

Family Law Arbitration from the Court Perspective

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FAMILY LAW ARBITRATION FROM THE COURT PERSPECTIVE

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The General Assembly enacted the North Carolina Family Law Arbitration Act in 1999.¹ This alternative dispute resolution (ADR) technique to resolve family law issues, other than the divorce itself,² has begun to spread across the State. The Act supersedes the *Crutchley* decision, which had held that arbitral awards' being binding under the former Uniform Arbitration Act, arbitration could not be used for child support or custody because of statutes that required continuing reviewability of those issues.³ The Court of Appeals has decided the first cases under the Act.⁴

Counsel have available a commentary on the Act and suggested forms and arbitration rules in a *2006 Revised Handbook* on the North Carolina Bar Association Family Law Section website,⁵ a few clicks away for anyone with computer access.⁶ Although the *Handbook* is designed for practitioner use, judges may also find it helpful.

¹ The 2005 General Assembly revised the Act, sometimes cited in this analysis as the FLAA, N.C. Gen. Stat. §§ 50-41 - 50-62 (2005), to conform to the Revised Uniform Arbitration Act (RUAA) in force in this State, *id.* §§ 1-569.1 - 1-569.31 (2005), which replaced the Uniform Arbitration Act (UAA), *id.* §§ 1-567.1 - 1-567.20 (2003), previously in force in North Carolina. The UAA may govern older agreements to arbitrate. *See id.* § 1-569.3(b) (2005). RUAA annotations may refer only to cases under the superseded UAA. They must be used with caution; statutory language changes between the UAA and the RUAA may produce different results under the RUAA.

² N.C. Gen. Stat. § 50-41(a) (2005).

³ *Crutchley v. Crutchley*, 306 N.C. 518, 523-25, 293 S.E.2d 793, 797-98 (1982); *see also* Parts D.3.a(1), D.3.a(5), D.3.c.

⁴ *Semon v. Semon*, 161 N.C. App. 137, 587 S.E.2d 460 (2003), is the first reported case under the Act; *Poole v. Cogdell*, 164 N.C. App. 411, 595 S.E.2d 816, 2004 WL 1098733 (2004, unpublished op.); *see also* *Pataky v. Pataky*, 160 N.C. App. 289, 304, 585 S.E.2d 404, 414 (2003), *aff'd, discret. rev. improvidently granted*, 350 N.C. 65, 602 S.E.2d 360, 361 (2004) (citing Act, encouraging FLAA use to resolve family law issues without court interference).

⁵ George K. Walker, *2006 Revised Handbook: Arbitrating Family Law Cases Under the North Carolina Family Law Arbitration Act as Amended in 2005* (3 vols., May 20, 2006) (2006 Revised Handbook). Volume I publishes the Act, recommended forms

This paper attempts to analyze practice under the Act from the perspective of the Court. Part A inquires why parties agree to arbitrate. Part B sketches the procedural package for arbitration under the Act. Part C discusses arbitration steps outside the courthouse. Part D discusses situations where a court may be involved in arbitration. Part E offers conclusions.

A. Why Arbitrate Pursuant to an Agreement?

The court-ordered arbitration rules exclude family law cases from that ADR technique;⁷ its purpose was to create an "efficient economical alternative to traditional litigation . . ." ⁸ of small money damage claims. Family law cases can involve much more money and much more complex issues than can be heard in the usual hour limit for these proceedings, which must be open to the public.⁹ There are several reasons why parties might prefer to arbitrate family law differences, rather than litigate them in court or use other dispute resolution techniques.

1. Arbitration by agreement is an ADR method that falls between settlement or mediation and litigation. The oldest form of ADR is settlement by agreement of the parties. It is still available and should be considered for use. Court-annexed mediated settlement conferences are now available for equitable distribution, alimony or support.¹⁰ In cases where settlement or mediation result in impasse, and parties do not wish to

and rules and comments for them. Volume II publishes suggested documents for use with arbitration and court proceedings connected with arbitration under the Act. Volume III publishes George K. Walker, *Arbitrating Family Law Cases by Agreement: Handbook for the North Carolina Family Law Arbitration Act (1999) (1999 Handbook)*, predecessor to the 2006 Revised Handbook, the former UAA, superseded in 2003 by the RUAA, and the FLAA as enacted through 2003. The 1999 Handbook may be useful for older agreements to arbitrate, which may incorporate its forms and rules by reference. They differ slightly from those in the 2006 Revised Handbook, Volume I.

⁶ The Handbook may be available in hard copy in lawyers' offices or in research libraries, *e.g.*, at the Wake Forest University School of Law.

⁷ N.C. Ct.-Ord. Arb. R. 1(a)(1)(iv), 1(b)(1).

⁸ N.C. Ct.-Ord. Arb. R. 1, *Comment*.

⁹ N.C. Ct.-Ord. Arb. R. 3(a), 3(n).

¹⁰ N.C. Gen. Stat. §§ 7A-38.4A, 7A-494 - 7A-495, 50-13.1 (2005).

litigate for reasons of privacy, etc., as discussed below, arbitration by agreement under the Act is now an option.¹¹

2. Privacy. This is a big reason for arbitration under the Act. Although the Act itself does not require privacy, standard rules for FLAA cases and rules associated with all arbitrations so provide.¹² If a party violates the privacy rule, which is a contract term in agreements to arbitrate, that party can be sued for breach of contract and may incur sanctions imposed during the arbitration. Also, the 2005 amendments to the Act allow a court to seal or redact an arbitral award under the same terms and conditions that it would seal or redact a judgment.¹³

3. Efficiency and convenience. The sad truth for many divorces is that both spouses must work for a living. Most courts are open during the day, i.e., during times when many litigants, other than those on night shifts and the like, are employed. Parties agreeing to arbitrate can agree to conduct proceedings at hours other than normal court times, e.g., during the evenings or weekends. This may mean less work time missed and therefore more money available for support, etc., if an arbitral award orders them. Babysitters may be more available at these times. Counsel and the arbitrator must, of course, agree to evening or weekend arbitration or other times convenient with the parties.

4. Less threatening or intimidating environment. Depending on circumstances of the parties and the case, arbitration can be held in places that seem less intimidating or less threatening than a courtroom full of strangers. This can be important for, e.g., children or some adults. There is nothing to stop parties, counsel and the arbitrator from arbitrating in casual clothing at a neutral site, e.g., a North Carolina resort, if parties are willing to bear the cost.

¹¹ Basic R. 6 in the 2006 Revised Handbook allows mediation once arbitration proceedings begin.

¹² *See, e.g.*, Basic R. 11 in the 2006 Revised Handbook, which is based on standard commercial arbitration rules.

