

HOUSE BILL REPORT

SHB 1088

As Passed House:
February 27, 2023

Title: An act relating to the uniform family law arbitration act.

Brief Description: Concerning the uniform family law arbitration act.

Sponsors: House Committee on Civil Rights & Judiciary (originally sponsored by Representatives Walen and Reeves; by request of Uniform Law Commission).

Brief History:

Committee Activity:

Civil Rights & Judiciary: 1/11/23, 1/27/23 [DPS].

Floor Activity:

Passed House: 2/27/23, 95-0.

Brief Summary of Substitute Bill

- Adopts the Uniform Family Law Arbitration Act to create a statutory scheme for the arbitration of family law disputes.

HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 10 members: Representatives Hansen, Chair; Farivar, Vice Chair; Walsh, Ranking Minority Member; Graham, Assistant Ranking Minority Member; Cheney, Entenman, Goodman, Peterson, Rude and Walen.

Staff: Yelena Baker (786-7301).

Background:

Arbitration Generally.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

Arbitration is a form of nonjudicial dispute resolution in which the parties explicitly agree to submit disputes to a privately selected decision maker, the arbitrator. The arbitrator acts as a judge to determine all issues of contested facts and law, and then makes a final and binding decision, which is subject to limited court review.

The Washington Uniform Arbitration Act.

In Washington, private arbitration is governed and conducted under the Washington Uniform Arbitration Act (UAA), which was adopted in 2005 and based on the model Revised Uniform Arbitration Act proposed by the Uniform Law Commission (ULC).

The UAA prescribes procedures for initiating and conducting arbitration, compelling or staying arbitration, issuing provisional remedies, as well as confirming, enforcing and appealing arbitration awards and rulings. Additionally, the UAA specifies the powers of an arbitrator, the disclosures an arbitrator must make prior to accepting an appointment, and an arbitrator's immunity from civil liability.

Family law disputes arbitrated under the UAA generally include disagreements about marital property, spousal maintenance, as well as parenting plan and child support disputes.

Mandatory Arbitration of Certain Civil Actions.

Under state law, arbitration of certain civil actions may be required in counties with a population of more than 100,000. In counties with a population of 100,000 or less, the superior court of the county or the county legislative authority may authorize arbitration of certain civil actions.

In the context of family law disputes, civil actions in which the sole relief sought is establishment, termination, or modification of maintenance or child support payments are subject to mandatory arbitration if mandatory arbitration of these actions is approved by majority vote of the superior court judges of a county which has authorized arbitration.

Federal Arbitration Law Applicable to Family Law Disputes.

The Federal Arbitration Act applies generally to any agreement to arbitrate an existing or subsequent dispute arising out of a contract affecting interstate commerce. In addition to state law, the Federal Arbitration Act may apply to some family law disputes, such as disputes that involve property located in more than one state.

Uniform Family Law Arbitration Act.

The ULC is an organization that authors and promotes enactment of uniform laws in areas of law where national uniformity is desirable and practical.

In 2016 the ULC promulgated the Uniform Family Law Arbitration Act (UFLAA) which sets out arbitration procedures for contested issues arising under a state's family or domestic relations law. The UFLAA tracks many of the provisions of the model Revised Uniform Arbitration Act on which the Washington UAA is based.

The UFLAA has been adopted in four states: Arizona, Hawaii, Montana, and North Dakota.

Summary of Substitute Bill:

The Uniform Family Law Arbitration Act (UFLAA) is adopted to create a statutory scheme for the arbitration of family law disputes. Many UFLAA provisions are similar to the Washington Uniform Arbitration Act, with several provisions specific to the family law dispute context, such as qualifications of an arbitrator, recording of hearings, and provisions related to protecting a party or child.

Key Definitions and Scope.

"Family law dispute" means a contested issue arising under state law on domestic relations.

"Child-related dispute" means a family law dispute regarding legal custody, physical custody, custodial responsibility, parental responsibility or authority, parenting time, right to access, visitation, or financial support regarding a child.

The UFLAA does not apply to several types of civil actions and proceedings, including:

- civil actions that are subject to mandatory arbitration;
- jurisdictional determinations under the Uniform Child Custody Jurisdiction and Enforcement Act, which addresses interstate civil enforcement for child custody orders;
- proceedings under the Uniform Parentage Act to preclude establishment of parentage by a perpetrator of sexual assault;
- issuance, modification, or termination of civil protection orders; and
- delegation of the court's authority to permanently modify a parenting plan.

