

Family Law Arbitration: Third Party Alternative Dispute Resolution

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I. GENERAL COMMERCIAL ARBITRATION

Matrimonial law arbitration may be an idea whose time has come. Arbitration as a dispute resolution methodology has been around for hundreds if not thousands of years. A big boost for arbitration in the United States came in the mid-1920's with the adoption of the Federal Arbitration Act. That act made agreements to arbitrate enforceable in our courts.

Over the past century, arbitration has been used primarily in labor and commercial law and a tremendous body of case law has developed in those areas. The National Conference of Commissioners of Uniform State Laws gave us the Uniform Arbitration Act (UAA) in 1956 and the Revised Uniform Arbitration Act (RUAA) in 2000. Forty-nine states had adopted the UAA. As of 2007, the following twelve states have adopted the RUAA: Alaska, Colorado, Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah and Washington. The RUAA is currently pending in New York and in the District of Columbia.

The preamble to the RUAA states that "the primary purpose of the act is to advance arbitration as a desirable alternative to litigation. A revision is necessary at this time in light of the ever-increasing use of arbitration and the developments of the law in this area." If this is a "desirable alternative to litigation" in other areas of the law, why were we, as family lawyers, being left behind in its "ever-increasing use . . . ?"

On October 1, 1999, North Carolina became the first state to adopt an arbitration statute specifically designed for family law cases. This statute was amended in 2003 and again in 2005 after North Carolina adopted the RUAA for general commercial arbitrations. The 2005 amendments were necessary to incorporate the improvements of the RUAA over the UAA. The North Carolina statute became the basis for the national Model Family Law Arbitration Act of the American Academy of Matrimonial Lawyers.

Colorado, Connecticut, Indiana, Michigan, New Hampshire, and New Mexico have followed North Carolina's lead and have enacted specific statutes for matrimonial arbitration. None of these state statutes

are as comprehensive as those of North Carolina. Other states permitting matrimonial law arbitrations do so under the general authority of one of the uniform acts, sometimes cross-referencing matrimonial statutes to these general arbitration statutes. Unfortunately, due to the unique nature and needs of matrimonial cases, general commercial arbitration statutes are often deficient and provide insufficient authority to address all of the issues that we face in our matrimonial cases.

II. THE ADR CONTINUUM

On an alternative dispute resolution continuum, mediation falls on one end and arbitration falls on the other. While these two valuable litigation alternatives are not mutually exclusive, they are very different. Mediation is a party-driven process with each party encouraged to accept responsibility and to retain authority throughout the negotiation process. Arbitration is a third-party process in which a neutral is cloaked with judicial-like authority to decide specific designated issues. While arbitration is an alternative to the courtroom, arbitration is more similar to litigation than it is to mediation.

III. IT'S THE CONTRACT, STUPID

An arbitrator derives authority from the written agreement of the parties which may be memorialized by a contract or a consent order. There are generally two categories of agreements into which arbitration parties must enter. First, they must agree to place specific issues in dispute into arbitration; and second, they must agree on the rules that the arbitrator must follow in conducting this arbitration. These two categories of agreements may appear in one document or in two or more.

The North Carolina Family Law Arbitration Act is found within the family law statutes. N.C. Gen. Stat. §§ 50-41-62 (2006). The Act provides specific statutory authority for family law arbitration in North Carolina. North Carolina has also adopted the Revised Uniform Arbitration Act, N.C. Gen. Stat. §§ 1-569.1-569.431 (2006), and it is also possible to arbitrate certain family law issues under that Act. Thus, it is important to designate the appropriate Act in the agreement or consent order to arbitrate. Presumably, family lawyers will select the North Carolina Family Law Arbitration Act in almost all instances because that Act is tailor-made for family law cases and provides parties with more flexibility in arbitrating these cases.

The second category of agreement into which the parties must enter addresses the rules for the arbitration. With very few limitations, parties may limit or expand the arbitrator's authority in a given case.

The arbitrator may be given almost unlimited authority on how the arbitration sessions are to be conducted or that authority may be significantly limited by agreement of the parties. The parties may agree upon a different standard of review than would otherwise apply in family law litigation.