¹³ N.C. Gen. Stat. § 50-57(b) (2005); *see also* its Comment in the 2006 Revised Handbook and Part D.3.

5. More geographically convenient. Although most North Carolina counties are compact and driving times are short, traffic and parking near courthouses can be issues and time-wasters. If parties, counsel and the arbitrator agree, arbitration can be conducted closer to home.

6. Less cost. Another advantage is less cost, although studies differ on whether arbitration is less costly than litigation. Counsel should cost out probable expenses of litigation versus arbitration, including not only time in arbitration or in actual litigation in the courthouse but also "peripheral" time spent traveling to the courthouse compared with travel to an agreed site, and time spent awaiting hearings when other matters like criminal cases may be ahead on the docket. Since arbitration papers can be e-mailed or faxed if parties agree on these communication methods,¹⁴ there may be time, postage and paper expenses saved.

7. Less delay. A seventh advantage is less delay than courses that follow a litigation path, although studies also differ on whether arbitration gives quicker results. Much of this depends on the nature of the case, counsel and the parties. A simple case with few assets might conclude more quickly in a few evenings or a Saturday in arbitration than processing through the courthouse. The same might be true for a complex case if parties are willing to arbitrate at times or days when courts are not usually in session. On the other hand, a recalcitrant party can try to gum up the works; however, the Act has provisions for imposing sanctions for this situation.¹⁵ Although rules for arbitrating family law disputes contemplate the same turnaround times for the equivalent of pleadings, parties can agree to shorten these times, perhaps during the equivalent of a pretrial conference or in the agreement to arbitrate.¹⁶

B. The "Procedural Package" for Arbitration by Agreement of the Parties

¹⁴ Basic R. 26, 2006 Revised Handbook.

¹⁵ See N.C. Gen. Stat. §§ 50-45(h), 50-51, 50-52(b), 50-53(b), 50-54(d), 50-55(d) (2005); see also Comments on these statutes in the 2006 Revised Handbook.

¹⁶ Basic R. 3, 5, 25, 2006 Revised Handbook.

There are two ways to arbitrate cases by agreement of the parties, institutional and "ad hoc" arbitration. Besides governing legislation, modern arbitrations depend on rules the parties choose in the context of arbitration legislation.

1. Institutional versus ad hoc arbitration. Arbitrating by agreement of the parties can involve administering the proceeding by an institution, usually a nonprofit. An example is the American Arbitration Association (AAA). No such institution, analogous to mediation institutions in North Carolina, now exists for family law arbitrations. North Carolina family law arbitrations are all ad hoc, i.e., parties agree to arbitrate, select the arbitrator(s), and otherwise administer the procedure themselves, usually with counsel's advice and the rulings of the arbitrator.

2. Statutes, the agreement to arbitrate, and rules. Subject to limits in the Act on waivers of statutory requirements,¹⁷ parties can write their own procedural ticket for arbitrating. Usually they accomplish this through an agreement to arbitrate, reciting basic requirements, e.g., what will be arbitrated, how many arbitrators, arbitrator ethics standards, and incorporation of standard arbitration rules by reference, perhaps with special rules for a particular arbitration. The rules, which can be written into the agreement or can be incorporated by reference, are the primary vehicle for moving arbitration forward. The *2006 Revised Handbook* publishes recommended documents, forms and rules in Volumes I and II. The Act provides that if parties agree to arbitrate but cannot agree on arbitration rules, a court may choose rules for the proceedings.¹⁸

3. The place of the Act in family law legislation. The Act is designed to be read and applied with other State legislation:

. . . Certain provisions of this . . . [Act] have been adapted from the Uniform Arbitration Act formerly in force in this State, the Revised Uniform Arbitration Act in force in this State, the North Carolina International Commercial Arbitration and Conciliation Act, and Chapters 50, 50A, 50B, 51, 52 and 52C of the General Statutes. This Article shall be construed to effect its general purpose to make

¹⁷ N.C. Gen. Stat. § 50-42.1 (2005); *see also* its Comment in the 2006 Revised Handbook.

¹⁸ N.C. Gen. Stat. § 50-45(e) (2005); *see also* its Comment in the 2006 Revised Handbook.

uniform provisions of these Acts and Chapters 50, 50A, 50B, 51, 52, 52B and 52C of the General Statutes.¹⁹

Case law under this State's former UAA, the current RUAA and this State's International Commercial Arbitration and Conciliation Act are persuasive authority for decisions under the FLAA where the language is the same or very similar.²⁰ The Act is designed to give an additional procedure for resolving family law disputes, except the divorce itself,²¹ and not to create new family law substantive rules.

To the extent that other jurisdictions' versions of the UAA, the RUAA or international arbitration statutes are the same or similar, case law under those statutes might be examined for persuasive authority. Applicable federal law, *e.g.*, under the Federal Arbitration Act (FAA) or treaties to which the United States is a party such as the child abduction convention, trumps state law.²²

C. Steps in Arbitration Outside the Courthouse

If parties sign an agreement to arbitrate a family law case and comply with the agreement and the resulting arbitral award, the only time a court may be concerned with the procedure is when parties file for divorce and a final order is entered in the case.²³ If there is an agreement to arbitrate and parties do not comply with its terms or an arbitral award, or if a party believes that postseparation support, alimony, child custody, child support have not been awarded in accordance with North Carolina law, court intervention may be invoked. Part D describes typical situations where that can occur.

¹⁹ N.C. Gen. Stat. § 50-62(a) (2005); *see also* its Comment in the 2006 Revised Handbook and note 1.

²⁰ *See Semon*, 161 N.C. App. at 139, 587 S.E.2d at 462 (noting similarity between FLAA and UAA provisions for modifying award). Courts may also cite the FLAA and FLAA cases for issues under other arbitration legislation. *See, e.g.*, *Smith v. Young Moving & Storage, Inc.*, 167 N.C. App. 487, 488, 606 S.E.2d 173, 175 (2004) (citing *Semon*, FLAA in UAA-governed case on award modification issue).

²¹ N.C. Gen. Stat. § 50-41(a) (2005); *see also* its Comment in the 2006 Revised Handbook.

²² U.S. Const. art. VI.

²³ The Act is clear that the divorce itself cannot be the subject of arbitration. N.C. Gen. Stat. § 50-41(a) (2005); *see also* its Comment in the 2006 Revised Handbook.

