marital debt; and
- * any other contested marital matters.

Arbitration could only be ordered by the court where the parties had signed a written arbitration agreement, and then the court could only order arbitration to occur in accordance with the written agreement. Before a court could accept a written arbitration agreement, the court would be required to provide each party with information provided by the state court administrative office (SCAO) regarding domestic relations arbitration. The SCAO's materials would have to provide at least the following information: that arbitration is binding,

that it may or may not be appropriate for the party's case, that each party may consult with an attorney before entering the arbitration process or choose to be represented by an attorney throughout the arbitration process, and an explanation of where and how legal services may be obtained if the party is unable to afford an attorney.

Generally, if either party were subject to a personal protection order involving domestic violence or child abuse or if the domestic relations matter involved allegations of domestic violence or child abuse, the case would be excluded from arbitration. However, a court could refer such a case to arbitration provided that both parties agreed to waive the exclusion. Neither party could waive this exclusion without being represented by an attorney throughout the action, including the arbitration process. Furthermore, both parties would have to be informed of the arbitration process, the suspension of the formal rules of evidence, and the binding nature of the arbitration. If, after receiving this information, the parties decided to waive the exclusion from arbitration, both the court and the attorneys for each of the parties would be required to ensure that each party's waiver was informed and voluntary, and each party's waiver would have to be placed on the record. Matters of child abuse or neglect would be specifically excluded from arbitration under the bills and would not be subject to the provisions for waiver.

Appointment of arbitrator. In order to be appointed as an arbitrator an individual would have to:

- * be an attorney in good standing with the state bar of Michigan;
- * have practiced in Michigan for no less than five years before the appointment, and have demonstrated an expertise in the area of domestic relations law; and
- * have had training in the dynamics of domestic violence and in handling domestic relations matters involving domestic violence.

The office of the friend of the court would be required to make available a list of arbitrators who met the required qualifications. This list would have to include a summary of each arbitrator's qualifications and experience.

Arbitration of a domestic matter could be heard by a single arbitrator or by a panel of three arbitrators who would be appointed by the circuit court as necessary. The court would be required to appoint any arbitrator

that the parties agreed upon, provided that he or she was qualified to be an arbitrator and consented to the appointment. Anyone appointed as a domestic relations arbitrator would have the same immunity from liability during the arbitration proceeding as the circuit court judge who has jurisdiction over the matter.

Powers, duties and proceedings. An arbitrator, attorney, or party would be required to disclose anything that might affect the arbitrator's ability to be impartial. If an arbitrator's impartiality was or might be affected by, among other things, bias, financial or personal interest in the outcome of the arbitration, or a past or present business or professional relationship with one of the parties or their attorneys, either party could request that the arbitrator disqualify himself or herself. If the arbitrator did not remove himself or herself within 14 days of a request for disqualification, the party could file a motion with the circuit court seeking to have the arbitrator disqualified.

A domestic relations arbitrator would be required to hear and make an award on each issue under the arbitration agreement. Arbitrators would have all of the following powers and duties:

- * to administer oaths or issue subpoenas as provided in the court rules;
- * to issue discovery orders relating to the issues being arbitrated;
- * to allocate arbitration fees and expenses between the parties, including imposing fees or expenses as sanctions against one of the parties; and
- * to enter an order requiring a party to produce specified information that the arbitrator considered relevant to, and helpful in resolving, an issue subject to the arbitration.

If the arbitrator considered it relevant to an issue being arbitrated, he or she also could order the filing of affidavits identifying the parties' places of employment and other sources of income, and listing the parties' assets and liabilities. The arbitrator could not release the affidavits until after both parties had filed them, and would be required to try to release the affidavits to the opposite parties at approximately the same time. The required affidavit would have to list at least all of the following:

- (1) real property;

- (2) checking and savings account balances, regardless of the form in which the money was held;
- (3) stocks and bonds;
- (4) income tax refunds due the parties;
- (5) life insurance, including cash value and amount payable at death;
- (6) loans held as a creditor or money owed to the parties, regardless of the form of the debt;
- (7) retirement funds and pension benefits;
- (8) professional licenses;
- (9) motor vehicles, boats, mobile homes, or any other kind of vehicle, including untitled vehicles;
- (10) extraordinary tools of a trade;
- (11) cemetery lots;
- (12) ownership interests in businesses;
- (13) limited partnerships; and
- (14) other assets in whatever form.