Resources are readily available to assist parties in fashioning the rules that will govern a given arbitration. When the Family Law Section of the North Carolina Bar Association submitted the proposed Act to the General Assembly for consideration, it had already drafted a set of non-mandatory rules that are archived with the North Carolina Bar Association. In addition, a number of arbitration associations have published voluntary rules that can be incorporated wholesale into arbitration agreements or consent orders, or from which certain provisions can be selected. The North Carolina Rules and Forms also provide an excellent starting point for attorneys contemplating putting a case into arbitration. Many of the provisions of the North Carolina Rules and Forms should be made a part of every agreement or consent order to arbitrate. Of course, attorneys will want to substitute and delete certain provisions depending upon the exigencies of a given case.

The North Carolina Family Law Arbitration Act, along with the ancillary rules and commentary archived with the North Carolina Bar Association, can be found at:

<http://family.ncbar.org/Legal+Resources/2006+Family+Law+Handbook/default.aspx>

<http://www.family.ncbar.org/Legal+Resources/Publications/default.aspx>

Forms developed for use with the Act and Rules can be found in Volume II of the material.

IV. THE COMPLETE ATTORNEY

Family lawyers are accustomed to negotiating support and property settlement agreements resolving the substantive issues in dispute. At least as much attention should be given to the contracts and consent orders to arbitrate. In lieu of negotiating an agreement that will specify which party will receive the car, the attorney is negotiating an agreement for a system by which a third party will be authorized to determine who gets the car. Due to the unique demands of every dispute, it will almost never be appropriate to adopt the North Carolina Bar Association Rules and Forms without modification for the exigencies of a given case.

Although arbitration of family law disputes is not appropriate in every case, it is likely to be appropriate in more cases than most family law attorneys realize. The complete family law attorney should be able to advise the client about this alternative dispute resolution methodology and, if that procedure is selected, be prepared to negotiate an agreement or consent order to arbitrate along with appropriate rules to the benefit of that client.

V. ORIGINS OF THE NORTH CAROLINA FAMILY LAW ARBITRATION ACT

The Family Law Section of the North Carolina Bar Association became interested in family law arbitration in the mid-1990s. While a number of states, including North Carolina, appeared to permit the arbitration of certain family law issues under general commercial arbitration statutes, no state had adopted an arbitration statute specifically tailored to family law cases. The initial objective of the Family Law Section was to simply resolve some ambiguity and limitations created by the case of *Crutchley v. Crutchley*, 306 N.C. 518, 293 S.E.2d. 793 (1982), with a simple legislative policy statement that all family law matters are subject to arbitration. After consulting with commercial arbitration expert, Professor George K. Walker of the Wake Forest University School of Law, the Section decided to expand their objective to the development of a comprehensive family law arbitration statute along with ancillary rules and forms. Professor Walker led a special Family Law Section committee in this effort, which resulted in the 1999 Act and the ancillary rules and forms.

VI. FAMILY LAW ARBITRATION ON THE NATIONAL STAGE

In 1999, North Carolina led the way with the first comprehensive family law arbitration statute in the United States. Several other states have now adopted such statutes, but none are as comprehensive as that of North Carolina.

In the late 1980's and early 1990's, the American Academy of Matrimonial Lawyers became involved in the effort to promulgate family law arbitration within the various states. At that time, the AAML drafted a set of model rules but no model statute. AAML fellows wrote arbitration articles and this organization conducted arbitrator training workshops as early as 1989. The North Carolina fellows who worked with the national AAML Arbitration Committee provided the impetus toward formulating a national model statute, and in 2004 the AAML adopted the comprehensive act along with ancillary rules, based upon the North Carolina statute, rules and forms.

At present, the family law arbitration cultures in the various states vary widely. While family law arbitration is unheard of in some states, other states have embraced this methodology. It is difficult to accurately assess the level of this methodology's use because most family law arbitrations are conducted in private and confidentiality is an important consideration for many parties. In variation on the theme, several states have a system of private judging which functions much like arbitration, except that the person hired to hear the case is commissioned as a state judge for that particular case.