D. Court Action in the Arbitral Process

North Carolina appellate courts have recognized a strong policy for arbitration and enforcing parties' agreements to arbitrate.²⁴ The Family Law Act repeats this policy.²⁵ The Act underscores this by providing for court-imposed costs in appropriate cases.²⁶

1. Court action before arbitration begins. There are several situations where court action may be necessary before arbitration proceedings begin.

a. Interface with other family law ADR: settlement, mediation, collaborative law, parenting coordinators. One issue that may arise early in a family law case is the interface of FLAA-governed arbitrations with other ADR methods: settlement, court-annexed mediation, collaborative law or parenting coordinators. As noted above, court-ordered arbitration is not available for family law cases.²⁷

(1) Settlement. There is nothing in the Act prohibiting parties from arbitrating a dispute, or part of it, after efforts at settlement fail. For example, parties may agree on all aspects of a divorce except dividing certain property. That property issue can go to arbitration.

(2) Mediation. There is nothing to prohibit parties from arbitrating under the Act if mediation fails. The mediation statutes do not directly cover a situation where parties agree to arbitrate under the Act, perhaps in a longstanding prenuptial agreement, and later file for divorce, thereby becoming eligible for mediation. However, "[n]othing . . . [in the mediation statute, N.C. Gen. Stat. § 7A-38.4A] shall prohibit the parties from participating in other dispute resolution procedures, including arbitration, to the extent

²⁴ Johnston County v. R.N. Rouse & Co., 331 N.C. 88, 91-92, 414 S.E.2d 30, 33 (1992); Servomation Corp. v. Hickory Constr. Co., 316 N.C. 543, 544, 342 S.E.2d 853, 854 (1986); Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984); Revels v. Miss North Carolina Pageant Org., Inc., 627 S.E.2d 280, 283 (N.C. App. 2006); *see also Pataky*, 160 N.C. App. at 303, 585 S.E.2d at 413 (encouraging FLAA use to resolve family law issues without court interference).

²⁵ N.C. Gen. Stat. § 50-41(a) (2005); *see also* its Comment in the 2006 Revised Handbook.

²⁶ N.C. Gen. Stat. § 50-51(f) (2005); *see also* Part D.3.

²⁷ *See* Part A.

authorized under State or federal law."²⁸ This provision, plus authority to waive, "For good cause, on the motion of either party, or on the court's own motion," custody proceedings,²⁹ is authority for a court considering an agreement to arbitrate under the Act to waive mediation. The Basic Rules for the Act provide for mediation, if parties agree to it, after a case is in arbitration.³⁰

(3) Collaborative law. The collaborative law statutes specifically provide for parties' agreeing to use other ADR forms.³¹ Parties can agree on collaborative law, and if that does not resolve matters, they can agree to arbitrate under the Act.

(4) Parenting coordinators. The 2005 General Assembly also enacted parenting coordinator legislation.³² The statute allows a court, for good cause shown, to end or modify a parenting coordinator appointment upon a party's motion, agreement of the parties and the parenting coordinator, or by the court on its own motion.³³ If the parties have agreed to a parenting coordinator, the court may end or modify the appointment according to that agreement or a later agreement by the parties.³⁴ The statutes do not directly address how parenting coordinators and arbitration under the Act interface. Although this might be a subject for amended legislation, the Basic Rules for FLAA-governed arbitrations recite procedures for this.³⁵ Basic Rules 15(i)-15(k) attempt to cover situations involving parenting coordinators:

²⁸ N.C. Gen. Stat. § 7A-38.4A(g) (2005); *see also id.* § 7A-38.4A(c) (2005) (chief district court judge "may order a mediated settlement conference or another settlement procedure, as provided under *id.* § 7A-38.4A[g]).

²⁹ N.C. Gen. Stat. § 50-13.1(c) (2005); *see also* N.C. Unif. R. Regul. Mediation of Child Custody & Visitation under N.C. Custody & Visitation Mediation Prog., R. 8.

³⁰ Basic R. 6, in the 2006 Revised Handbook.

³¹ N.C. Gen. Stat. § 50-78 (2005); *see also id.* § 50-76(a) (2005).

³² N.C. Gen. Stat. § 50-90 - 50-100 (2005).

³³ N.C. Gen. Stat. § 50-99(a) (2005).

³⁴ N.C. Gen. Stat. § 50-99(b) (2005).

³⁵ Basic R. 15(i)-15(k), in the 2006 Revised Handbook.

(i) If a court enters a parenting coordinating order pursuant to N.C. Gen. Stat. § 50-91(b), and the parties later sign or have previously signed an agreement to arbitrate, the parties and the arbitrator shall cooperate with the parenting coordinator, and the coordinator shall cooperate with the arbitrator and the parties, in resolving issues remitted to the coordinator and the arbitration.

(j) If a court enters a parenting coordinator order pursuant to N.C. Gen. Stat. § 50-91(a) and the parties later sign an agreement to arbitrate, the parties and the arbitrator shall cooperate with the coordinator, and the coordinator shall cooperate with the arbitrator and the parties, in resolving issues remitted to the coordinator and the arbitration.

(k) If parties to an arbitration wish appointment of a parenting coordinator pursuant to N.C. Gen. Stat. § 50-91(a), the parties shall recite the existence of an agreement to arbitrate under the Family Law Arbitration Act in the § 50-91 consent agreement. If a court enters a coordinator order pursuant to § 50-91 and the parties have previously signed an agreement to arbitrate, the parties and the arbitrator shall cooperate with the coordinator, and the coordinator shall cooperate with the arbitrator and the parties, in resolving issues remitted to the coordinator and the arbitration. If the arbitrator and the coordinator do not agree on a course of action, the arbitrator's decision shall prevail, unless the court otherwise rules in its § 50-91 orders.

These rules acknowledge the primacy of court orders in parenting coordinator situations and direct the arbitrator to cooperate with the coordinator, and the coordinator to cooperate with the arbitrator, to achieve the best results. If a court is aware of an agreement to arbitrate, or if parties indicate interest in arbitrating, it is hoped that the court will assist the process by directing cooperation. The rules are not designed to usurp a court's or a coordinator's role but to achieve the best results in a case.³⁶

b. Enforcing agreements to arbitrate. Agreements under the Act are valid, irrevocable unless parties revoke them by later agreement, and enforceable.³⁷ If a party refuses to arbitrate, a court may compel parties to go to arbitration.³⁸ This might happen in several situations: (1) parties sign an agreement to arbitrate perhaps long before

³⁶ See also the Comments to Basic R. 15(i)-15(k) in the 2006 Revised Handbook.

³⁷ N.C. Gen. Stat. § 50-42 (2005); see also its Comment in the 2006 Revised Handbook.

