

DOMESTIC RELATIONS
ARBITRATION

House Bill 4277 as passed by the House
Second Analysis (4-2-97)

Sponsor: Rep. David Gubow
Committee: Judiciary

THE APPARENT PROBLEM:

Although both Michigan court rule and a recent court of appeals case allow arbitration in domestic relations matters, neither court rule nor Michigan case law provides standards or guidelines for such arbitration. Michigan does have a Uniform Arbitration Act, but the statute doesn't specifically address domestic relations arbitration and so also provides no guidelines for such arbitration. Thus, the only way currently to resolve issues that need a binding decision in domestic relations matters is through a determination by a circuit court judge. Given the busy dockets in many circuits and the requirements on circuit court judges to give priority to criminal matters, however, it often is difficult for judges to find the time to address and resolve domestic relations issues with certainty and finality and in a timely manner. Legislation has been introduced that would put domestic relations arbitration into statute.

THE CONTENT OF THE BILL:

The bill would amend the Revised Judicature Act by adding a new chapter providing for the arbitration of domestic matters.

Under the bill, parties of an action for divorce, annulment, separate maintenance, or child support, custody, or parenting time, or a postjudgment proceeding relating to such an action, would have the option of having their domestic relations matters arbitrated. A domestic relations arbitration proceeding would be governed by the bill, and by court rules, except to the extent that those provisions were modified by the arbitration agreement or by the bill. If there were a conflict between the provisions of the bill and the provisions of the uniform arbitration act, the provisions of the bill would control.

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 not be ordered by the court, unless the parties had signed a written arbitration agreement and the court could only order arbitration to the extent that the written agreement indicated. In cases involving allegations of domestic violence, if the parties agreed to arbitration, each party would have to be represented by an attorney, the court would be required to have each party's consent placed on the record, and both the court and the attorneys for each of the parties would be required to ensure that each party's consent was informed and voluntary.

Appointment of arbitrators. Arbitration of a domestic matter could be heard by a single arbitrator or by a panel of three arbitrators. The circuit court would appoint the arbitrator or panel of arbitrators as necessary, and the office of the friend of the court would have to make available a list of arbitrators who met the required qualifications. The list would have to include a summary of each arbitrator's qualifications and experience.

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 5 years immediately preceding the appointment, and have demonstrated an expertise in the area of domestic relations law; and

* have had training in handling domestic relations matters involving domestic violence.

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 him or herself. If the arbitrator did not remove him 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 an affidavit that identified the party's place of employment and other sources of income, and that listed the assets and liabilities of the parties. 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 assets, in whatever form, but including 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;

(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; and

(11) cemetery lots.

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 material to the case. (The parties would have to set a schedule for the production or exchange of that information. If no objection was

made before the hearing to the production or lack of production of any of this information, such objections would be considered to have been waived.)

An arbitrator would also be required to order reasonable access to information that was 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 5 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 when 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.

Although the parties could agree to have a record made of all or certain portions of the hearing, except where the court rules or the arbitration agreement provided otherwise, no record would be required to be made of the arbitration hearing. 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. 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, the parties would have to place it on the record, under oath, and the agreement would have to be included in the arbitrator's 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 circuit court under the law that would apply to the domestic relations dispute being arbitrated.

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 would be required to file a judgment, order, or motion to settle judgment with the circuit court within 21 days after the arbitrator's award was issued. If the plaintiff did not file the appropriate papers in a timely fashion, another party to the case could file the necessary judgment, order, or motion to settle judgment and request sanctions against the other party.

The arbitrator would still have jurisdiction to correct any errors or omissions in an award for up to 21 days after the award was issued. Either party could make a motion for such a correction provided it was done within 21 days after the award was issued. The other party could then respond to the motion within 14 days after first motion was made. The arbitrator would then have 14 days after the time period for a response expired to make or refuse to make the change.

Vacation or modification of domestic arbitration awards. Except as follows, the standards and procedures for review of a domestic arbitration award would be governed by the court rules. If an arbitration award concerned child support, custody, or parenting time, the court's review of the award would be required to be based only upon the record of the arbitration hearing. 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. Such an award could not be vacated or modified unless the court found that the award as issued was not in the best interests of the child.

If the arbitration award did not involve children, the court could vacate the 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.
- * The arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear material evidence, or otherwise conducted the hearing in a way that substantially prejudiced a party's rights.

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 received 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 or had refused to hear material evidence, improperly refused to postpone a hearing, or otherwise conducted the hearing in a manner that substantially prejudiced a party's rights, 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.

Effective date. The bill would take effect October 1, 1997.

MCL 600.5070 et al.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bill would have no fiscal impact on state or local units of government. (3-6-97)

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 NW2nd 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 to arbitrate or a record, even when issues of child custody, support, and parenting time are arbitrated. Finally, because of crowded court dockets and the precedence that criminal cases must take over others, the parties to domestic relations disputes, and their families, can be in what is a normally very stressful situation for a long time, through no fault of their own.

The bill would address all of these problems. Standards and guidelines provided by the bill would provide uniformity to the process and safeguards that are essential to fair hearings. The bill would provide for voluntary participation in domestic relations arbitration only after informed consent, on the record, by the parties involved; no court could order arbitration otherwise. The bill 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 chose not to arbitrate their issues. The bill also would protect parties in cases involving allegations of domestic violence by requiring that each party be represented by an attorney, by requiring the court to have each party's consent placed on the record, and by requiring that both the court and the attorneys for each of the parties ensure that each party's consent was informed and voluntary.

Against:

According to some, 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 hearing date set in the distant future with no guarantee that the case will be heard even then. The bill should contain provisions to protect against placing the parties in such a position to avoid the use of arbitration as a means of preventing hearings on divorces from coming before the courts.

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. In addition, there is no basis for the presumption that merely because an attorney is a family law attorney that he or she is qualified to be an arbitrator and is thereby able to make decisions as to custody, parenting time and other decisions regarding the lives of the children of a divorce.

Finally, some argue that the bill's provision requiring that both parties 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 only requires that the parties be represented if they wish to participate in arbitration. 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.

POSITIONS:

The Family Law Section of the State Bar of Michigan supports the bill. (3-11-96)

The Capital Area Fathers for Equal Rights opposes the bill. (3-11-97)

Analyst: W. Flory
