

## Drafting Arbitration Clauses

**Introduction:** Arbitration in divorce and related family law matters is governed by the Domestic Relations Arbitration Act (DRAA). MCL 600.5070 et seq. The statute requires two documents for arbitration: 1) An order referring the case to arbitration; and 2) An arbitration agreement.

It has been held that the two documents may be combined into a single document if all of the required provisions in MCL 600.5071 and MCL 600.5072(1)(e) are included. The Michigan Supreme Court held that no separate written agreement beyond the order for binding arbitration is required (1) if the parties stipulate to entry of the order and the order meets the criteria of MCL 600.5071 and .5072(1)(e) and (2) if the parties satisfy MCL 600.5072(1)(a)–(d) on the record. *Miller v Miller*, 474 Mich 27, 707 NW2d 341 (2005).

Orders referring a case to domestic relations arbitration are fairly basic. For a same, see **Exhibit 1**. The arbitration agreement is more complex than the referral order. It presents the most potential pitfalls for drafters. The agreement specifies the issues to be arbitrated and the powers and duties of the arbitrator. These materials will focus drafting the arbitration agreement.

Although much of what must be included in an arbitration agreement is prescribed by statute and will be the same from one arbitration agreement to another, several optional areas of concern are addressed in these materials.

**Child-Related Issues:** First, if the arbitration is to include child-related issues such as child custody, parenting time, child support, residency, shared decision-making, etc., special provisions and procedures are required by statute.

An arbitration agreement may provide for the use of a record in the proceedings. MCL 600.5077(1). If a record is not required, the arbitrator may make his/her own personal record (typically audio recordings) to aid in reaching a decision. *Id.*

However, a record is required for any portion of the hearing that concerns child-related issues. The record of child-related testimony must follow Michigan Court Rules for preservation of a witness's testimony in a deposition. MCL 600.5077(2). See **Exhibit 2** for sample language. An arbitrator exceeded her authority under the DRAA when she failed to record the arbitration proceedings in accordance with MCL 600.5077(2). The trial court erred when it failed to correct the arbitrator's error by conducting its own evidentiary hearing. No independent review of the arbitrator's findings was possible due to the inadequacy of the arbitration record. *Kirby v Vance*, 481 Mich 889; 749 NW2d 741 (2008).

**Timeliness:** This is another area governed by statute. The arbitrator must issue a decision within 60 days after the end of the hearing or after reviewing proposed findings of fact and conclusions of law if these were requested. MCL 600.5078(1). This time period can be lengthened or shortened by written agreement of the parties. In an especially complex case, over 60 days may be needed. If the issues are simple, or if a speedy determination is needed, parties may contract for an award in fewer than 60 days.

If time is of the essence, the agreement should expressly state so. Otherwise, failure of the arbitrator to meet the 60 day (or other agreed-upon) deadline may be deemed harmless error. *In re Day Estate*, 70 Mich App 242, 246; 245 NW2d 582 (1976). See also, *Grossklaus v Grossklaus*, COA No. 240124, Dec. 9, 2003, unpublished, which held:

We note that the first award was issued well after the forty-five day period, and plaintiff did not object at that time. We conclude that the time frame expressed in the parties' agreement was not a material term of the contract. Accordingly, by failing to comply with this provision, the arbitrator did not act outside the material terms of the contract and, therefore, did not exceed his powers within the meaning of MCR 3.602(J) when he failed to render an award within the stated time frame. [Note: *Grossklaus* was pre-DRAA, but relies on the arbitration court rule, MCR 3.602(J), which also applies to domestic relations arbitrations.]

If the arbitrator failed to timely issue an award, objection untimeliness must be prompt to avoid waiving a timeliness claim. Continued participation in the arbitration process could be viewed as a waiver of an arbitrator's violation of the requirement to issue an award within the specified time.

An example of a "time is of the essence" provision for issuance of the arbitrator's award is found at **Exhibit 3**.

**Proper Application of Law to Facts of Case:** Few clients understand (and not every lawyer explains to his/her client) that an arbitrator is more powerful than a judge. Judges are bound to make findings of fact supported by the record and properly interpret and apply the law to those facts. If they fail to do so, there may be grounds for appeal. Arbitrators, however, may make factual and/or legal mistakes that will not result in their award being vacated or modified. That an award granted by an arbitrator contains relief that could not have been granted by a court is not sufficient grounds for vacating or refusing to confirm the award. MCL 600.5081(3).

There is an exception for child-related issues (custody, parenting time, and child support). An award related to the child may be vacated by the court if the court finds it is not in the best interests of the children. MCL 600.5080(1). On child-related issues, the court's review is premised on proper application of the relevant statutes and court rules. MCL 600.5080(2). Therefore, unlike purely financial issues, a grant of relief on child-related issues

that is outside the range permitted by statute or court rule will be grounds for vacate or modify that portion of the award

When I was actively doing arbitrations under the DRAA, I insisted that the arbitration agreement contain a clause requiring me to properly apply Michigan substantive and procedural law. I didn't want to deprive a party of meaningful relief if I in good faith made a factual or legal error. I continue to believe that if the parties want an award consistent with what a court could grant if the case when to trial, the arbitration agreement must **require** the arbitrator to follow applicable statutes, rules, and case law when rendering the award.

