

**Editor-in-Chief's Column**

**Targeted Arbitration**

by Charles F. Vuotto Jr.

How many times is a case stalled by one or two limited issues or problems? How many times have you found that a discreet discovery issue stops the case dead in its tracks? The kneejerk reaction is to file a motion. However, aside from the substantial time and money associated with motion practice, there is often a lack of finite resolution to these vexing obstacles that ultimately do not allow the case to move forward in a productive fashion. As we all know, there are times when litigants and/or counsel have trepidation about arbitrating all issues in a case. However, the concerns with arbitration of a family law matter may be assuaged if the arbitration is relegated to limited issues. The author suggests that parties are free to engage in *targeted arbitration* of discreet issues that may be impeding the progress of the case.<sup>1</sup>

A review of most family judges' dockets would likely reveal that attorneys typically fail to avail themselves of all of the remedies contemplated by the statutory and procedural schemes, which the Legislature and Judiciary have established. Although the concept of what the author describes herein as targeted arbitration may strike many as a novel approach, it is only novel if parties fail to regularly utilize all of the tools available to them to resolve family disputes in a combination of ways, rather than choosing one method to the exclusion of all others. There is no question that the New Jersey Supreme Court has repeatedly stated that the public policy of the state of New Jersey supports arbitration of disputes.<sup>2</sup> Most view this pronouncement as suggesting arbitration of all issues in a case. However, it need not be the only viable approach.

The revised form of Rule 5:1-4 provides for an "Arbitration Track" under the following terms, "[a]t any point in a proceeding, the parties may agree to execute a Consent Order or Agreement to arbitrate or resolve *the issues* pending before the court pursuant to the Uniform Arbitration Act, N.J.S.A. 2A:23B-1 *et seq.*, (hereafter referred to as "UAA"), the New Jersey Alternative Procedure for Dispute Resolution Act, N.J.S.A. 2A:23A-1 *et seq.*, (hereafter referred to as "APDRA") or any other agreed upon framework for arbitration of disputes between and among parties to any proceeding arising from a family or family-type relationship except as provided in R.5:1-5. Issues not resolved in the arbitration shall be addressed in a separate mediation process or by the court after the disposition of the arbitration."<sup>3</sup> Although the rule refers to "issues," and one could infer that it means *all* of the issues, once directed to the relevant Rules of Court, it becomes abundantly clear that the rules anticipate the option of bifurcating the issues impeding the resolution of the case.

The court rules provide that "prior to the execution of any Agreement or entry of a Consent Order, each party shall review and execute the Arbitration Questionnaire, which is set forth in Appendix XXIX-A, and each party's questionnaire shall be attached to the Agreement or Consent Order."<sup>4</sup> The questionnaire seeks to ensure that litigants fully understand the effect their choice of arbitration will have on their options available to resolve their dispute. Question 5 inquires: "Do you understand that you have the right to a trial in the Superior Court of New Jersey in which a judge would render a decision, and that by entering into the arbitration/alternate dispute resolution agreement, *you are waiving your right to a trial?*" (Emphasis added)<sup>5</sup> Admittedly, this question gives one the impression that the choice to arbitrate

is an either/or decision. The author believes the questionnaire is clearly directed to the *clients* in the dispute, not counsel, and that it, therefore, errs on the side of overstating the limitations.

A simple review of the template forms provided to draft an agreement to arbitrate reveal that the resolution of discreet issues is clearly contemplated by the court. Both the template provided for agreements to arbitrate pursuant to UAA and the template provided for agreements to resolve disputes pursuant to the APDRA allow the parties to decide the scope of the issues to be resolved by the arbitrator/umpire.<sup>6</sup> The parties can choose whether they are submitting “*all issues* that could be raised and adjudicated in the Superior Court of New Jersey...” or whether they wish to “exclude” certain identified issues. Significantly, for this discussion, the third choice is that the “parties elect to submit *the following issues* to the umpire for resolution” with the added instruction to list issues.<sup>7</sup> The APDRA also explicitly provides for the court’s ability to stay any judicial proceeding that involves a claim subject to arbitration. But it also explicitly states that, “If a claim subject to the arbitration is *severable*, the court may limit the stay to that claim.” (Emphasis added.)<sup>8</sup> Thus, the court can move forward to resolve other contested issues while the arbitration is pending.

This option of targeted arbitration can be utilized for a myriad of issues. For example, as family practitioners we are frequently faced with such issues as whether a particular timesharing arrangement is appropriate, whether an asset is exempt from equitable distribution, whether a gift was given to one party or both, whether a prenuptial agreement is enforceable, what the value is of an asset (most commonly a home or business), to name just a few thorny disputes. Often, pending issues such as the aforementioned prevent the entire case from otherwise settling.

There are other advantages to isolating certain issues for arbitration. For example, the client who has a business valuation issue might also have a *Sheridan* problem if the matter is heard by the court.<sup>9</sup> Additionally, a complex issue might be more easily resolved before an arbitrator whose sole focus is the matter at hand, rather than before a family court judge whose calendar does not permit the court to schedule consecutive trial dates, and, while in trial, is repeatedly forced to interrupt testimony to hear various other urgent family court matters such as temporary restraining orders, bench warrants, etc.

Finally, there is another tangible benefit to utilizing targeted arbitration in family matters. If the parties elect to arbitrate, the litigation shall be assigned to the Arbitration Track, and the arbitration shall proceed pursuant to Rule 5:1-5. Rule 5:1-5(c) provides that the matter shall be placed on the Arbitration Track “for no more than one year following the Arbitration Track assignment, which term may be extended by the court for good cause shown. Cases assigned to the Arbitration Track should be *given scheduling consideration when fixing court appearances in other matters*.” (Emphasis added).<sup>10</sup> Therefore, targeted arbitration intended to resolve discreet issues that are causing an obstacle in the case cannot only result in removing the issue that may be holding up the resolution of the case, but also can provide a reduction of stressors on the court, the litigants and their counsel.

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*The author wishes to thank Lynn Norcia, of counsel with Starr, Gern, Davison & Rubin, P.C., for her assistance with this column.*

## Endnotes

1. Mediation can also be used in a similar manner during the course of the litigation to target and isolate discreet issues for resolution with a mediator.

2. "Our courts have long noted our public policy that encourages the 'use of arbitration proceedings as an alternative forum." *Wein v. Morris*, 194 N.J. 364, 375-76, 944 A.2d 642 (2008) (quoting *Perini Corp. v. Greate Bay Hotel & Casino, Inc.*, 129 N.J. 479, 489, 610 A.2d 364 (1992)). *Fawzy v. Fawzy*, 199 N.J. 456, 468, 973 A.2d 347, 354, 2009 N.J. LEXIS 674, \*23 (N.J. 2009).
3. R. 5:1-4(a)(5).
4. R. 5:1-5(b)(1).
5. Appendix XXIX-A (5).
6. The APDRA uses the term 'umpire' to describe the individual conducting the proceeding and the UAA uses the term 'arbitrator' for the same individual.
7. Appendix XXIX-B, ¶2 and Appendix XXIX-C, ¶ 2.
8. N.J.S.A. 2A:23B-7g.
9. *Sheridan v. Sheridan*, 247 N.J. Super. 552, 589 A.2d 1067, 1990 N.J. Super. LEXIS 496 (Ch. Div. 1990).
10. R. 5:1-5(c).