Originally published in the New Jersey Family Lawyer Vol. 37, No. 6/July 2017

Family Law Arbitration: Yes, There Really are Court Rules

by Noel S. Tonneman

In 2009, the New Jersey Supreme Court decided *Fawzy v. Fawzy*,[1] which was soon followed by *Johnson v. Johnson*.[2] These cases directed the New Jersey Supreme Court Family Practice Committee to develop forms and procedures for the arbitration of family law matters pursuant to the Uniform Arbitration Act (UAA)[3] and the Alternative Procedure for Dispute Resolution Act (APDRA).[4]

After six years of effort, first by the Supreme Court Family Practice Committee and then by the Supreme Court *Ad Hoc* Committee on the Arbitration of Family Matters (the committee), the Supreme Court adopted the report of the committee, with virtually no changes, in the 2016 edition of the Rules of Court. Despite the passage of 21 months since the report was adopted, there are lawyers and judges who are unaware of the existence of court rules that define the process of arbitration in family part matters.

This article will focus on the court rules regarding arbitration, the application and misapplication of these rules, the rules that work and those that need to be fine tuned, and the manner in which the bench and bar can work together to achieve the maximum benefit from this powerful alternative dispute resolution (ADR) tool.

To understand the rules for family arbitration, one must first realize these rules exist.

There are four rules that address family law arbitration: Rule 4:21A-1(f), Rule 5:1-4, Rule 5:1-5, and Rule 5:3-8. Rule 4:21A-1 addresses civil arbitration and specifically directs that arbitration of family part matters shall be governed by Rule 5:1-5.

Rule 5:1-4 provides for an arbitration track assignment, while Rule 5:1-5 sets out the requirements that must be satisfied to arbitrate a family law matter. Rule 5:3-8 sets forth the bases to confirm or set aside the award.

The Arbitration Track

Rule 5:1-5(a) provides that virtually any issue in dispute between parties to any proceeding heard in the family part may be submitted to arbitration. The very limited exceptions to arbitrable issues are listed in that rule.[5]

There are three documents that must be executed: the agreement to arbitrate, the arbitration questionnaire, and the arbitrator disclosure form. Forms for each of these required documents are found in the appendix to the rules at Appendix XXIX-A through XXIX-D.

There is no requirement that all issues in dispute must be submitted to arbitration. The agreement to arbitrate must identify the issues to be arbitrated, and it will only be those issues that the arbitrator will have jurisdiction to decide. The agreement to arbitrate will outline the procedures to be used and will address the right of review of any arbitration award.

The arbitration questionnaire must be executed by each party. By executing the questionnaire, the parties acknowledge they are waiving or otherwise limiting certain significant rights. These rights include a waiver of the right to trial by a judge of the issues in dispute and a limitation on the right to review by the Appellate Division. The

parties also acknowledge their understanding of the very limited circumstances under which a challenge to the arbitration award can be made. By executing the questionnaire, and thereby acknowledging an understanding of the arbitration process in which they are about to participate, the integrity of the process is upheld.

The final document is the arbitrator disclosure form. It is a very detailed questionnaire the arbitrator must complete, identifying any and all possible connections the arbitrator, including his or her law firm and his or her household members, might have with any of the participants in the arbitration. The conflicts, whether actual or not, may be waived. The arbitrator is under a continuing duty to update his or her responses should circumstances so require, and failure to do so may be grounds to vacate the award.

There is no rule that requires the filing of the agreement to arbitrate or related documents. However, unless these documents have been signed, any effort to confirm an arbitration award will be unsuccessful if challenged. If the matter is not in litigation, the executed documents may be presented with the motion to confirm the award.[6] If the matter is in litigation, it is best to attach the agreement to arbitrate, with the executed questionnaire attached, to a consent order. By doing so, the court is aware of the issues being arbitrated, which are no longer under the jurisdiction of the court.

Once the agreement to arbitrate and the arbitration questionnaires are executed, the case may be placed on the arbitration track. The arbitration track was first provided for in the 2016 rules, and is found in Rule 5:1-4.