An example of such a provision was found in *Washington v Washington*, 283 Mich App 667, 673–674; 770 NW2d 908 (2009). The arbitration agreement provided that the arbitrator follow statute and case law. When the arbitrator issued an award that unequally divided the property, an appeal followed. On appeal, the Court of Appeals determined that the arbitrator's unequal property award was proper under Michigan law where one party dissipated marital assets. Therefore, the award was proper under the arbitration agreement.

For a sample clause requiring the arbitrator to properly apply Michigan law when rendering his/her award, see **Exhibit 4**.

**Providing for a Substitute or Successor Arbitrator:** This one is both personal and professional. My longtime friend and bandmate from the Bare Assets Jazz Quartet, John F. Mills, was a brilliant lawyer, talented musician, and oft-used arbitrator. His last arbitration was the still-pending *Zelasko v Zelasko* divorce arbitration.

John was diagnosed with cancer, underwent treatment, and continued his effort to complete the *Zelasko* arbitration. Sadly, he became increasingly ill and passed away before he could issue a final award on the child-related issues of custody, parenting time, and support. I represented the husband in appellate proceedings related to the uncompleted arbitration.

The DRAA provides for disqualification of an arbitrator for cause, such as evident impartiality or conflicts of interest. The arbitrator, the attorneys, and the parties must disclose any circumstance that might affect the arbitrator's impartiality. MCL 600.5075(1). If the arbitrator's impartiality might be affected by bias, financial or personal interest in the outcome of the proceeding, or a past or present relationship with one of the parties or their attorneys, either party may request that the arbitrator disqualify himself or herself. *Id.* If the arbitrator fails to remove himself or herself within 14 days of a request for disqualification, the party seeking the arbitrator's disqualification may move for disqualification with the circuit court. *Id.*

If an arbitrator is disqualified, the court may appoint another arbitrator **agreed to by the parties**. However, if the parties cannot agree on a new arbitrator, the court may **void the arbitration agreement** as proceed to trial **as if arbitration has not been ordered**. MCL 600.5075(2).

Unfortunately, the statute fails to expressly state what happens if an arbitrator becomes disabled or dies prior to issuing a final award. Is that equivalent to a disqualification? Not exactly. According to the Court of Appeals unpublished decision in *Zelasko v Zelasko*, COA No. 324514, Dec. 8, 2015, “In a situation where an arbitrator has been found to be biased or partial, the validity of the entire proceeding becomes an issue and it makes sense to have a ‘do over.’”

In other words, if the arbitrator cannot finish the arbitration because he or she was disqualified under MCL 600.5075(1), no part of the arbitration remains valid and the process starts over either in front of a new agreed-upon arbitrator or, if the parties cannot agree on a new arbitrator, in front of the court.

However, if an arbitrator dies or becomes disabled before completing the award, if interim awards were issued and confirmed by the court, those are preserved. However, the *Zelasko* panel held that the court lacks authority to appoint a substitute arbitrator over the objection of either party.

Because the statute is insufficient in this regard, parties should include in their arbitration agreements a provision deciding what will happen if their agreed-upon arbitrator cannot complete the arbitration and issue a final award. The parties could choose to then refer the matter back to the court for trial, name a specific substitute or successor arbitrator, or agree upon a method to select a substitute or successor arbitrator.

The parties should also decide what happens to any interim awards and whether confirmation by the court of those awards is or is not significant to whether they are preserved and remain binding on the parties.

Sample clauses for appointment of a substitute arbitrator are found at **Exhibit 5**.

### **Consent Order Referring Case to Binding Arbitration**

The parties agree to submit the issues of child custody, child support, property division, attorney fees, and spousal support to [name] for binding arbitration.

IT IS ORDERED:

[Name] is appointed under the Domestic Relations Arbitration Act (DRAA), MCL 600.5070 et seq., to serve as arbitrator for this case.

The issues referred to arbitration are child custody, child support, property division, attorney fees, and spousal support.

A record will be made of all child-related issues.

Plaintiff will pay [percentage] of the arbitrator's fee, and defendant will pay [percentage].

An arbitration agreement will be executed by both parties and their counsel along with the arbitrator before arbitration proceedings start.

[Signature lines for parties, counsel, and the court.]

### **Clause Requiring Record of Arbitration of Child Related Issues**

The issues referred to arbitration include child custody, parenting time, and child support. As required by MCL 600.5077(2), a record will be made of that portion of the arbitration proceeding addressing these issues. The record will be made in the same manner required by the Michigan Court Rules for the record of witness testimony in a deposition.