Additionally, the UFLAA does not authorize the arbitrator to make an award that:

- grants a legal separation or dissolution of marriage or domestic partnership, or annulment;
- terminates parental rights;
- grants an adoption or a guardianship of a child or incapacitated individual; or
- determines the status of dependency.

Arbitration Agreement.

The UFLAA requires that an arbitration agreement be in a record signed by the parties and that it identifies the arbitrator or method of selecting an arbitrator, as well as the family law dispute the parties intend to arbitrate.

Except with regard to child-related disputes, an agreement to arbitrate a family law dispute that arises between the parties before, at the time, or after the agreement is made is valid and enforceable as any other contract. An agreement to arbitrate a child-related dispute that arises between the parties after the agreement is made is enforceable only if the parties

affirm the agreement after the dispute arises or if the agreement is entered during a family law proceeding and the court approved or incorporated the agreement in a court order.

If a party objects to arbitration on the grounds that the arbitration agreement is unenforceable or the agreement does not include a family law dispute, the court must decide whether the agreement is enforceable or includes the family law dispute.

Initiating Arbitration.

A party may initiate arbitration by giving notice to arbitrate to the other party in the manner specified in the arbitration agreement. If the manner of arbitration notification is not specified, a party may give notice under the law and procedural rules governing contractual arbitration.

An arbitration hearing need not be recorded unless required by other law or by the arbitrator, provided by the arbitration agreement, or requested by a party. An arbitrator must record, electronically or otherwise, any part of an arbitration hearing concerning a child-related dispute.

Compelling or Terminating Arbitration.

A party may file a motion in court to compel or terminate arbitration. On motion of a party, the court must terminate arbitration if the court determines that:

- the arbitration agreement is unenforceable;
- the family law dispute is not subject to arbitration; or
- the arbitration should not proceed pursuant to the UFLAA provisions related to family violence or child abuse.

Motions must be filed in the court where the family law proceeding is pending. An order denying a motion to compel arbitration or granting a motion to stay arbitration may be appealed in the same manner as an order or a judgment in a civil action.

Arbitrator Selection.

Unless waived by the parties, an arbitrator must be an attorney with a minimum of five years of experience practicing family law, or a former judicial officer, including a former pro tempore judicial officer. An arbitrator must have received specified minimal training in child development, child and juvenile mental health issues, identifying domestic violence and child abuse, and trauma-informed practices.

The arbitration agreement controls the identification or method of selection of the arbitrator. On motion of a party, the court must select an arbitrator if the agreed-upon arbitrator is unable or unwilling to act or if the arbitrator selection method fails.

If the parties agree to discharge an arbitrator or the arbitrator is disqualified, the parties may select a new arbitrator by agreement or request the court to select another arbitrator.

Required Disclosures.

Before agreeing to serve as an arbitrator, an individual must disclose to all parties any known fact that a reasonable person would believe is likely to affect the impartiality of the arbitrator or the arbitrator's ability to make a timely award. This disclosure obligation applies on an ongoing basis to the arbitrator, the parties, and the attorneys representing the parties.

If a required disclosure is not made, the court may suspend the arbitration, vacate an award, or grant other appropriate relief.

Powers and Duties of an Arbitrator.

Unless the parties agree otherwise, an arbitrator's powers include the power to:

- select the rules for the arbitration;
- conduct the prehearing conferences and the hearing;
- administer oaths to parties and witnesses;
- compel discovery and determine the admissibility and weight of evidence;
- issue a protective order to prevent the disclosure of privileged or confidential information;
- appoint an attorney, guardian ad litem, or other representative for a child at the expense of the parties; and
- impose a procedure to protect a party or child from risk of harm, harassment, or intimidation.

Additionally, an arbitrator may impose a sanction on a party for bad faith or misconduct during the arbitration.

Party Participation.

A party to arbitration may participate in the arbitration to the full extent permitted under the law and procedural rules, and be represented in the arbitration by an attorney. Additionally, a party has a right to be accompanied by an individual who will not be called as a witness or act as an advocate.