Unlike in North Carolina, many, if not most states, require judicial review of all matrimonial law agreements including agreements to arbitrate. While this level of judicial review varies, judges in these states are in a position to derail otherwise considered and valid contracts to arbitrate. The sanctity of the family law contract in North Carolina makes this state an even more attractive setting for family law arbitrations.

VII. OVERVIEW OF THE NORTH CAROLINA FAMILY LAW ARBITRATION ACT AND ANCILLARY RULES AND FORMS

As mentioned above, the North Carolina Family Law Arbitration Act, along with the ancillary rules and commentary can be found at:

<http://family.ncbar.org/Legal+Resources/2006+Family+Law+Handbook/default.aspx>

Therefore, the Act and rules will not be reproduced for this manuscript. The twenty-five statutes that comprise the North Carolina Family Law Arbitration Act, N.C. Gen. Stat. §§ 50-41-62 (2006), are summarized as follows:

§ 50-41. Purpose; short title.

The North Carolina Family Law Arbitration Act specifically states that it is the express public policy of the State of North Carolina to permit the arbitration of all issues arising out of a marital separation or divorce except for the divorce itself.

§ 50-42. Arbitration Agreements Made Valid, Irrevocable and Enforceable.

Written agreements to arbitrate entered into before or after the marriage are valid except for child issue arbitration provisions in premarital agreements.

§ 50-42.1. Nonwaivable Provisions.

Some rights may never be waived and some may be waived only after a controversy has arisen.

Before a controversy arises, a party may not waive or vary the effect of the provisions in the following statutes:

- § 50-42. Validation and Enforceability of Arbitration Agreements.
- § 50-42.2 (a). Notice of Arbitration Proceedings.
- § 50-42.2 (b). Appearance at Hearing Waives Notice.
- § 50-45.1. Conflict of Interest Disclosure by Arbitrator.
- § 50-49 (a). Power of Arbitrator Administer Oaths and Issue Subpoenas.
- § 50-49 (b). Depositions May Proceed in Arbitration.
- § 50-49 (e). Issuance of Subpoenas and Witness Compensation.
- § 50-58. Applications to the Court by Motion.
- § 50-59. Definitions of “court” and “person.”

Parties may not waive or vary the effect of the following statutes at any time:

- § 50-43. Proceedings to Compel or Stay Arbitration.
- § 50-45 (f). Arbitrator Immunity.
- § 50-52. Change of Award by Arbitrators.
- § 50-53. Confirmation of Award.
- § 50-54. Vacating and Award.
- § 50-55. Modification or Correction of Award.
- § 50-56. Modification of Spousal Support and Child Issues Awards.
- § 50-57. Orders or Judgments on Awards.
- § 50-60. Appeals.
- § 50-61. Article Not Retroactive.
- § 50-62. Construction and Uniformity of Interpretation.

§ 50-42.2. Notice. Minimum arbitration proceeding notice requirements are set forth.

§ 50-43. Proceedings to Compel or Stay Arbitration.

Under certain circumstances, a court must halt arbitration proceedings and under others the court must compel the parties to arbitrate. If the court finds that there is a valid agreement or consent order to arbitrate, the court has no alternative other than to order the arbitration to proceed. There is no state constitutional right to a jury trial on the issue of whether there is a valid agreement to arbitrate. *Kiell v. Kiell*, 179 N.C. App. 396, 398-400, 633 S.E. 2d 827, 829-30 (N.C. Ct. App. 2003).

§ 50-44. Interim Relief and Interim Measures.

An arbitrator has the authority to implement certain interim relief measures unless that authority is limited by the terms of an agreement or consent order.

§ 50-45. Appointment of Arbitrators by Court; Rules for Conducting the Arbitration.

Unless the parties agree otherwise, there shall be one arbitrator and if the parties are unable to agree upon that arbitrator, the court shall appoint one using the specified criteria.

§ 50-45.1. Disclosure by Arbitrator.

Arbitrators are required to make extensive conflict of interest disclosures at the outset of an arbitration proceeding and throughout the arbitration process unless the parties agree otherwise after the controversy has arisen.

§ 50-46. Majority Action by Arbitrators.