Unlike other track assignments, assignment to the arbitration track shall only be with the consent of the parties and counsel. A case cannot be assigned to the arbitration track by the court. Similarly, once assigned to the arbitration track, the matter cannot be reassigned to another track unless all parties agree. This rule underscores the fact that arbitration is a voluntary process in which the parties have agreed to participate, and the court may not override that agreement if the required documents have been executed.

The track assignments of Rule 5:1-4 control calendaring issues and discovery deadlines. Depending upon track assignment, discovery deadlines are imposed pursuant to Rule 5:5-1(e).

Unlike other track assignments, which are to be made "as soon as practicable" after the earlier of the filing of case information statements (CISs) or the first case management conference, Rule 5:1-4(a)(5) provides that the assignment to the arbitration track may occur at any point in the proceeding. Once on the arbitration track, the arbitration is to proceed pursuant to Rule 5:1-5. Issues that are not resolved in arbitration shall be addressed in mediation or by the court after the disposition of the arbitration. This reflects the fact that not all issues before the court need to be submitted to arbitration.

Rule 5:1-5(c) then provides that any action pending when the agreement or consent order to arbitrate is reached shall be placed on the arbitration track "for no more than one year following 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." There is no authority for the dismissal of a case when it enters arbitration. There is also no mention of any discovery deadline for matters on the arbitration track in Rule 5:5-1(e).

At this juncture, the case should be off the court's radar and calendar, at least regarding the issues the parties agreed to arbitrate, and the issues should now be under the control of the arbitrator.

The Arbitration Process and Confirmation of the Award

The next step is to arbitrate the issue(s) agreed upon in the agreement to arbitrate. In general, the arbitrator controls the process pursuant to the agreement to arbitrate. Upon conclusion, the arbitrator issues an award. Since the arbitrator cannot enter an order or judgment, the arbitration award is now presented to the court for confirmation as an order. That process is controlled by Rule 5:3-8.

If the matter is pending in court, the application is to be made by motion. However, the court rule specifically provides that the return date for the motion may be shortened by the court. Past practice has been for arbitration awards, especially interim arbitration awards, to be submitted by way of consent order. Although the rule is silent on that procedure, there seems to be no reason why a court would not file a consent order that simply stated the attached arbitration award "shall be and the same is hereby entered as an order of the court."

If the matter is not in litigation, confirmation is requested summarily pursuant to Rule 5:4-1. Again, although the court rule is silent, there should be no objection to the submission of a post-judgment consent order to confirm an arbitration award.

There will be circumstances when a party will object to confirmation. In most cases, the bases to modify or vacate an arbitration award will be clearly set forth in the agreement to arbitrate. The court's role is to either confirm, vacate, modify or correct the award pursuant to the parties' agreement to arbitrate. However, Rule 5:3-8(b) and (c) set forth additional grounds to vacate an arbitration award that involve parenting time, custody or child support, although these terms should be included in the agreement to arbitrate.

An award of child custody or parenting time shall be confirmed unless the court finds a record of documentary evidence has not been kept; no detailed findings of facts or conclusions of law were made; a verbatim record of the proceedings was not made; or there is evidential support establishing a *prima facie* case of harm to a child.

If no verbatim record had been made, the award is subject to vacation and review *de novo* by the court. If a *prima facie* case of harm is established, the court shall conduct a hearing. If there is then a finding of harm, the award is vacated and the court determines *de novo* the child's best interest; if there is no finding of harm, the award is confirmed.

With regard to a child support award, the award shall be confirmed unless the court finds there is evidential support establishing a *prima face* case of harm to a child. In that event, the court conducts a hearing. If, after the hearing, there is a finding of harm, the court shall vacate the award and determine *de novo* the child's best interest.

It should be clear that under all circumstances the burden to set aside an award from a properly conducted arbitration is high.

Arbitration provides advantages for all involved. The court is relieved of a case that would consume time on the calendar; the clients can achieve confidentiality and control over scheduling; the lawyers can tailor presentations beyond the limitation of customary courtroom procedure; and a more prompt resolution can be obtained for the benefit of all.

Why, then, has there not been a universal embrace of the family law arbitration process by the bench, bar, and public? There are many reasons, and they depend upon the role of the player.

Concerns of the Participants and the Court

For the attorneys, the negotiation of the agreement to arbitrate pursuant to the requirements of Rule 5:1-5 is, at times, a Herculean feat. All too often the negotiations fail, and no agreement is reached.