The required affidavits also would have to list all liabilities, in whatever form, including at least all of the following: secured and unsecured credit, taxes, rents, and security deposits.

As soon as practicable after the arbitrator's appointment, the arbitrator would have to meet with the parties and their attorneys. At that meeting they would have to consider all of the following matters:

- * the scope of the issues submitted for arbitration;
- * a date, time, and place for the hearing;
- * the list of witnesses who might testify;
- * a schedule for exchanging expert reports or summaries of expert testimony;
- * any circumstances that might affect the arbitrator's impartiality; and
- * the exhibits, documents, or other information that each party believes to be applicable and material to the case. The parties would also have to set a schedule for

the production or exchange of this information. (If no objection was made before the hearing regarding the production of information that the party knew or should have known existed, such objections would be considered to have been waived.)

An arbitrator would also be required to order reasonable access to information that was applicable and material to the issues being arbitrated. At a minimum, each party would be required to provide all of the following:

- * a current, complete and accurate sworn financial disclosure statement;
- * financial disclosure statements for the past three years;
- * state and federal income tax returns for the past three years or other time period as ordered by the arbitrator;
- * a copy of any orders issued by the court relating to any issue subject to arbitration, as well as tax returns for the year of the order and a financial statement for the time at which the order was entered, including at least gross and net income and assets and liabilities; and
- * a proposed award for each issue subject to arbitration.

Generally, no record would be made of the arbitration hearing, except where the bills, court rules, or the arbitration agreement provided otherwise. A record would be required of any portion of the hearing that concerned child support, custody, or parenting time and would be made in the same manner as required by the Michigan court rules for the record of a witness's testimony in a deposition. The parties could agree to have a record made of all or certain portions of the hearing. In addition, if the arbitrator so desired, he or she could make a record solely for the purpose of assisting in making his or her decision.

If the parties reached an agreement regarding child support, custody, or parenting time, it would have to be placed on the record, under oath, and the agreement would have to be included in the arbitrator's written award. An arbitrator could not award a child support amount that deviated from the friend of the court's child support formula unless the arbitrator complied with the same requirements for such a deviation prescribed for the circuit court.

Domestic arbitration awards. Unless the parties and the arbitrator reached an alternative agreement in writing or on the record, the arbitrator would be required to issue his or her decision within 60 days after the end of the hearing and after receiving the proposed findings of fact and conclusions of law if they had been requested by the arbitrator.

The award and any other orders issued by the arbitrator would be enforced by the circuit court in the same manner as if the court had issued them. If necessary a party could make a motion to the court to enforce an award or order issued by an arbitrator. Unless the arbitrator or the court granted an extension, the plaintiff in the matter would be required to file a judgment, order, or motion to settle the judgment with the circuit court within 21 days after the arbitrator issued the award. If the plaintiff failed to file the appropriate papers in a timely fashion, the other party could file them and request sanctions against the other party.

The arbitrator would retain jurisdiction to correct any errors or omissions in an award until the court confirmed the award. Either party could make a motion for such a correction provided the motion was made within a 14-day period after the award was issued. If such a motion was made, the other party would have 14 days to respond. The arbitrator would then have 14 days after the response was received or, if no response was received, after the expiration of the response time period to make or refuse to make the change.

Vacation or modification of domestic arbitration awards. Generally, the standards and procedures for review of a domestic arbitration award would be governed by the court rules. A review or modification of a child support amount would have to be conducted under, and would be subject to, the standards and procedures provided in other state law and by court rules that were applicable to child support amounts. An award concerning child support, custody, or parenting time could not be vacated or modified unless the court found that the award, as issued, was not in the best interests of the child.

The court could also vacate or modify an award under the following circumstances:

- * The award was procured by corruption, fraud, or other undue means.
- * There was evidence of corruption or partiality on the part of the arbitrator, or evidence of misconduct on the part of the arbitrator that prejudiced the rights of one of the parties.

- * The arbitrator exceeded his or her authority.

If a party sought to have a domestic arbitration award vacated on the grounds that it had been procured by corruption, fraud, or other undue means, the application seeking review of the award would have to be made within 21 days after the grounds were known or should have been known.

If the court determined that an award should be vacated because the arbitrator had exceeded his or her authority, the court could order the arbitrator to rehear the matter.