In multi-arbitrator arbitrations, decisions of the panel must be by majority, unless the parties agree otherwise.

§ 50-47. Hearing.

Broad general standards for the conduct of an arbitration proceeding are specified and are to be applied unless the parties agree otherwise.

§ 50-48. Representation by Attorney.

Each party to an arbitration has the right to be represented by legal counsel and this right may not be waived prior to a hearing.

§ 50-49. Witnesses; Subpoenas, Depositions; Court Assistance.

The arbitrator is given the power to swear witnesses, to issue subpoenas and to direct the discovery process.

§ 50-50.1. Consolidation.

The court may consolidate certain types of arbitration proceedings.

§ 50-51. Award; Costs.

Arbitration awards must be in writing, signed and dated. Certain other requirements for the award are included in this section along with the authority of the arbitrator to award costs. The authority of the arbitrator to award costs may be limited by agreement of the parties.

§ 50-52. Change of Award by Arbitrators.

An arbitrator may change or clarify an award under certain specific and limited circumstances such as evident miscalculations. The award may also be changed by the arbitrator prior to the award being submitted.

§ 50-53. Confirmation of Award.

This is the procedure that converts an arbitration award into a court order, just as if the award had been the result of a court trial. Parties may agree that the arbitration award will not be confirmed, thereby remaining a contract.

§ 50-54. Vacating an Award.

A court may vacate an arbitration award under specific and limited circumstances, including fraud and corruption and the arbitrator exceeding the authority granted. The North Carolina Court of Appeals held that judicial review of an arbitration award is confined to determination of whether

there exists one of the specific grounds for vacation of an award under the arbitration statute. *Semon v. Semon*, 161 N.C. App. 137, 587 S.E.2d 460 (N.C. Ct. App. 2003).

§ 50-55. Modification or Correction of Award.

A court may modify or correct an arbitration award under specific and limited circumstances. This application must be made within ninety days after delivery of the award to the applicant and generally may address only evident miscalculations, matters of form and areas where the arbitrator has exceeded his or her authority. The North Carolina Court of Appeals has held that a party waived his right to contend that the arbitrator's award was imperfect when he failed to file an application to modify or correct the award within ninety days after delivery of copy of the award. *Semon v. Semon*, 161 N.C. App. 137, 587 S.E.2d 460 (N.C. Ct. App. 2003). The Court also held that the state statutes provide the exclusive grounds and procedure for vacating, modifying or correcting an arbitration award. *Id.*

§ 50-56. Modification of Award for Alimony, Post separation Support, Child Support, or Child Custody on Substantial Change of Circumstances.

To the same extent as court orders for spousal support or child issues are modifiable, confirmed arbitration awards are modifiable. To the same extent as contracts for spousal support or child issues are modifiable, unconfirmed arbitration awards are modifiable.

§ 50-57. Orders or Judgments on Awards.

This statute provides for the entry of an order or judgment upon the order granting confirmation of the arbitration award, and permits the court to seal or redact provisions in an award under certain circumstances.

§ 50-58. Applications to the Court.

Court involvement is initiated by motion and notice just like any other legal proceeding.

§ 50-59. Court; Jurisdiction; Other Definitions.

The terms "court" and "person" are defined.

§ 50-60. Appeals.

This statute lists six specific circumstances for failure to follow procedural aspects on the North Carolina Family Law Arbitration Act when orders or judgments may be appealed to the North Carolina appellate courts.

§ 50-61. Article Not Retroactive.

The Act is applicable only to those agreements and consent orders to arbitrate made on or after October 1, 1999.

§ 50-62. Construction; Uniformity of Interpretation.

This Act shall be construed, when possible, consistent with the North Carolina Uniform Arbitration Act, the Revised Uniform Arbitration Act, the North Carolina International Commercial Arbitration and Conciliation

Act and certain other North Carolina family law statutes. The use of electronic records and signatures conform to the federal Electronic Signatures in Global and National Commerce Act.