There are form arbitration agreements in the appendix to the court rules. Appendix XXIX-B is the form arbitration agreement based upon the UAA, while Appendix XXIX-C is based upon the APDRA. The attorneys must first understand the major differences between these two statutes in order to decide which form to use.

One of the more difficult issues to agree upon is the extent of review of an arbitration award. This issue is one of the more significant distinctions between the UAA and APDRA. Under the APDRA, there are more extensive written submissions by counsel and the umpire (the APDRA does not use any form of the word 'arbitrate'). The award of the umpire shall be in writing and "shall state findings of all relevant facts, and make all applicable determinations of law."[7] As a result, an award may be modified or vacated if it is found that the rights of the complaining party "were prejudiced by the umpire erroneously applying law to the issues and facts presented for alternative resolution."[8] Once an award under the APDRA is confirmed by the trial court, there is no further statutory right to further appeal or review.[9]

No such comparable level of review at the trial court level is found in the UAA. Pursuant to the UAA, the arbitrator is not obligated to state reasons for its award, or to apply the law of the state of New Jersey. The award of the arbitrator must simply be "in writing."[10] Modification or vacation of the award is based upon extremely limited grounds.[11] However, a trial court's order confirming or denying confirmation of the award or from a final judgment entered can be appealed pursuant to the UAA.[12]

While the UAA and APDRA are the statutory authorities in New Jersey that authorize arbitration, Rule 5:1-5 does not limit litigants to the confines of these statutes. The rule provides that a litigant may proceed under "any other agreed upon framework for arbitration or resolution of disputes between and among parties to any proceeding heard in the family part...."[13] Thus, you may choose to start with one of the form agreements and add provisions from the other form to create an agreement that works best for the case. The rule provides the attorneys with the ability to craft an agreement tailored to the needs of the parties and the issues, but this, in and of itself, is often the cause of conflict. No one form is suitable for all cases. The bottom line is that it takes a lot of time and effort to create the required agreement to arbitrate.

From the clients' perspective, there are several concerns that may result in a resistance to arbitration. For example, a client may be wary of his or her perceived limitation on the right of review in the event he or she disagrees with the decision. A client may express discomfort that 'someone in a black robe' will not be rendering a decision. The cost of arbitration is also a concern of the client. A client must pay an arbitrator for its work, but not the judge. Each of these concerns can and must be addressed by the attorney.

The bench has its concerns. There is a plethora of case law in this state regarding family law arbitration. In each, the court was asked to determine the viability of the arbitration award or the process. This often resulted in the need for a plenary hearing, requiring the court to spend almost as much time trying to determine whether an award should be upheld as it would have spent trying the entire case.[14] These cases pre-date the new court rules.

Fawzy confirmed the right to arbitrate family law disputes, including custody. *Fawzy* also set out the procedural safeguards for the arbitration of custody disputes, which were further expanded in *Johnson* and *Minkowitz*. Indeed, it was the pronouncements made in *Fawzy* and subsequent case law that led to the creation of the current family part arbitration rules.

The most obvious concern of the bench is that there is no 'code' for the arbitration track. Therefore, cases that are in arbitration but are more than one year old according to the docket are now 'aged.' This affects a judge's reportings and statistics, and places unnecessary pressure on the judge to whom the case has been assigned.

The court rules do not explicitly state that issues in arbitration are under the exclusive jurisdiction of the arbitrator, except for review of awards. That appears to be the root cause of some courts continuing supervision of matters that are in arbitration. However, the arbitration process envisions a 'hands-off' approach from the court. Indeed, the APDRA provides that the court shall stay the court action involving any issue subject to arbitration,[15] while the UAA states that any judicial proceeding that involves a claim subject to arbitration shall be stayed, on just terms.[16] While the form agreements do not track that language, both do provide that the issues in arbitration "shall be subject to the jurisdiction of and determination by the arbitrator."[17] The arbitration questionnaire makes it clear the client will waive the right to trial by proceeding with arbitration. Thus, while it may be presumed that sole jurisdiction of the issues being arbitrated rests with the arbitrator, the rule is not explicit.