³⁸ N.C. Gen. Stat. § 50-43 (2005); see also its Comment in the 2006 Revised Handbook. Parties cannot waive this provision. N.C. Gen. Stat. § 50-42.1(c) (2005); see also its Comment in the 2006 Revised Handbook.

divorce proceedings, and a party later refuses to arbitrate; (2) parties file for divorce, privately agree to arbitrate, and a party then refuses to go forward with arbitration; (3) parties file for divorce, the court suggests arbitration or parties advise the court that matters are going to arbitration, or a consent order signed by parties and counsel is filed,³⁹ and a party then refuses to arbitrate; (4) a divorce becomes final, and parties later agree to arbitrate some issues, e.g., custody and support, and a party then refuses to arbitrate. In all four cases a court can order parties to arbitrate if there is a valid written agreement.⁴⁰ An appeal will lie for an order denying an application to compel arbitration.⁴¹ Similarly, an appeal will lie for an order granting an application to stay arbitration, i.e., that there is no valid agreement to arbitrate.⁴²

A problem can arise if parties appear before a court and orally represent that they will arbitrate and there is a later renege. This can be cured by a court order, signed by parties and counsel for parties, reciting that the parties agree to arbitrate pursuant to the Family Law Act, and signed by the judge like any other order.⁴³

c. Court assistance in preserving assets. The Act provides for protecting assets before the arbitrators make their award through interim relief and interim measures. If arbitrators have not been appointed or the arbitrators are not available, e.g., they are on vacation, a party may seek interim relief, e.g., for preserving assets, directly from a court, unless parties have limited this by written agreement.⁴⁴ In other cases parties must apply to the arbitrator for interim measures and not the court. However, ". . . a party to an arbitration governed by [the Act] may request from the court enforcement of the

³⁹ 2006 Revised Handbook, Vol. II publishes a consent order form.

⁴⁰ N.C. Gen. Stat. § 50-42(a) (2005), tracking other State arbitration legislation, requires that the agreement to arbitrate be in writing. A handshake or verbal agreement will not do. *See also* § 50-42's Comment in the 2006 Revised Handbook.

⁴¹ N.C. Gen. Stat. § 50-60(a)(1) (2005); *see also* Part D.4.

⁴² N.C. Gen. Stat. § 50-60(b) (2005); *see also* Part D.4.

⁴³ 2006 Revised Handbook, Vol. II publishes a consent order form.

⁴⁴ N.C. Gen. Stat. § 50-44(a) (2005), referring to *id.* § 50-44(c) (2005); *id.* § 50-44(g) (2005).

arbitrators' order granting interim measures and review or modification of any interim measures governing child support or child custody."⁴⁵ Moreover, although parties may, as noted above, limit interim relief or interim measures by written agreement, they may not limit "relief pursuant to G.S. 7B-502, 7B-1902, 50-13.5(d), 50-20(h), 50A-25, 50B-3, 50B-5, Chapter 52C of the General Statutes; federal law; or treaties to which the United States is party, whose purpose is to provide immediate, emergency relief or protection."⁴⁶ This provision is designed to give the same protection for spouses and children they would have in a case in court that is not subject to arbitration. Parties do not waive the right to arbitrate by requesting interim relief or interim measures from the court.⁴⁷

d. Court appointment of arbitrators. Like its RUAA counterpart and the former UAA, the Family Law Act provides for court appointment of arbitrators if parties sign an arbitration agreement and cannot agree on the arbitrator(s), or if they sign a bare-bones agreement to arbitrate that does not name an arbitrator or declare a method for choosing one.⁴⁸ The FLAA also requires the court to consult with a prospective court-appointed arbitrator before appointment as to:

- (1) The positions and desires of the parties.
- (2) The issues in dispute.
- (3) The skill, substantive training, and experience of prospective arbitrators in those issues, including their skill, substantive training and experience in family law issues.
- (4) The availability of prospective arbitrators.⁴⁹

⁴⁵ N.C. Gen. Stat. § 50-44(b) (2005).

⁴⁶ N.C. Gen. Stat. § 50-44(g) (2005).

⁴⁷ N.C. Gen. Stat. § 50-44(j) (2005). *See also* the Comment to *id.* § 50-44 in the 2006 Revised Handbook.

⁴⁸ Like the UAA, the FLAA also allows a court to appoint arbitrators if the method the parties choose in the agreement fails or for any reason cannot be followed, or if an arbitrator who has already been appointed fails or is unable to act (e.g., because of death), and the parties have not chosen a successor. N.C. Gen. Stat. § 50-45(b) (2005); *see also* its Comment in the 2006 Revised Handbook.

⁴⁹ N.C. Gen. Stat. § 50-45(c) (2005); *see also* its Comment in the 2006 Revised Handbook.

These provisions seek to assure that an arbitrator competent for family law issues will serve, an additional protection for spouses and children.

Besides these requirements, the 2005 amendments added standards for arbitrator disclosure of known facts that a reasonable person would consider likely to affect an arbitrator's impartiality. Arbitrators must disclose facts to parties, who must timely object to the arbitrator's appointment or continuing to serve.⁵⁰ Although these requirements particularly apply to arbitrators that parties choose, they also apply to arbitrators judges appoint. The *2006 Revised Handbook*, Volume II, publishes an Arbitrator Disclosure Form that may be useful to a court considering appointing an arbitrator. An arbitrator's failure to disclose facts the statute requires can be grounds for vacating an award.⁵¹ An arbitrator's failure to abide by arbitrator ethics standards like the *North Carolina Canons of Ethics for Arbitrators*⁵² cannot be grounds for vacatur; the arbitration statute lists the only proper grounds for vacating an award.⁵³ Canon VIII specifies that statutory ethics standards, like the FLAA disclosure rules, trump any conflicting *Canon* standards.⁵⁴

Although no arbitration institution is presently available for family law arbitration administration in North Carolina, looking to the future the Act provides for agreement on

⁵⁰ Arbitrators have a continuing duty to disclose. N.C. Gen. Stat. §§ 50-45.1(a) - 50-45.1(c) (2005).

⁵¹ N.C. Gen. Stat. §§ 50-45.1(d) - 50-45.1(f) (2005), referring to *id.* § 50-54(a)(2) (2005); *see also* the Comment to § 50.45.1 in the 2006 Revised Handbook; Part D.3.a(4).

⁵² Order Adopting North Carolina Canons of Ethics for Arbitrators, Sept. 9, 1999, 350 N.C. 877 (1999). They and Comments after each Canon as part of the Order are binding for court-ordered arbitrations under N.C. Gen. Stat. § 7A-37.1 (2005).

⁵³ *Cf.* ANR Coal Co. v. Cogentrix of North Carolina, Inc., 173 F.3d 493 (4th Cir. 1999); The Canons are useful reminders of the standards arbitrators should follow and can be cited to support a vacatur application.