The Forms and Rules for Arbitrating Family Law Disputes in North Carolina are not mandatory and are not part of the North Carolina General Statutes. They are archived with the North Carolina Bar Association and are available to parties and attorneys who wish to fashion forms and rules to govern a specific arbitration. They are divided into Basic and Optional Forms and Basic and Optional Rules. The Forms present some general formatting options while the Rules address the specifics of the authority of the arbitrator and the procedures for the arbitration. The topics addressed by the Basic Rules are ones that must be addressed by the parties and the arbitrator. If the parties have agreed to arbitrate pursuant to the North Carolina Family Law Arbitration Act but cannot agree upon rules, the statutes provide that the arbitrator will select the rules. Presumably this is an area that parties will not want to leave up to the arbitrator.

There are thirty-eight Basic Rules for Arbitration of Family Law Disputes. The parties are free to ignore, incorporate, delete, or revise these Rules for a given arbitration. Each explanation for each Rule below can be preceded by “Unless the parties agree otherwise in writing”

1. Agreement of Parties Primacy of Rules.

In the event that the parties have executed two agreements or consent orders to arbitrate with two separate sets of rules, these Rules shall govern the arbitration absent provisions to the contrary.

2. Number of Arbitrators.

While the parties may select any number of arbitrators to hear their dispute, the default provision is for one arbitrator.

3. Initiation Under Arbitration Provision in a Contract.

If a party wishes to initiate an arbitration proceeding pursuant to a contract, that party (the claimant) shall make a demand on the respondent pursuant to certain time deadlines set forth in the Rule. Arbitration pleadings are described in this Rule.

4. Initiation Under a Submission.

This is the procedure for initiating an arbitration when the parties are already involved in an existing dispute.

5. Changes of Claim; Amendments.

This Rule establishes procedures and timelines for amendments to pleadings and changes in claims.

6. Administrative Conference; Preliminary Hearing; Mediation Conference.

Arbitrators are given extensive administrative authority over a case and may require the parties to participate in certain pre-arbitration events. The arbitrator may facilitate a mediation settlement conference but the arbitrator may not serve as the mediator.

7. Site of the Arbitration.

An arbitrator is given discretion in selecting the arbitration site.

8. Date, Time and Place of Hearing.

An arbitrator is given discretion in selecting the arbitration date, time and place and must send hearing notices to the parties at least twenty days before a hearing. Appearance at a hearing by a party waives any notice objections.

9. Representation.

Each party has a right to be represented by legal counsel at any arbitration hearing, but shall notify the other party and the arbitrator of the name and contact information of legal counsel at least seven days prior to the hearing.

10. Record of Arbitration.

Either party may arrange for the arbitration proceedings to be recorded, but the arbitrator must determine whether that recording shall constitute the official record of the proceeding.

11. Attendance at Hearings.

The parties, their attorneys, witnesses, the arbitrator and anyone with a direct material interest in the arbitration may attend the hearings. However, the arbitrator has the discretion to determine the propriety of attendance of any other persons and may exclude certain persons from the hearing during certain testimony. The arbitrator may not exclude parties, their attorneys and other essential persons.

12. Postponements.

The arbitrator may postpone a hearing for good cause shown and must postpone a hearing if it is requested by both parties in writing. The arbitrator has the authority to impose costs incurred by parties or the arbitrator related to a postponement.

13. Oaths.

The arbitrator is required to take an oath before proceeding with the first hearing and a form oath is set forth in this Rule.

14. Majority Decision.

If a multi-arbitrator panel is used, their decisions must be by majority rule.

15. Order of Proceedings; Communication with Arbitrator.

This Rule sets forth the procedure to be followed at the hearing and prohibits *ex parte* communications with the arbitrator by a party except by a prior agreed upon procedure.

16. Arbitration in the Absence of Party or Counsel.

An arbitration hearing may proceed in the absence of a properly noticed party or attorney unless a postponement has been obtained from the arbitrator.

17. Evidence and Procedure.

The arbitrator is the judge of the relevance and materiality of the evidence and the rules of evidence and civil procedure shall be general guides in conducting the hearing.

18. Evidence by Affidavits; Post-Hearing Filing of Documents or Other Evidence.

The arbitrator may receive and consider evidence by affidavit and may receive and consider documents after the hearing provided that all parties are given an opportunity to examine such documents.