No ex parte communications with the arbitrator are permitted, except to the extent allowed in a family law proceeding for communication with a judge.

Protection of a Party or Child.

If a party is subject to a protection order or has been convicted of a domestic violence offense, or if an arbitrator determines there is a reasonable basis to believe a party's safety or ability to participate effectively in arbitration is at risk, the arbitrator must stay the arbitration and refer the parties to court. The arbitration may not proceed unless the party at risk affirms the arbitration agreement, and the court determines that:

- the affirmation is informed and voluntary;
- arbitration is not inconsistent with the protection order; and
- reasonable procedures are in place to protect the party from risk of harm, harassment,

or intimidation.

Temporary Orders or Awards.

Before an arbitrator is selected or if the arbitrator is not able to act on an urgent request in a timely manner, the court may enter a temporary order relating to spousal maintenance or child support, a temporary parenting plan, a temporary restraining order, or a preliminary injunction.

After an arbitrator is selected, the arbitrator may make a temporary award relating to temporary spousal maintenance or child support, a temporary parenting plan, or preliminary injunction. However, an arbitrator may not make a temporary award pertaining to a protection order, as defined in the UFLAA, in which case the UFLAA provisions related to protecting a party or child apply.

On motion of a party, before the court confirms a final award, the court may confirm, amend, or vacate a temporary award by an arbitrator. The court may also enforce a subpoena or interim award issued by an arbitrator.

Final Award and Confirmation of Award.

An arbitration award must state the reasons on which it is based. Parties may agree to waive this requirement of a reasoned award if the family law dispute is not a child-related dispute.

An arbitration award is not enforceable as a judgment until it is confirmed by the court. On motion of a party, the court must confirm an award if the parties agree to confirmation or if the time has expired to make a motion to correct, vacate, or amend the award and no motion is pending. If an award determines a child-related dispute, the court must confirm the award if the court finds that the award complies with state law and is in the best interests of the child.

An order confirming or denying confirmation of an award may be appealed in the same manner as an order or a judgment in a civil action.

Correction of Unconfirmed Award.

On motion made no later than 30 days after an arbitrator gives notice of an award, an arbitrator may correct an award for mathematical miscalculations or evident descriptive mistakes, for errors of form not affecting the merits of arbitrated issues, or to clarify the award.

On motion of a party made no later than 90 days after an arbitrator gives notice of an award, the court must correct the award for mathematical miscalculations or evident descriptive mistakes, errors of form not affecting the merits, or an arbitrator's mistake in making an award on a dispute not submitted to the arbitrator. A party may seek from the court a correction of an award that has already been corrected by the arbitrator.

The court may confirm a corrected award unless a motion to vacate or amend an unconfirmed award is pending. An order correcting an award may be appealed in the same manner as an order or a judgment in a civil action.

Vacation or Amendment of Unconfirmed Award.

On motion of a party, the court must vacate an unconfirmed award if the moving party establishes that specified grounds for vacating exist, including where:

- the award was procured by corruption, fraud, or other undue means;
- there was evident partiality, corruption, or misconduct by the arbitrator;
- the arbitrator exceeded the arbitrator's powers; or
- no arbitration agreement exists.

The court must vacate an unconfirmed award that determines a child-related dispute if the moving party establishes that the award does not comply with state law or is contrary to the best interests of the child. An award subject to vacation on this ground may be amended by the court if the court determines that amending rather than vacating is in the best interests of the child.

Additionally, the court must vacate an unconfirmed award in a child-related dispute if the record of the hearing or the statement of reasons in the award is inadequate for the court to review the award.

A motion to vacate or amend an award must be filed no later than 90 days after an arbitrator gives the party filing the motion notice of the award. When the award is challenged on the grounds of corruption or fraud, a motion to vacate must be filed no later than 90 days after the corruption or fraud is known or should have been known to the moving party.

Judgment on Award and Modification of Confirmed Award.

On granting an order to confirm, vacate, or amend an award, the court must enter judgment in conformity with the order. Final judgment on an arbitration award may be appealed in the same manner as an order or a judgment in a civil action.

If a party requests a modification of a confirmed award or judgment based on a fact occurring after confirmation, the parties must proceed under the dispute resolution method specified in the award or judgment. If no method is specified, the parties may agree to arbitrate the modification or proceed in court under state law governing modifications of family court decrees.