⁵⁴ The Canons standards may be part of agreements to arbitrate. *See* Form C and its Comment, 2006 Revised Handbook.

such an institution and for court involvement in choice of an institution if parties cannot agree on it.⁵⁵

e. Court selection of arbitration rules. The Act provides for the parties' written agreement on rules for conducting the arbitration. If parties sign an agreement to arbitrate, e.g., in a court order, but then cannot agree on rules, the arbitrator they pick or the court chooses must select the rules. If the arbitrator cannot decide on rules, a party can apply to the court⁵⁶ for an order for rules to be used. The court must refer to model rules developed by arbitration institutions or similar sources,⁵⁷ e.g., rules published in the *2006 Revised Handbook*.

In all but unusual cases the parties will choose their own rules. However, if parties agree to arbitrate and cannot agree on an arbitrator or arbitration rules, the court may appoint the arbitrator. The court-appointed arbitrator, chosen for competence in family law under the Act, has authority to choose the rules. If parties agree to arbitrate and appoint an arbitrator but do not choose arbitration rules, the arbitrator has authority to choose the rules if parties cannot agree upon them. (This part of the statute reflects the common law, i.e., arbitrators may choose the rules if parties have not done so as long as the rules are fair.) In either case, i.e., if the arbitrator is court-appointed or chosen by the parties and the arbitrator cannot settle on rules, the court may choose rules for the arbitration. It is likely that this ultimate fail-safe, i.e., a court's choosing the rules, will happen only in a multi-arbitrator case where the arbitrators cannot decide on rules. In either scenario --- arbitrators' choice of rules or court choice of rules --- rules in the *2006 Revised Handbook* should be given serious consideration.

f. Court-ordered consolidation of arbitrations. The RUAA and the FLAA provide for court-ordered consolidation of arbitrations unless parties agree that separate

⁵⁵ N.C. Gen. Stat. § 50-45(d) (2005); *see also* its Comment in the 2006 Revised Handbook.

⁵⁶ Applications to a court are by motion like motions in civil actions. N.C. Gen. Stat. § 50-58 (2005); *see also* its Comment in the 2006 Revised Handbook.

⁵⁷ N.C. Gen. Stat. § 50-45(e) (2005); *see also* the Comment in the 2006 Revised Handbook.

arbitrations shall not be consolidated.⁵⁸ The former FLAA provision, N.C. Gen. Stat. § 50-50, allowed court consolidation only if parties agreed to consolidation and then refused to do so.

Basic Rules 5A and 5B, published in the *2006 Revised Handbook*, opt parties in FLAA-governed arbitrations out of consolidation with other arbitrations, including class action arbitrations.⁵⁹ Consolidation may be rare in family law cases, but the statute covers situations if parties in business together have an agreement to arbitrate business matters, later marry with a prenuptial or postnuptial agreement to arbitrate family matters, and then seek a divorce.

2. Court action once arbitration begins. If parties comply with an agreement to arbitrate, no court action as discussed in Parts D.1, D.3 or D.4 may be necessary. However, a court may be called upon to appoint an arbitrator if a vacancy occurs and parties cannot fill it,⁶⁰ to preserve assets if an arbitrator is not available,⁶¹ or to consolidate arbitrations if a party becomes involved in a separate arbitration after the family law arbitration begins unless parties have agreed that the family law arbitration shall not be consolidated.⁶² Besides these situations, the Act provides for court action in assisting with discovery upon request of the arbitrator or a party with approval of the arbitrator under the Civil Rules, if parties do not cooperate in discovery before the arbitrator.⁶³ If arbitration is connected with a divorce action to be filed, or after it has

⁵⁸ N.C. Gen. Stat. §§ 1-569.10, 50-50.1 (2005); *see also* the Comment to *id.* § 50-50.1 in the 2006 Revised Handbook.

⁵⁹ Basic R. 1 declares that if parties execute two or more agreements to arbitrate, the Basic Rules shall govern if there is a conflict between rules in the other agreements. *See also* the Comment to Basic R. 1 in the 2006 Revised Handbook. Basic R. 5A and 5B in the 2006 Revised Handbook opt parties out of consolidated arbitrations. The suggested Rules assure primary protection for children and spouses under the Family Law Act. Comments to Basic R. 5A and 5B offer optional Rules for consolidation if parties want this.

⁶⁰ *See* Part D.1.d.

⁶¹ *See* Part D.1.c.

⁶² *See* Part D.1.f.

⁶³ N.C. Gen. Stat. § 50-49(d) (2005).

been filed, the arbitration may be a subject of a court's status conferences or continuance motions.⁶⁴

3. Court action when parties complete arbitration. When parties complete proceedings before the arbitrator, the arbitrator must make a "reasoned" award, i.e., the arbitrator must write an award, following the general format of findings of fact and conclusions of law under Civil Rule 52, unless the parties agree otherwise in writing.⁶⁵ Family law arbitration is unlike general arbitration in the United States, where arbitrators usually make an award similar to a general verdict, i.e., saying who wins or loses and what money or specific relief is to be awarded to a winner. The rationale for the reasoned award in family law cases is the likelihood of custody and support issues, reviewable by a court as discussed in Parts D.3.a(1) and D.3.c. If parties comply with an award, it may never reach the courthouse.

A party may apply to a court to confirm an award unless they have agreed that part or all of the award shall not be confirmed by the court and unless grounds --- i.e., applications to vacate⁶⁶ or applications to modify or motions to correct⁶⁷ an award --- are urged.⁶⁸ Once an award has been confirmed, it becomes a judgment and is docketed as such. At this point a judgment on an award is subject to enforcement like any

⁶⁴ Although the Basic Rules do not establish time lines for completing an arbitration, the agreement to arbitrate may. Moreover, N.C. Gen. Stat. § 50-51(g) (2005) provides that a party may apply to the court to order completion of an arbitration. Basic R. 6 provides for an administrative conference, analogous to a pretrial conference. Parties should advise the arbitrator of any deadlines in the divorce proceedings. Conversely, a court should consider the availability of an administrative conference in establishing deadlines, e.g., requiring counsel to advise the arbitrator of the court's rulings.

⁶⁵ N.C. Gen. Stat. § 50-51(b) (2005); *see also* the Comment to § 50-51 in the 2006 Revised Handbook. *Id.* Vol. II publishes a Model Decision and Award for arbitrator guidance.

⁶⁶ *See* Part D.3.a.

⁶⁷ *See* Parts D.3.b, D.3.c.

⁶⁸ N.C. Gen. Stat. § 50-53 (2005); *see also* the Comment to § 50-53 in the 2006 Revised Handbook.

judgment.⁶⁹ Since an award can include specific performance as a remedy⁷⁰ in addition to money damages and costs,⁷¹ a court may receive an application for injunctive relief based on the award now converted to a judgment, which would carry with it a possible penalty of contempt for failure to obey the court order.