19. Inspection or Investigation.

The arbitrator has the authority to make an inspection or investigation.

20. Interim Measures.

This Rule simply references the interim measures provisions of N.C. Gen. Stat. §§ 50-54.

21. Closing of Hearing.

A specific procedure is set forth for closing the hearing. Closing the hearing is a specific event from which certain time deadlines are calculated.

22. Reopening of Hearing.

A hearing may be reopened at any time before an award is made.

23. Waiver of Oral Hearing.

The parties may agree to waive an oral hearing and proceed with only a submission of tangible evidence and written arguments.

24. Waiver of Rules.

If a party proceeds with an arbitration hearing with knowledge that a provision or a requirement of the Rules has not be complied with, and that party fails to object in writing, that party will be deemed to have waived the right to object.

25. Extensions of Time.

The parties or the arbitrator may modify any period of time set forth in the Rules, except that the arbitrator may not modify the time for making the award.

26. Serving Notice.

Service shall be accomplished by mail addressed to the party or the party's counsel at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that a party is given a reasonable opportunity to be heard in regard to such service. Notice by facsimile, telex, telegram, electronic mail or other forms of electronic communication is also permitted

27. Time of Award.

The arbitrator shall make the award no later than thirty days from the date of the closing of the hearing.

28. Form and Scope of Award.

The award must be in writing and dated and must bear the signature of a majority of the arbitrators. Unless the parties agree otherwise, it shall contain the reasons upon which the award is based. The arbitrator must not exceed the scope of his or her authority.

29. Award Upon Settlement.

An arbitrator may enter a consent award.

30. Delivery of Award to Parties.

The arbitrator must serve the award as provided in this Rule.

31. Release of Documents for Judicial Proceedings.

Upon a party's written request, the arbitrator shall furnish any arbitration documents to that party at that party's expense if those documents may be required in judicial proceedings related to the arbitration.

32. Application to Court; Exclusion of Liability.

The parties to an arbitration are deemed to have consented to a court judgment on the arbitration award and arbitrators are granted immunity.

33. Expenses, Costs and Fees.

This Rule describes certain expenses, fees and costs and grants the arbitrator extensive discretion in awarding these expenses, fees, costs and in determining sanctions and how they are to be paid.

34. Arbitrator's Compensation.

The arbitrator's compensation is to be determined when the arbitrator is selected and the agreed upon terms shall be set forth in writing.

35. Deposits.

The arbitrator may require an advance deposit by a party or the parties to cover expenses of the arbitration, including the arbitrator's fees.

36. Interpretation and Application of Rules.

The arbitrator interprets and applies the Rules.

37. Time.

Time periods shall be computed using the North Carolina Rules of Civil Procedure and other North Carolina law.

38. Judicial Review and Appeal.

No judicial review of errors of law in the award is permitted.

VIII. SEVEN KEY DIFFERENCES IN THE NORTH CAROLINA FAMILY LAW
ARBITRATION ACT AND GENERAL COMMERCIAL
ARBITRATION STATUTES

The North Carolina Family Law Arbitration Act differs from traditional commercial arbitration in the following seven critical areas:

A. *Modifiability of Child Custody, Child Support, Postseparation Support and Alimony.*

Generally, there is not a need for general award modifiability in traditional commercial arbitration. If a landlord and tenant are in a dispute over rental fees, they are looking for the arbitrator to provide a number for them. There is no need for that number to be modified in the future. Such is the general nature of commercial arbitration. Family law cases, on the other hand, always have a modifiability component on children issues and often involve modifiability of spousal support issues. If family law arbitration awards could never be modified, all cases involving children and many involving spousal support would be precluded from arbitration. The drafters of the North Carolina Family Law Arbitration Act wanted to provide statutory authority to arbitrators to function as much like district court judges as possible. To enable a family law arbitrator to step into the role of a judge in deciding child and spousal support issues, provision was made in the North Carolina Family Law Arbitration Act for modifiability of these issues to the extent that court orders could be modified. The North Carolina Family Law Arbitration Act did not change substantive North Carolina family law. If an award has not been confirmed, these matters can be modified in the same way that a contract on these topics can be modified. If an award has been confirmed, these matters can be modified in the same way that court orders are modified. The drafters of the Act did not want to limit parties in any way from arbitrating the entire gamut of family law issues.