The fact that an award granted by an arbitrator contained relief that could not have been granted by a court of law or equity would not be sufficient grounds for vacating or refusing to confirm an award.

Appeals. An appeal from an arbitration award that had been reviewed by the circuit court would proceed in the same manner as an appeal from an order or judgment in other civil actions.

MCL 600.5070 et al.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bills would have no fiscal impact on state costs or revenues. Local costs and/or potential savings would depend upon each case and would be indeterminate. (10-24-00)

ARGUMENTS:

For:

Arbitration is a form of alternative dispute resolution which, in Michigan, is allowed and regulated under the Uniform Arbitration Act (MCL 600.5001 to 600.5035). The Revised Judicature Act (RJA), of which the Uniform Arbitration Act is a chapter, also has a chapter on health care arbitration. However, the RJA does not specifically address arbitration in domestic relations matters, and so provides no guidelines or standards for such arbitration. Michigan court rule [3.216(A)(3)] allows a court to order arbitration, upon stipulation of the parties, but also doesn't provide standards or guidelines for such arbitration. And although recently the court of appeals [in Dick v Dick, 210 Mich App 576, 534 NW2d 185 (1995)] did sanction the use of arbitration (as well as the use of "binding mediation") in domestic relations matters, case law doesn't provide guidelines for such arbitration either.

In addition to the fact that neither statute, court rule, nor case law provide standards or guidelines for domestic relations arbitration, under current court rule there also is no appeal from arbitrators' decisions except for fraud or for arbitrating outside the arbitration agreement. Current case law also doesn't require either a written agreement by the parties to engage in arbitration or a record, even in cases involving issues of child custody, support, and parenting time. Finally, alternative dispute measures have great appeal in domestic relations matters. Because of crowded court dockets and the fact that criminal cases must take precedence over other matters, the parties (and their families) in a domestic relations dispute may find themselves waiting a long time before they have a hearing to resolve the dispute and as a result often will resort to alternative dispute resolution methods.

The bills would address all of these problems. Standards and guidelines would provide uniformity to the process and safeguards that are essential to fair hearings. Requiring voluntary participation in domestic relations arbitration only after informed consent, in writing, by the parties involved would reduce the risk that participants could be steamrolled into taking part. Matters of child abuse and neglect would be specifically excluded from arbitration and cases that involved allegations of domestic violence could only be subjected to arbitration under limited circumstances.

Finally, expanded use of arbitration would reduce court dockets, so that more cases could be addressed more quickly. Parties not litigating domestic relations matters would have quicker and better access to the court, while, with a reduced case load, more court time could be available to those parties who still feel the need to take their domestic relations matter to trial.

Against:

According to some, many courts routinely avoid hearing divorce cases and do everything in their power to force a settlement between the parties rather than holding a hearing on the case and making a decision. The bill does nothing to fix this problem and in fact provides judges with another way to avoid making a decision in the divorce cases that come before them. In fact, given the alleged reluctance of judges to hear divorce cases, it seems likely that couples could be forced to participate in arbitration by having to choose between taking part in arbitration now, or having a distant hearing date with no guarantee that the case will be heard even then.

The bill's grant of immunity to an arbitrator is also unfair; arbitrators should be liable for bias, abuse of discretion, failure to accord due process and gross malfeasance of office. Finally, some argue that the bill's provision requiring both parties to be represented by attorneys in cases where there has been an allegation of domestic violence would deny the parties their constitutional right to represent themselves.

Response:

The requirement to have an attorney is limited to certain domestic violence situations and does not preclude self-representation in court; it merely requires those who desire to take part in arbitration to maintain representation. If either party wished to represent himself or herself, then they could not participate in arbitration, but they could still get a divorce and could still represent themselves before the court.

Against:

The requirement that the parties must review a form to be provided by the state court administrative office (SCAO) poses a problem. By requiring that review of the form precede participation, the bills could have the presumably unwanted effect of preventing arbitration from occurring unless and until the forms were completed and made available to the courts. Rather than requiring a form to be created, it might be better to require the parties to sign an acknowledgment or affidavit that they have been informed of the relevant issues.

POSITIONS:

The Family Law Section of the State Bar of Michigan supports the bills, but is concerned that the requirement for the provision of SCAO forms could have an unintended consequence of limiting or barring arbitration until the forms are created. (10-23-00)

The Michigan Advocacy Project is not opposed to the bills. (10-23-00)

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#This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.