Grounds for appeal, as with other arbitration legislation, are relatively limited but include orders confirming or denying confirmation of an award.⁷²

The 2005 amendments to the Act provided for sealing or redacting arbitration awards or orders or judgments or court orders resulting from a confirmed award under the Act.⁷³ A judge has the same discretionary authority to seal or redact a document related to an arbitral award as the judge has for sealing or redacting a judgment or other document in a case in litigation. Although arbitrations are private by agreement of the parties,⁷⁴ and this privacy by contract should carry over into an award confirmed as a judgment, the 2005 amendment makes it clear that a court has independent discretionary authority to redact or seal these papers. This is important for family law arbitration. An arbitrator's detailed reasoned award⁷⁵ may include sensitive numbers, such as Social Security or bank numbers that would be subject to redaction, or findings of fact related to the parties' conduct that may not be in the interest of children of a marriage to be made public.⁷⁶

⁶⁹ N.C. Gen. Stat. § 50-57(a) (2005).

⁷⁰ N.C. Gen. Stat. § 50-51(d) (2005).

⁷¹ N.C. Gen. Stat. § 50-51(f) (2005).

⁷² See N.C. Gen. Stat. § 50-60 (2005) and Part D.4.

⁷³ N.C. Gen. Stat. § 50-57(b) (2005). Parties may not waive provisions of *id.* § 50-57 (2005). *Id.* § 50-42.1(c) (2005); see also its Comment in the 2006 Revised Handbook.

⁷⁴ See Part A.2.

⁷⁵ N.C. Gen. Stat. § 50-51(b) (2005).

⁷⁶ See also the Comment to § 50-51 in the 2006 Revised Handbook.

a. Vacatur grounds. After an award has been made, a party may apply to a court to vacate an award; this may be combined with an application to modify or correct the award.⁷⁷ If vacatur is granted, the court must remit the case to arbitration, unless the court finds there was no arbitration agreement, the issues was not adversely decided upon a motion under N.C. Gen. Stat. 50-43, and the party did not participate in the arbitration without raising the objection.⁷⁸ The Family Law Act follows traditional vacatur grounds in modern arbitration legislation and adds three additional grounds: (1) vacatur in cases involving child support and custody, (2) punitive damages, and (3) review of errors of law.

(1) Child support and custody. The Act supersedes the *Crutchley* decision⁷⁹ by providing that a court may determine that an award for child support or child custody is not in the best interest of the child. The burden of proof at a hearing on this issue is on the party seeking to vacate the award.⁸⁰ The Act also has a special provision for modifying awards of alimony, postseparation support, child support or child custody.⁸¹

(2) Punitive damages. The Act allows parties to contract for award of punitive damages, but the arbitrator must state the award in a record and must specify facts justifying the award and the amount of the award attributable to punitive damages.⁸² If an award includes punitive damages, a party may move to vacate because awarding them is clearly erroneous.⁸³

(3) Review of errors of law. Unlike the RUAA and most arbitration statutes, the Act provides for review of issues of law if, but only if, parties contract for judicial review

⁷⁷ N.C. Gen. Stat. § 50-55(c) (2005); *see also* Parts D.3.b, D.3.c.

⁷⁸ N.C. Gen. Stat. § 50-54(c) (2005).

⁷⁹ *See* notes 3, 91-93 and accompanying text; *see also Pataky*, 160 N.C. App. at 303, 585 S.E.2d at 413.

⁸⁰ N.C. Gen. Stat. § 50-54(a)(6) (2005).

⁸¹ N.C. Gen. Stat. § 50-56 (2005), discussed in Part D.3.c.

⁸² N.C. Gen. Stat. § 50-51(e) (2005).

⁸³ N.C. Gen. Stat. § 50-54(a)(7) (2005).

of errors of law. If the court finds that the arbitrator has committed an error of law prejudicing a party's rights, the award must be vacated.⁸⁴ This means that an arbitrator's findings of fact in a reasoned award, except those involving alimony, postseparation support, child support or child custody or punitive damages,⁸⁵ stand as found by the arbitrator. Although Basic Rule 38, published in the *2006 Revised Handbook*, provides that there shall be no judicial review of errors of law, the Rule Comment offers an optional rule draft for parties wanting to contract for review of issues of law.

If parties contract for review of errors of law, that review must be conducted by the District Court, the court that would vacate the award on other grounds. The Act provides for appellate review of that vacatur issue.⁸⁶ The initial review of errors of law does not go to the Court of Appeals for decision; the Court of Appeals can hear the issue only after there has been a District Court decision on this point, and perhaps others such as additional vacatur grounds or motions to correct or modify, and there is a final judgment in the District Court.

(4) Traditional vacatur grounds. The Act follows other arbitration legislation in grounds for vacating an award:

- (1) The award was procured by corruption, fraud or other undue means;
- (2) There was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing the rights of a party;
- (3) The arbitrators exceeded their powers;
- (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown for the postponement, refused to hear evidence material to the controversy, or otherwise conducted the hearing contrary to the provisions of G.S. 50-47; [or]
- (5) There was no arbitration agreement, the issue was not adversely determined in proceedings under G.S. 50-43, and the party did not participate in the arbitration hearing without raising the objection. The fact that the relief awarded either could not or would not be granted by a court is not ground for vacating or refusing to confirm the award[.]⁸⁷

⁸⁴ N.C. Gen. Stat. § 50-54(a)(8) (2005).

⁸⁵ See Parts D.3, D.3.a(1), D.3.a(2).

⁸⁶ N.C. Gen. Stat. 50-60(b) (2005); see also Part D.4.

⁸⁷ N.C. Gen. Stat. §§ 50-54(a)(1) - 50-54(a)(5) (2005).

The second basis, "(2) . . . evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing the rights of a party[,]" is tied to the new disclosure requirements. An arbitrator's failure to disclose a fact and a party's timely objection to this may be grounds for vacatur.⁸⁸

(5) No non-statutory grounds for vacatur. Besides statutory grounds for vacating arbitral awards, courts have developed non-statutory grounds for vacating awards under the FAA: (1) if an award is arbitrary and capricious, (2) if enforcement of an award is against public policy, or (3) if an award was made in manifest disregard of law.⁸⁹ The FAA controls certain arbitration issues in cases involving interstate or foreign commerce; while State courts must enforce its applicable provisions, a typical family law arbitration will not involve interstate or foreign commerce. Like cases involving local, as distinguished from interstate, matters, State law like the former UAA, the RUAA that superseded it, or the Family Law Act,⁹⁰ controls.