Enforcement.

The court must enforce a confirmed award, including a temporary award, in the manner and to the same extent as any other order or judgment of a court. If an arbitration award was confirmed by a court in another state, the court must enforce in the manner and to the same extent as any other order or judgment from another state.

Immunity of Arbitrator.

An arbitrator acting in that capacity in a family law dispute is immune from civil liability to the same extent as a judge of a court acting in a judicial capacity.

An arbitrator is not competent to testify and may not be required to produce records about a statement, conduct, or ruling that occurred during an arbitration. This provision does not apply in a hearing to determine a claim by the arbitrator against a party or in a hearing on motion to vacate an award on the grounds that the award was procured by fraud or corruption, or that there was evident partiality, corruption, or misconduct by the arbitrator.

If a person commences a civil action against an arbitrator based on the arbitrator's services and the court determines that the arbitrator is immune from civil liability or is not competent to testify or required to produce records, the court must award the arbitrator reasonable attorneys' fees and costs.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect on January 1, 2024.

Staff Summary of Public Testimony:

(In support) Currently, in family law disputes, arbitration may be used to resolve financial matters, but parties who are in dispute over these nonfinancial issues, such as parenting plans and custody, have to go to court. The bill allows arbitration to be used in all family law matters.

The bill is based on the 2016 Uniform Family Law Arbitration Act (UFLAA), and since then the Uniform Law Commission, the Washington State Bar Association, and other stakeholders and legislators have worked on making sure that this bill complies with unique provisions of Washington law. Four states have adopted the UFLAA, which has also been approved by the American Bar Association.

In some counties, current wait times for cases to be heard are up to a year. It is very hard to get to court on a motion because of the delays. Families often need temporary orders and even those can take several weeks to obtain from the court, so allowing arbitration will give families more options. Arbitration is a slightly less formal process and can be accessed quickly. Allowing arbitration will ease the burden on the court system.

The bill requires an arbitrator to refer the case to court when there is a protection order. This provision does not account for the dramatic pivot the courts have made towards remote technology during the pandemic. If there is a protection order and the arbitrator does not

see a safety issue, the case should proceed in arbitration with the use of remote technology. A party appearing by video can do so from an undisclosed location.

The bill draws on the Revised Uniform Arbitration Act (RUAA) that Washington enacted in 2006. Many of the provisions in the bill are going to be familiar to arbitrators and practitioners in the dispute resolution field. For example, the provisions about arbitrator disclosure, awards, appeals, and arbitrator immunity all come from the RUAA. However, the bill includes special provisions not found in the RUAA for arbitrations relating to child custody and support and protections for victims of domestic violence.

Washington should adopt this law because it provides parties with more flexibility and privacy, which are huge benefits to those seeking to resolve disputes of a sensitive nature, such as disputes relating to children. All court hearings litigating a family law dispute are public, but in arbitration, all hearings remain private. Parties may also choose the arbitrator and therefore have more control and more flexibility regarding schedule, rules, and timing of their dispute resolution process. The bill was also carefully crafted to guard the role of courts with respect to children. Arbitration awards regarding child custody or child support cannot be confirmed unless the court finds that the award complies with applicable law and is in the best interest of the child. Additionally, the bill provides safeguards to ensure that one party to the arbitration will not intimidate or otherwise overpower another.

The bill requires that arbitrators be trained in detecting domestic violence and child abuse before arbitrating a family law dispute. A party to an arbitration may be accompanied by a friend or supporter who will not be called as a witness or act as an advocate.

(Opposed) None.

(Other) Certain types of cases, such as those involving dependency of a child or termination of a parent-child relationship, should be excluded from the bill. The minimum training requirements for arbitrators should be strengthened and should be more specific to the kinds of complicated matters that the family law arbitrators handle. Arbitration should not be required if a party is a survivor of abuse, or if a party has been convicted of domestic violence, child neglect, or child abuse.

Persons Testifying: (In support) Representative Amy Walen, prime sponsor; Steve Rosen; Kari Bearman, Uniform Law Commission; Paul McVicker; and Patrick Rawnsley, Washington State Bar Association Family Law Executive Committee.

(Other) Judge Sean O'Donnell, Superior Court Judges' Association.

Persons Signed In To Testify But Not Testifying: None.