These concerns often result in required court conferences while the arbitration is proceeding in order to 'report back' on the status of the arbitration proceeding, which may occur the day the arbitration is scheduled. This is inconsistent with the concept of arbitration. When attorneys are called in for conferences after being placed on the arbitration track, it may be difficult to explain this conference to a client, since one of the advantages of arbitration is the avoidance of court time and its attendant costs.

A reasonable justification for the court to require attorneys to report back on the progress of arbitration during its one-year track assignment occurs when the case has been 'dual tracked.'

Rule 5:1-4(c) allows for the assignment of certain issues to the arbitration track while the balance of the issues are assigned to a different track under the court's control. The solution appears to be a dual designation of the arbitration and complex tracks, so the court can manage the various aspects of the case. This seems intuitively logical, but there appears to be no ability to report that dual tracking based upon the statistical reporting that is now required of judges.

The last sentence of Rule 5:1-4(a)(5) states that "[i]ssues not resolved in arbitration shall be addressed in a separate mediation process or by the court after disposition of the arbitration." This statement leaves room for interpretation of how to proceed.

By definition, arbitration is a resolution of the issues. The logical conclusion is that the only issues not resolved by arbitration would be those not submitted to arbitration.

It may not be necessary to wait until the end of the arbitration process to resolve the other issues. For example, if the issue in arbitration is the validity of a prenuptial agreement, then the parties may proceed through the court to resolve another issue, such as custody. Admittedly, financial issues, such as support and equitable distribution, may need to await the resolution of arbitration of the validity of the prenuptial agreement. However, this would not preclude moving forward with the judicial resolution of custody.

The rules do not provide the court with clear direction on how to handle the bifurcation of the issues, a problem that is compounded by its reporting requirements.

Perhaps the most difficult role in the process is that of the arbitrator. An arbitrator is not a judge. An arbitrator may not be bound to apply the rules of evidence. An arbitrator may direct the presentation of witnesses, or take greater control of the proceedings than a judge might otherwise do. An arbitrator has a greater duty to disclose potential conflicts as a result of the all-encompassing arbitrator disclosure form. But, like a judge, an arbitrator is a neutral decision-maker, not a mediator.

The task of making significant decisions that will affect a family's future is a difficult one. Maintaining the role of neutral decision-maker may strain a friendship, and ruling against a colleague's client on a hard-fought issue may destroy the friendship. Before accepting appointment as the arbitrator, these concerns should be fully explored. Once the role has been accepted, it is incumbent upon the arbitrator to maintain control of the proceedings and render a decision promptly.

Reconciling the Concerns

Each participant in the arbitration process has a different role, but the goal should be the same: fair and expeditious out-of-court resolution of disputes.

It is incumbent upon the attorneys to enter into the arbitration process with a thorough understanding of the rules. If there is an issue that belongs in arbitration, the client should be made aware of it immediately. The client needs to be educated about the process and involved in the discussions concerning the details of any proposed agreement to arbitrate. The attorney should begin to draft the agreement to arbitrate in consultation with the adversary, sooner rather than later. Even a limited issue arbitration may have complicated procedural issues, which may take time to resolve.

Often, the first issue counsel and the parties focus on is the right of review of the arbitration award. The suggestion, however, is to first focus on the issue or issues in dispute.

There is no requirement to arbitrate every issue that is otherwise before the court. For example, the parties may agree to arbitrate the validity of a prenuptial agreement, the value of a business, or a spouse's entitlement to the other spouse's interest in a premarital business. Alternatively, the parties may agree to arbitrate issues of custody or parenting time of the children only. Perhaps it is a post-judgment issue of credits and debits upon the sale of the marital home. The issues to be arbitrated may dictate many other terms of the agreement.

For example, finality may be the goal for a single-issue arbitration such as the credits and debits on sale of the marital home. As a result, a limited right of review, or

perhaps no right of review except for correction of clerical errors, may be appropriate. Findings of facts and conclusions of law may not be necessary, reducing the cost of the arbitration process.

For more complex or multiple issues, the parties may choose to add 'mistake of law' as a reviewable event pursuant to an agreement under the UAA. The parties may agree to a private appellate arbitrator or private appellate panel. Indeed, providing for such further review of an arbitrator's decision often removes one of the client's strongest objections to the arbitration process. Requirements for a reviewable award may include a provision that a record of the underlying process has been maintained, something that is not otherwise required unless arbitrating a parenting time or custody issue.

