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House Bill 4552 (Substitute S-1 as reported by the Committee of the Whole)

House Bill 4615 (Substitute S-2 as reported)

Sponsor: Representative Michael Switalski (House Bill 4552)

Representative Marc Shulman (House Bill 4615)

House Committee: Family and Civil Law

Senate Committee: Families, Mental Health and Human Services

Date Completed: 12-13-00

RATIONALE

Arbitration and mediation are voluntary alternatives to litigation that can resolve a wide variety of civil actions, including domestic relations matters. Arbitration is a process in which the parties agree to submit certain issues, or an entire dispute, to a neutral third party who will hear each side and render an opinion that is binding upon the parties. Mediation provides a forum in which the parties can work directly with a mutually acceptable third party to reach an agreement on disputed issues; mediation is nonbinding except as stipulated by the parties.

Arbitration and mediation are the subject of both Michigan statute and court rules, including a court rule that allows domestic relations matters to be mediated (MCR 3.216). The arbitration of domestic relations cases, however, is not specifically addressed. Neither the Uniform Arbitration Act (contained in Chapter 50 of the Revised Judicature Act) nor the Michigan court rule governing arbitration (MCR 3.602) contains language specific to family law. In practice, however, domestic relations matters are being arbitrated, and in 1995 the Michigan Court of Appeals held that binding arbitration is appropriate to resolve property distribution issues, child support disputes, and child custody determinations (*Dick v Dick*, 210 Mich App 576). Therefore, many people believe that Michigan should enact statutory guidelines to govern the arbitration of domestic relations disputes.

CONTENT

The bills would add Chapter 50B to the Revised Judicature Act to govern arbitration in domestic relations matters. The bills would do the following:

- Allow the parties to a domestic relations matter to stipulate to binding arbitration by a signed agreement.
- Require the parties to acknowledge the receipt of information about domestic relations

arbitration.

- Exclude cases involving domestic violence from arbitration, unless the parties waived this exclusion.
- Exclude a child abuse or neglect matter from arbitration.
- Provide that arbitration could be heard by one arbitrator or a panel of three, and prescribe arbitrator qualifications.
- Require the disclosure of any circumstance that could affect an arbitrator's impartiality.
- Specify the powers and duties of an arbitrator, including the authority to order discovery and the production of information.
- Allow an arbitrator to order the parties to file sworn statements of employment, income, assets, and liabilities.
- Require an arbitrator to order the parties to produce financial information.
- Establish deadlines for an arbitration award to be issued and for various motions or decisions.
- Require a court to enforce an award, and specify the grounds for vacating an award.
- Require an appeal of an award to be in the same manner as the appeal of other civil judgments.

The bills are tie-barred to each other.

House Bill 4552 (S-1)

Scope

Chapter 50B would provide for and govern arbitration in domestic relations matters. Arbitration proceedings also would be governed by court rule except to the extent those provisions were modified by an arbitration agreement or Chapter 50B. The new chapter would control if there were a conflict between it and Chapter 50.

Chapter 50B would not apply to arbitration in a domestic relations matter if, before the bill's effective

date, the court had entered an order for arbitration and all of the parties had executed an arbitration agreement.

Arbitration Agreement: Exclusion

Parties to an action for divorce, annulment, separate maintenance, or child support, custody, or parenting time, or to a postjudgment proceeding related to such an action, could stipulate to binding arbitration by a signed agreement that specifically provided for an award with respect to one or more of the following issues: real and personal property; child custody; child support (subject to the restrictions and requirements in other law and court rule as provided in the Act); parenting time; spousal support; costs, expenses, and attorney fees; enforceability of prenuptial and postnuptial agreements; allocation of the parties' responsibility for debt as between them; and/or other contested domestic relations matters.

The court could not order a party to participate in arbitration unless each party to the domestic relations matter acknowledged, in writing or on the record, that he or she had been informed in plain language of all of the following:

- Arbitration was voluntary.
- Arbitration was binding and the right to appeal was limited.
- Arbitration was not recommended for cases involving domestic violence.
- Arbitration might not be appropriate in all cases.
- The arbitrator's powers and duties would be delineated in a written arbitration agreement that all parties would have to sign before arbitration commenced.
- During arbitration, the arbitrator would have the power to decide each issue assigned to arbitration under the arbitration agreement, although the court would enforce the arbitrator's decisions on those issues.
- The party could consult with an attorney before entering into the arbitration process or choose to be represented by an attorney throughout the process.
- If the party could not afford an attorney, he or she might wish to seek free legal advice, which might or might not be available.

In addition, each party would have to be informed that a party to arbitration would be responsible, either solely or jointly with other parties, to pay for the cost of the arbitration, including fees for the arbitrator's services; and, in comparison, a party does not pay for the court to hear and decide an issue, except for the payment of filing fees and other court fees prescribed by statute or court rule for which the party would be responsible regardless of the use of arbitration.