B. *Interim Relief.*

Interim relief was not permitted under the old Uniform Arbitration Act in North Carolina but the newer Revised Uniform Arbitration Act and the North Carolina Family Law Arbitration Act allows an arbitrator to grant interim relief unless that relief is limited by the agreement or consent order to arbitrate.

C. *Default to a Single Arbitrator.*

Three-arbitrator panels are typically used in commercial arbitrations and multi-arbitrator panels are sometimes used in complex and high-asset family law arbitrations pursuant to the Act. In a recent nine week equitable distribution arbitration, a three person arbitration panel was used. The panelists were all retired District Court, Superior Court, and Court of Appeals judges. There was a great deal of money at stake and a trial of this case magnitude would have brought the work of one judicial district to a halt requiring extensive judicial resources. The parties agreed not to appeal substantive issues unless there was a written dissent from one of the panelists. A three judge panel provides an extra level of comfort for parties who want the finality of a no-appeal arbitration but are reluctant to give one person such extensive authority. The great majority of family law arbitrations are conducted by a single arbitrator who either has the confidence of both sides or whose authority is appropriately limited so that the parties are comfortable with providing a single person with so much authority. The Act and the Rules provide for a single arbitrator unless the parties agree otherwise. To avoid the problems of having an arbitration impasse, provision is usually made for an odd-numbered panel. Arbitration would not be a practical option for many low and middle income litigants if they would be required to pay for three arbitrators.

D. *Default to a Reasoned Award.*

While parties may agree that the arbitrator will not make findings, if they are silent on this issue, the arbitrator must make written findings of fact to support the award. This can be a particularly important provision for modifiable child and spousal support issues in order to give a court or a subsequent arbitrator a baseline for making a modification determination. In commercial arbitration under the Uniform Arbitration Act and the Revised Uniform Arbitration Act, rulings on substantive issues of law are not permitted and, as discussed above, awards are non-modifiable. Under these circumstances, there is no need for findings of fact or conclusions of law. If, under the North Carolina Family Law Arbitration Act, a party has preserved the right to appeal substantive issues or if the arbitrator is asked to render an award on child issues or spousal support, findings of fact and conclusions of law may be critical. A court hearing an appeal of such an award or addressing a modification will be bound by the arbitrator's findings of fact.

E. *Premarital Agreements to Arbitrate Child Issues Are Not Binding.*

Provisions in a premarital agreement providing for the arbitration of child issues are not enforceable. This was not a limitation that the drafters of the North Carolina Family Law Arbitration Act included in the initial drafts. It was added in a legislative subcommittee.

F. *Judicial Review of Child Issues Awards If Provisions Not in Child's Best Interest.*

In an effort to address *parens patrie* doctrine concerns and the inherent responsibility of the state to oversee the interests of children, provision was made in the North Carolina Family Law Arbitration Act for a review by the District Court of child custody and child support arbitration awards on the motion of a party. If a party carries the burden of showing that the award is not in the best interest of the child, the court may vacate the arbitration award. It is the concern about the arbitration of child issues that has prevented some states from adopting family law arbitration statutes or that has caused some state courts to limit the scope of family law arbitrations. This provision in the North Carolina Act was copied from a Texas statute that was declared constitutional by the Texas Court of Appeals in *In re C.A.K.*, 155 S.W.3d. 554 (Tex. App. 2004).

G. *Judicial Review of Substantive Issues.*

The default is for no judicial review of substantive errors of law. If the parties wish to preserve this right, they may agree in writing to judicial review by the District Court and then by the appellate courts. Neither the Uniform Arbitration Act nor the Revised Uniform Arbitration Act permits such judicial review, even if the parties agree. A relatively small number of family law cases are appealed to the North Carolina Court of Appeals so the chances of an appeal in any given case are remote. However, some parties and attorneys are reluctant to give up this right and would not agree to arbitration of family issues without this right being preserved. Other parties and attorneys see a value in foreclosing this right for the sake of finality. If this right has been preserved and a party wishes to take an appeal, the appeal would first be to the District Court. The District Court judge would be bound by the arbitrator's findings of fact and would enter an order that could then be appealed to the North Carolina Court of Appeals.