Specifically, a court reporter will be employed to record the proceedings related to child custody, parenting time, and child support. That reporter will be selected by the arbitrator. The reporter's fees will be paid \_\_\_\_% by plaintiff and \_\_\_\_% by defendant.

Exhibits will be marked by the court reporter. If admitted into evidence, exhibits will be preserved by the arbitrator until issuance of a final award. Upon issuance of a final award, any exhibit in the possession of the arbitrator shall be returned to the attorney for the party sponsoring that exhibit.

The arbitrator may continue to make an audio recording of all arbitration proceedings, including those addressing child custody, parenting time, and child support, for the sole use by the arbitrator to assist in rendering an award. The audio recording is for the sole use by the arbitrator and is not an official record.

Neither party shall request or receive a copy of all or any portion of the arbitrator's audio recording. The arbitrator is obligated to keep the audio recording only until the expiration of the appeal period from a final judgment of divorce based on the arbitrator's award or if an appeal by right is timely filed, until the conclusion of that appeal. At that time, the arbitrator shall destroy the audio recordings made for the arbitrator's sole use.

### **Time is of the Essence**

On completion of the final arbitration hearing, the arbitrator will issue a final arbitration award on all issues referred to arbitration in writing and deliver a copy of the award to each attorney via email at the addresses provide above. If either attorney changes email addresses, it will be the obligation of that attorney to promptly notify the arbitrator and opposing counsel of that change and provide a new email address to be used by the arbitrator when providing the final award to counsel.

The arbitrator will provide the written award on all issues within \_\_ days after conclusion of the final arbitration hearing or within \_\_ days after receipt by the arbitrator of the proposed findings of facts and conclusions of law if requested by the arbitrator.

This provision is a material term of the arbitration agreement. Failure by the arbitrator to issue a final written award within the time stated above shall constitute the arbitrator exceeding his or her powers and shall result in the court vacating any final award that is issued as well as all prior interim awards that may have been issued.

If a final award is vacated for lack of timeliness, the arbitrator shall be deemed disqualified and the matter shall proceed as provided under MCL 600.5075(2), which states the court “may appoint another arbitrator agreed to by the parties or may void the arbitration agreement and proceed as if arbitration had not been ordered.”

Nothing in this agreement precludes the parties from agreeing, in writing, to extension of the deadline for issuance of the final written arbitration award. However, neither the arbitrator nor the court shall have authority to order an extension of the time to complete the award or to compel either party to agree to an extension.

### **Arbitrator Bound by Michigan Substantive and Procedural Law**

The parties and arbitrator agree that the arbitrator is bound not only by the laws of the state of Michigan regarding the domestic relations arbitration process, but is also bound by the substantive and procedural law (case, rules, and statutes) governing the issues submitted to binding arbitration, except as follows:

Cases:

Statutes:

Rules:

This agreement requires the arbitrator to properly interpret the law and properly apply the law to the facts of this case. Any failure to properly interpret and apply the law in making an interim or final arbitration award shall be an act exceeding the authority granted to the arbitrator in this agreement and shall require the court to vacate that portion of any interim or final arbitration award that is contrary to Michigan law, except as may be provided in the exclusions listed above.

### **Appointment of Substitute Arbitrator**

If for reasons other than those provided for in MCL 600.5075(1), such as death, disability, relocation out of the immediate geographic area, voluntary or involuntary retirement from the practice of law, etc., the arbitrator is unable to complete the arbitration process and issue a final award on all issues within the time limits specified elsewhere in this agreement, the parties agree that \_\_\_\_\_ shall serve as substitute arbitrator under the same terms and conditions provide for in this agreement. However, a new agreement identical in all substantive terms to this agreement shall be prepared and signed by both parties, their respective counsel, and the substitute arbitrator before arbitration proceedings may begin with the substitute arbitrator.

If the substitute arbitrator named above is unable or unwilling to serve, the matter shall proceed as provided in MCL 600.5075(2), which allows the parties to agree upon a new arbitrator to complete the matter, if no agreement is reached, the arbitration agreement will be deemed void and the matter shall proceed as if arbitration had not been ordered.

All interim awards issued by the original arbitrator shall be preserved and will remain binding on the parties and the substitute arbitrator, or his/her successor, unless vacated by the court.

or

All interim awards issued by the original arbitrator [whether or not previously confirmed by the court] shall be vacated to allow the substitute arbitrator, or his/her successor, to review the case and reach his/her own conclusions without being bound by the views of the original arbitrator.

### **Arbitration Void Upon Disability or Death of Arbitrator**

If for reasons other than those provided for in MCL 600.5075(1), such as death, disability, relocation out of the immediate geographic area, voluntary or involuntary retirement from the practice of law, etc., the arbitrator is unable to complete the arbitration process and issue a final award on all issues within the time limits specified elsewhere in this agreement, the parties agree that this arbitration contract will be deemed void, all interim awards, whether or not previously confirmed by the court, shall be vacated, and this matter shall and proceed as if arbitration had not been ordered.