Cases construing the former UAA⁹¹ held that an arbitrator's mistakes of law or fact are not vacatur grounds; the only grounds are those in the Act.⁹² *Crutchley v. Crutchley* ruled that public policy was not a ground for invalidating an arbitral award. However, *Crutchley* held that because of arbitral awards' binding nature under the former

⁸⁸ N.C. Gen. Stat. §§ 50-45.1(c) - 50-45.1(f) (2005), referring to *id.* § 50-54(a)(2) (2005); *see also* Part D.1.d. For further analysis of *id.* § 50-54 (2005), *see* its Comment in the 2006 Revised Handbook. Parties cannot waive provisions of N.C. Gen. Stat. § 50-54 (2005). *Id.* § 50-42.1(c) (2005); *see also* its Comment in the 2006 Revised Handbook.

⁸⁹ *B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 910 (11th Cir. 2006) (citing cases); *Pinnacle Group, Inc. v. Shrader*, 105 N.C. App. 168, 172, 412 S.E.2d 117, 121 (1992) (case governed by FAA).

⁹⁰ *See also* notes 1, 19-22 and accompanying text.

⁹¹ N.C. Gen. Stat. § 1-567.13 (2001)

⁹² *Revels*, 627 S.E.2d at 283; *Smith*, 167 N.C. App. at 489-90, 606 S.E.2d at 175-76; *Miller v. ROCA & Son, Inc.*, 167 N.C. App. 91, 96, 604 S.E.2d 318, 321 (2004), citing *Patton v. Garrett*, 116 N.C. 847, 858, 21 S.E. 679, 682-83 (1895); *Sholar Bus. Assocs., Inc. v. Davis*, 138 N.C. App. 298, 303, 531 S.E.2d 236, 240 (2000).

UAA, arbitration could not be used for child support or custody because of statutory requirements of continuing reviewability of those aspects of a divorce decree.⁹³

The upshot is that the North Carolina courts appear to have confined vacatur grounds to those cited in the former UAA. Since the Family Law Act copied the former UAA in this regard,⁹⁴ the result should be the same under the FLAA, along with the three additional grounds enacted in the FLAA.⁹⁵ As noted earlier, the Act supersedes *Crutchley*; because of the Act's vacatur, modification and appellate review provisions, custody and support issues may be arbitrated, subject to review under the same terms as a judge's decision.⁹⁶

(6) Appeal. Parties may appeal an order vacating an award without directing a rehearing.⁹⁷ If they have agreed to review of issues of law, they may appeal after a trial judge reviews issues of law.⁹⁸

b. Modifying or correcting awards: traditional grounds. Analogous to Civil Rule 60, the Act provides for court modification or correction of awards in terms that are similar to those in the RUAA, upon a party's application:

- (1) There is an evident miscalculation of figures or an evident mistake in the description of a person, thing or property referred to in the award;
- (2) The arbitrators have awarded upon a matter not submitted to them, and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
- (3) The award is imperfect in a matter of form, not affecting the merits of the controversy.⁹⁹

⁹³ *Crutchley*, 306 N.C. at 523-25, 293 S.E.2d at 797-98; *see also* note 3 and accompanying text; Parts D.3.a(1), D.3.c.

⁹⁴ *Compare* N.C. Gen. Stat. §§ 50-54(a)(1) - 50-54(a)(5) (2005) *with id.* § 1-567.13 (2001); *see also* Part D.3.a(4).

⁹⁵ *See* Parts D.3.a(1)-D.3.a(4).

⁹⁶ *See* note 3 and accompanying text; Parts D.3.a(1), D.3.c.

⁹⁷ N.C. Gen. Stat. § 50-60(a)(5) (2005); *see also id.* § 50-54(c) (2005); Part D.4.

⁹⁸ N.C. Gen. Stat. §§ 50-54(a)(8), 50-60(b) (2005); *see also* Parts D.3.a(3), D.4.

⁹⁹ N.C. Gen. Stat. § 50-55(a) (2005).

The modification or correction application may be joined with a vacatur application.¹⁰⁰ If a court grants the application, the court may modify or correct the award and must confirm the award as corrected or modified as long as there are no other modification or vacatur applications outstanding.¹⁰¹ The court may remit corrections or modifications to the arbitrators if issues (1) or (3) are involved.¹⁰² Orders modifying or correcting awards are appealable.¹⁰³

c. Modifying or correcting awards for alimony, postseparation support, child support or child custody based upon substantial change of circumstances. The Act includes a special provision for modifying an award if these issues are involved. This statute is in addition to other grounds for modification; it may be joined with a vacatur application.¹⁰⁴ The statute supersedes the *Crutchley* decision¹⁰⁵ by allowing modification or correction of awards for child support or child custody and alimony or postseparation support:

(a) A court or arbitrators may modify an award for postseparation support, alimony, child support, or child custody under conditions stated in G.S. 50-13.7 and 50-16.9 as provided in . . . this section [N.C. Gen. Stat. § 50-56].

(b) Unless the parties have agreed in writing that an award for postseparation support or alimony shall be nonmodifiable, an award by arbitrators for postseparation support or alimony pursuant to G.S. 50-16.2A, 50-16.3A, 50-16.4 or 50-16.7 may be modified if a court order for alimony or postseparation support could be modified under G.S. 50-16.9.

¹⁰⁰ N.C. Gen. Stat. § 50-55(b) (2005); *see also Semon*, 161 N.C. App. at 139, 587 S.E.2d at 462 (noting similarity between FLAA, UAA provisions); Part B.3. Parties cannot waive provisions of N.C. Gen. Stat. § 50-55 (2005). *Id.* § 50-42.1(c) (2005); *see also* its Comment in the 2006 Revised Handbook.

¹⁰¹ N.C. Gen. Stat. §§ 50-53(a), 50-55(b) (2005).

¹⁰² N.C. Gen. Stat. § 50-52(a) (2005); *see also* Comments to §§ 50-52 and 50-55 in the 2006 Revised Handbook. Parties cannot waive provisions of N.C. Gen. Stat. § 50-52 (2005). *Id.* § 50-42.1(c) (2005); *see also* its Comment in the 2006 Revised Handbook.

¹⁰³ N.C. Gen. Stat. § 50-60(a)(4) (2005); *see also* Part D.4.

¹⁰⁴ N.C. Gen. Stat. §§ 50-55(c), 50-56(f) (2005).

¹⁰⁵ *See* note 3 and accompanying text; Parts D.3.a(1), D.3.a(5); *see also Pataky*, 160 N.C. App. at 303, 585 S.E.2d at 413.

(c) An award by arbitrators for child support or child custody may be modified if a court order for child support or child custody could be modified under G.S. 50-13.7.