IX. ADVANTAGES TO ARBITRATION

A. *Party Friendly.*

While ultimately one party may be unhappy with the result of an arbitration, most parties appear to be comfortable with the arbitration process and hearing. The hearing typically takes place in an attorney's office in a far more relaxed and informal atmosphere than a courtroom.

B. *Attorney Friendly.*

With relaxed rules of evidence and procedure, there is much less chance that an attorney is going to be ambushed by the opposing counsel. Arbitrators are given wide latitude in how and when evidence is received. It is easier for an attorney to repair his or her case when evidentiary deficiencies are realized and the level of cooperation tends to be higher.

C. *Expertise of Arbitrator.*

Parties have an unlimited supply of arbitrators to choose from and they are free to select an arbitrator with specialized expertise on topics to be addressed in the arbitration. While there are many good and intelligent District Court judges in North Carolina, equitable distribution can involve very complex valuation issues that might best be understood by a family law specialist who has tried a number of cases presenting similar issues.

D. *Finality.*

While some parties choose to reserve the right to appeal substantive issues of law, most parties appear to value the finality of a non-appealable award. The use of multi-arbitrator panels is a way to build in an extra safeguard if a party is concerned about vesting that much authority in one person. Parties may even agree to an arbitration of an appeal.

E. *Economical.*

Arbitrations can be economical or expensive. If expense is a concern to the parties, they should address it with the arbitrator and make provisions in their agreement or consent order to arbitrate to conduct the hearing in an economical fashion through the use of affidavits, stipulations and written arguments.

F. Fast.

Without the constraints of limited courthouse resources and personnel, arbitrations can often proceed more quickly and on a time table that is convenient to all parties, the witnesses and the arbitrator. Crowded dockets are often a major consideration for parties considering family law arbitration as an alternative to the courtroom.

G. Additional Role for Attorney.

Arbitration provides an additional role for the attorney in an ADR process for which he or she should be compensated fairly while providing something of significant value to the parties.

H. Privacy.

Many arbitration parties welcome the opportunity to have the hearing conducted out of the public view. Procedures are available to seal and redact files and arbitrators may exclude non-essential personnel from the hearing.

X. CRITICAL APPLICATIONS

A. Whole Case.

An advantage to whole case arbitration is that the case can be heard in its interrelated entirety and not segmented into separate hearings for property division, alimony and child issues.

B. Bullet Issues.

Sometimes parties choose single issue arbitration. If one issue is preventing the resolution of the entire case, arbitration can be a quick and effective tool in resolving that issue.

C. Joint Custody Decisions.

An agreement or consent to arbitrate may grant a neutral third party the authority to make decisions on which joint custodians are deadlocked.

D. Executory Contract Provisions.

Frequently settlement contracts contain executory provisions such as those related to the sale of the former marital residence. While it is impossible to anticipate every problem or issue that might arise in the sale of property pursuant to the terms of a property settlement

agreement, an arbitrator can be a quick and effective tool for addressing those issues.

E. Mediation-Arbitration.

Most arbitrations are conducted after mediations impasse. Parties may wish to retain a person to serve as a mediator and then to give that same person authority to serve as an arbitrator on any issues that can not be resolved in mediation.

XI. CONCLUSION

While arbitration is not appropriate for every family law case, it is an ideal dispute resolution methodology in more cases than most family lawyers might imagine. It can be an effective methodology in both the high-dollar case and the low-dollar case. It can be a particularly attractive alternative dispute resolution methodology in judicial districts where crowded court dockets and limited judicial resources create significant delays in getting a case before a judge.

A family lawyer can never have too many alternate dispute resolution arrows in his or her quiver. The more arrows, the greater likelihood that he or she will be able to release the right one to score a bull's eye for the client and to obtain a fair and cost-effective result.