If either party were subject to a personal protection order involving domestic violence or if, in the pending domestic relations matter, there were allegations of domestic violence or child abuse, the court could not refer the case to arbitration unless each party waived this exclusion. A party could not waive the exclusion unless he or she were represented by an attorney throughout the action, including the arbitration process, and were informed on the record about the arbitration process, the suspension of the formal rules of evidence, and the binding nature of arbitration.

If a party decided to waive the exclusion from arbitration after receiving this information, the court and the party's attorney would have to ensure that the waiver was informed and voluntary. If the court found that a party's waiver was informed and voluntary, the court would have to place those findings and the waiver on the record.

A child abuse or neglect matter would be specifically excluded from arbitration under the Act.

Appointment of Arbitrator; Responsibilities

Arbitration under Chapter 50B could be heard by a single arbitrator or by a panel of three arbitrators. The court would have to appoint an arbitrator agreed to the parties if he or she were qualified (as described below) and consented to the appointment. An appointed arbitrator would be immune from liability in regard to the arbitration proceeding to the same extent as the circuit judge with jurisdiction of the action.

The court could not appoint an arbitrator unless he or she met all of the following:

- Was an attorney in good standing with the State Bar of Michigan.
- Had practiced as an attorney for at least five years before the appointment and demonstrated an expertise in the area of domestic relations law.
- Had received training in the dynamics of domestic violence and in handling domestic relations matters that had a history of domestic violence.

The Office of the Friend of the Court, an alternative dispute resolution clerk, or another individual designated by the chief judge could make available a list of arbitrators meeting these criteria, with a summary of each person's qualifications and experience.

An appointed arbitrator would have to hear and make an award on each issue submitted for arbitration under the arbitration agreement subject to its provisions. The arbitrator would have power and duty to do all of the following:

- Administer an oath or issue a subpoena as provided by court rule.
- Issue an order regarding discovery proceedings relative to the issues being arbitrated.
- Issue an order allocating arbitration fees and expenses between the parties or to one party, including imposing a fee or expense on a party or attorney as a sanction, subject to the agreement.
- Issue 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.

Affidavit of Income & Assets

If the arbitrator considered it relevant to an issue, he or she could order the filing of sworn statements that identified each party's place of employment and other sources of income, and that listed each party's assets and liabilities. The arbitrator could not release the sworn statements until after all parties had filed them. He or she would have to attempt to release them to the opposite parties at approximately the same time.

A sworn statement would have to list at least all of the following assets: real property; checking and savings account balances, regardless of the form in which the money was held; stocks and bonds; income tax refunds due the parties; life insurance, including cash value and amount payable at death; loans held as a creditor or money owed to the parties in any form; retirement funds and pension benefits; professional licenses; motor vehicles, boats, mobile homes, or any other type of vehicle including untitled vehicles; extraordinary tools of a trade; cemetery lots; ownership interests in businesses; limited partnerships; other assets in any form.

The sworn statement also would have to list secured and unsecured credits; taxes; rents and security deposits; and all other liabilities in any form.

Impartiality

An arbitrator, attorney, or party in an arbitration proceeding would have to disclose any circumstance that could affect an arbitrator's impartiality, including bias, a financial or personal interest in the outcome, or a past or present business or professional relationship with a party or attorney. Upon disclosure, a party could request disqualification of the arbitrator, and would have to make the request as soon as practicable after the disclosure. If the arbitrator did not withdraw within 14 days after a request, the party could file a motion for disqualification with the circuit court.

The court would have to hear the motion within 21 days after it was filed. If the court found that the arbitrator was disqualified, it could appoint another arbitrator agreed to by the parties or could void the arbitration agreement and proceed as if arbitration had not been ordered.

House Bill 4615 (S-2)

Production of Information

As soon as practicable after the appointment of an arbitrator, the parties and attorneys would have to meet with him or her to consider all of the following:

- Scope of the issues submitted.
- Date, time, and place of the hearing.
- Witnesses, including experts, who could testify.
- Schedule for exchange of expert reports or summary of expert testimony.
- Disclosure of a circumstance that could affect the arbitrator's impartiality.

The parties, attorneys, and arbitrator also would have to consider exhibits, documents, or other information each party considered applicable and material to the case and a schedule for production or exchange of the information. If a party knew or reasonably should have known about the existence of information he or she was required to produce, that party would waive objection to producing the information if he or she did not object before the hearing.

The arbitrator would have to order each party to produce information that was applicable and material to an issue under arbitration, including any 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 previous three years or other time period as ordered by the arbitrator.
- Proposed award for each issue subject to arbitration.

Also, if a court had issued an order concerning an issue subject to arbitration, the parties would have to produce a copy of the order, State and Federal income tax returns for the year it was issued, and a financial statement for the time at which the order was issued, including at least gross and net income and assets and liabilities.

Record of Hearing

Except as follows or as provided by court rule or an arbitration agreement, a record could not be made of an arbitration hearing. If a record were not required, an arbitrator could make a record to be used only by him or her to aid in reaching the decision. The parties could provide in their agreement that a record be made of those portions of a hearing related to one or more issues subject to arbitration.

A record would have to be made of that portion of a hearing that concerned child support, custody, or parenting time in the same manner required by the Michigan court rules for the record of a witness's testimony in a deposition.