(d) If an award for modifiable postseparation support or alimony, or an award for child support or child custody, has not been confirmed under G.S. 50-53, upon the parties' written agreement these matters may be submitted to arbitrators chosen by the parties under G.S. 50-45. G.S. 50-52 through 50-56 shall apply to this modified award.¹⁰⁶

Subsection 50-56(e) provides that if an award for modifiable postseparation support or alimony, or child custody or child support, has been confirmed, upon the parties' written agreement and joint motion, the court may remit these matters to arbitrators, perhaps the same arbitrators or different arbitrators. When the arbitrators complete the new award, the Act's provisions related to change of award by arbitrators, vacatur and modification apply to the new award. Although the parties may agree to send this issue to arbitration and jointly move the court, the court is not required ("may") to grant the motion. There are thus four options for modifying these aspects of an award upon a showing of substantial change of circumstances: (1) a new award by the same arbitrator; (2) a new award by a different arbitrator; (3) a modification by a court, if the court does not grant the parties' joint motion; or (4) by a court if the court receives an application by one party in the absence of a joint motion.

Orders modifying or correcting awards under this section are appealable.¹⁰⁷

4. Appeal. Grounds for appeal in arbitration are relatively limited.¹⁰⁸ For appellate review, there must be a final judgment, i.e., one that has no vacatur,

¹⁰⁶ N.C. Gen. Stat. §§ 50-56(a) - 50-56(d) (2005). Parties may not waive provisions of *id.* § 50-56 (2005). *Id.* § 50-42.1(c) (2005); *see also* its Comment in the 2006 Revised Handbook.

¹⁰⁷ N.C. Gen. Stat. § 50-60(a)(4) (2005); *see also* Part D.4.

¹⁰⁸ *See Semon*, 161 N.C. App. at 141, 587 S.E.2d at 463 (judicial review of arbitral award is confined to determining whether one of the specific grounds for vacating an award under the arbitration statute).

modification or correction applications pending, confirming an arbitral award.¹⁰⁹

Grounds for appeal common to the former UAA, the RUAA and the Family Law Act are:

- (a) An appeal may be based on failure to comply with the procedural aspects of this Article. An appeal may be taken from any of the following:
 - (1) An order denying an application to compel arbitration made under G.S. 50-43;
 - (2) An order granting an application to stay arbitration made under G.S. 50-43(b);
 - (3) An order confirming or denying confirmation of an award;
 - (4) An order modifying or correcting an award;
 - (5) An order vacating an award without directing a rehearing; or
 - (6) A judgment entered pursuant to provisions of this [Act].¹¹⁰

Appeal may be taken from a trial court judgment after a review for errors of law prejudicing a party if parties have contracted for this in the agreement to arbitrate.¹¹¹

Appeals must be taken in the manner and to the same extent as from orders or judgments in a civil action.¹¹² Under the usual circumstances appeals will go from District Court to the Court of Appeals, exactly as appeals from litigated family law cases would proceed, with possible Supreme Court review thereafter.

The appeal process under the Act thus protects spouses and children, where alimony, postseparation support, child custody or child support issues are involved. Unlike the RUAA, appeals cannot be waived.¹¹³

E. Conclusions

Arbitration under the Act has its closest analogue in private settlement negotiations or collaborative law proceedings, which are also conducted outside the

¹⁰⁹ N.C. Gen. Stat. §§ 50-53, 50-57(a) (2005); *see also* Part D.3. Parties cannot waive provisions of N.C. Gen. Stat. § 50-53 (2005). *Id.* § 50-42.1(c) (2005); *see also* its Comment in the 2006 Revised Handbook.

¹¹⁰ *Compare* N.C. Gen. Stat. § 50-60(a) (2005) *with id.* § 1-569.28 (2005); *see also* Part D.3; Comment to § 50-60 in the 2006 Revised Handbook

¹¹¹ N.C. Gen. Stat. §§ 50-54(a)(8), 50-60(b) (2005); *see also* Part D.3.a(3); Comment to § 50-60 in the 2006 Revised Handbook.

¹¹² N.C. Gen. Stat. § 50-60(c) (2005).

¹¹³ *Compare* N.C. Gen. Stat. § 50-42.1(c) (2005) *with id.* § 1-569.4(c) (2005).

courthouse and are not subject to court supervision as court-annexed mediations are. Arbitration by agreement thus differs from court-ordered arbitration, another court-supervised ADR program. It is similar to court-ordered arbitration in that a final, binding award can result, but only if statutory grounds for setting aside the award (vacatur, modification, correction) are not involved.

Arbitration by agreement is not suitable for all family law cases. The oldest and best ADR option is negotiated settlement, with resort to the courts for essential matters, e.g., the divorce itself. Mediation or collaborative law can work if parties truly commit to the process. If mediation or collaborative law does not work, or are perceived to be unworkable because of parties' animosity or for other, similar reasons, arbitration by agreement may be a better ADR option. It offers a neutral decisionmaker (the arbitrator) instead of the facilitator(s). There is a concrete result, an award, usually reasoned like Rule 52 findings of fact and conclusions of law, that can be confirmed as a judgment. It offers more privacy and maybe less time and expense than litigation. It can offer a less intimidating environment and can be more convenient in terms of site and times.

There are disadvantages.

If a party signs an agreement to arbitrate, that party is committed to the process unless the parties sign a new agreement to get the matter out of arbitration. This point should be brought home to parties. There are no nonsuits unless the other party agrees to end the process.

After an arbitrator has been chosen, the parties are "stuck" with that arbitrator unless the arbitrator resigns or is disqualified, e.g., through disclosure. The point is to choose the arbitrator wisely, perhaps a former judge or an experienced family law attorney.

The converse of saving time and expense may be true; in courts with relatively clear dockets, a case may proceed more rapidly and at less expense than in arbitration.

Except as required by statute, parties are subject to the rules they choose. Although experienced counsel drafted and use the *2006 Revised Handbook* rules, some rules may not fit a particular case; additional or different rules may be necessary. An example is Basic Rule 38, establishing a default principle that parties agree that there will be no review and appeal of issues of law; the Rule Comment offers the opposite choice.

Another is Basic Rule 20, declaring that all interim measures allowed by the Act are available in a case; the Rule Comment offers a more selective approach. The Rule drafters had to make choices in both cases and in others, like Rules 5A and 5B, which opt an arbitration out of consolidation with other arbitrations. The default options may not be suitable in a particular case. Part of the Conclusion to the Rules in the *2006 Revised Handbook*, italicized as it is in the *Handbook*, says: "*Drafters must consider the facts and circumstances of the client and the particular case and must determine which of the suggested form(s) or rule(s) fit(s) the needs of clients and the case.*"

Arbitration by agreement, as distinguished from court-annexed mediation or court-ordered arbitration, is the choice of the parties on advice of counsel, as it is if parties engage in settlement negotiations or collaborative law. Parties and counsel must choose wisely. Arbitration by agreement is not a "one size fits all" ADR option; it is not a panacea for all ills; it will not cure warts. It is, however, a valuable ADR option for some cases.