Written Award

Unless otherwise agreed by the parties and arbitrator in writing or on the record, an arbitrator would have to issue a written award on each issue within 60 days after the end of the hearing or, if requested by the arbitrator, after receiving proposed findings of fact and conclusions of law.

If the parties reached an agreement regarding child support, custody, or parenting time, the agreement would have to be placed on the record by the parties under oath and be included in the written award. An arbitrator could not include in the award a child support amount that deviated from the child support formula developed by the State Friend of the Court Bureau unless the arbitrator complied with the same requirements for such a deviation prescribed for the court under the law applicable to the domestic relations dispute being arbitrated.

The arbitrator would retain jurisdiction to correct errors or omissions in an award until the court confirmed it. Within 14 days after the award was issued, a party to the arbitration could file a motion to correct errors or omissions. The other party could respond to the motion within 14 days. The arbitrator would have to issue a decision on the motion within 14 days after receiving a response or, if a response were not filed, within 14 days after the response period expired.

Enforcement

The circuit court would have to enforce an arbitrator's award or other order issued under Chapter 50B in the same manner as an order issued by the court. A party could make a motion to the court to enforce an award or order.

The plaintiff in an action that was submitted to arbitration would have to file with the court a judgment, order, or motion to settle the judgment within 21 days after the arbitrator's award was issued, unless otherwise agreed to by the parties in writing or unless the arbitrator or court granted an extension. If the plaintiff failed to comply, another party could file a judgment, order, or motion to settle the judgment and could request sanctions.

Vacation or Modification of Award

The circuit court could not vacate or modify an award concerning child support, custody, or parenting time unless the court found that the award was adverse to the child's best interests, or the court was required to vacate the award (as described below). A review or modification of a child support amount, child custody, or parenting time would have to be conducted and would be subject to the standards and procedures provided in other statutes, in other applicable law, and by court rule that applied to child support amounts, child custody, or parenting time.

If a party applied to the court for vacation or modification of an arbitrator's award, the court would have to review it. The court would have to vacate an award under any of the following circumstances:

- The award was procured by corruption, fraud, or other undue means.
- There was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights.
- The arbitrator exceeded his or her powers.
- The arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.

An application to vacate an award on the ground that it was procured by corruption, fraud, or other undue means would have to be made within 21 days after the grounds were known or should have been known.

If the court vacated an award, it could order a rehearing before a new arbitrator chosen as provided in the agreement or, if there were no such provision, by the court. If an award were vacated on the ground that it was procured by corruption, fraud, or

other undue means, or that the arbitrator exceeded his or her powers, the court could order a rehearing before the arbitrator who made the award.

The fact that the relief granted in an award could not be granted by a court of law or equity would not be grounds for vacating or refusing to confirm the award.

Other standards and procedures regarding review of arbitration awards would be governed by court rule.

Appeal

An appeal from an arbitration award that the circuit court confirmed, vacated, modified, or corrected would have to be taken in the same manner as from an order or judgment in other civil actions.

Proposed MCL 600.5070-600.5075

(H.B. 4552)

Proposed MCL 500.5076.600.5082

(H.B. 4615)

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Arbitration and mediation can avoid the delay, expense, and acrimony that often accompany traditional courtroom litigation. These alternatives also offer a private way to resolve highly personal and painful disputes. Mediation already has become an effective technique for settling family law issues, but may not be the preferable method in many cases. If the parties themselves are unable or unlikely to reach an agreement, even with the assistance of a skilled negotiator, turning the matter over to a neutral decision-maker may be a better solution. As the Court of Appeals pointed out in *Dick v Dick*, the court rule on mediation specifically authorizes a court, on stipulation of the parties, to order the use of "other settlement procedures", which clearly include arbitration.

Although some domestic relations disputes already are being or have been arbitrated, there are no existing guidelines specific to these types of cases. The bills, therefore, would fill this gap. Recognizing the parties' needs and potential vulnerability, the bills contain a number of safeguards. For example, the bills would ensure that the parties received clear information about arbitration, and were told that they would be responsible for its costs. They also would have to be informed that arbitration was not recommended for cases involving domestic violence.

If a case did involve domestic violence, it could not be arbitrated unless each party was represented by an attorney throughout the action. The bills also specify that the arbitration of child support would be subject to other law and court rule, and a review or modification of child support, custody, or parenting time would be subject to the standards and procedures in other applicable statutes, case law, and court rules. If a case involved child abuse or neglect, it could not be submitted to arbitration.

These provisions would enable the parties to a domestic relations dispute to make an informed decision about whether to arbitrate, and then to proceed in a manner that could save them time, money, and aggravation. By establishing uniform standards throughout the State, as well as certainty about the process, the bills could promote the use of arbitration, which in turn could help relieve crowded court dockets.

Legislative Analyst: S. Lowe

FISCAL IMPACT

There are no statewide data on the current use of arbitrators in domestic relations matters. Reduced court costs would depend on whether the bills increased the use of arbitration in domestic relations matters.

Fiscal Analyst: B. Bowerman

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.