If the parties are in the middle of the divorce process, consider whether there is an unresolved issue that is preventing settlement. For example, if there is no agreement on the value of a business, arbitrate that issue only. Not only will it be able to be arbitrated before a decision-maker who is familiar with business valuation concepts, but the court will appreciate the resolution of an issue that would otherwise consume extensive trial time. Once the business is valued, settlement negotiations will be more productive and a settlement more likely to be achieved.

A request for placement on the arbitration track should never be made or granted unless there is a signed agreement to arbitrate and the required arbitration questionnaires have been signed. It is not a process that can be rushed. If the attorneys and litigants are present in court for a pretrial conference, and the concept of arbitration has been accepted but not yet confirmed in writing with a detailed agreement to arbitrate, counsel should be given a limited period of time to submit the required documents. Unless the litigants have sufficient time to discuss and consider the terms and ramifications of the arbitration process into which they are going to enter, the court may be faced with the application to deny confirmation of any resulting award. If the case is approaching trial time, perhaps the scheduling order might require the filing of trial briefs by a date certain if the required arbitration documents are not submitted prior to that time. This would encourage the parties to either resolve the agreement to arbitrate or confirm that arbitration will not proceed without further delaying resolution on the court's calendar.

Once on the arbitration track, the arbitrator needs to control the process, in discovery, scheduling, and the hearing. This may mean the arbitrator must tell his or her colleague there will be no more adjournments, that certain evidence will or will not be admitted, or that certain penalties may be imposed if deadlines are not met. One of the goals of arbitration is often an expeditious resolution of the issues. By adhering to the schedules fixed by the arbitrator, even the more complex arbitrations should be resolved within the one-year track assignment. If the deadlines and hearing dates have all been met and held as scheduled, the 'good cause' exception for extension of the one-year track assignment is more likely to be granted.

Unless the case is 'dual tracked,' there should be no further court-initiated actions while the case is on the arbitration track. To resolve the jurisdictional issue, consider adding to the agreement to arbitrate specific language stating that the issues in arbitration shall be under the exclusive jurisdiction of the arbitrator, except for confirmation, modification, correction or vacation of an award, and that all judicially initiated actions concerning the issues in arbitration shall be stayed while the issues are in arbitration. This

will then become a court order when incorporated into a consent order filed with the court.

As a courtesy, voluntarily advise the court of the status of the arbitration. This can easily be accomplished by submitting interim awards of the arbitrator to the court for confirmation. This allows the court to track the status of the arbitration without the necessity of spending court time on conferences. For example, submitting an award setting arbitration dates to the court in the form of a consent order that grants peremptory status to those arbitration dates not only advises the court the practitioner is proceeding with a hearing, but potentially minimizes scheduling conflicts with other matters. Arbitration events should be given the same level of respect as a court event.

For cases that are dual tracked, there may be no need for the court to wait until after the arbitration process to address the remaining issues, as a literal reading of Rule 5:1-4(a)(5) suggests. For example, there may be no need to delay resolving parenting time or custody issues while a business valuation is being arbitrated. Both issues can proceed simultaneously. In all events, improved methods for tracking cases in arbitration appear to be needed.

If the litigants are in a post-judgment situation, consider arbitration before going to court. An application for college contribution or support modification often results in post-judgment mediation and/or early settlement panel (ESP) before returning to court for resolution. By arbitrating the issue first, the requirement for post-judgment mediation and/or ESP is eliminated, which will expedite resolution of the dispute and provide cost-savings for the client.

Conclusion

By complying with the 2016 rules, the number of objections to confirmation of arbitration awards and resulting plenary hearings should be greatly reduced. The rules were enacted in response to the case law that had developed prior to the enactment of the rules, and the lack of clear guidance on the procedural requirements for family part arbitration (which are different than traditional civil arbitration requirements), primarily as a result of the court's *parens patriae* role. The rules lay out all the requirements for successful arbitration, and clearly set forth the grounds for denying confirmation of an award. There are more procedural requirements for the arbitration of issues concerning the support and custody of children. As a result, any effort to vacate or modify an award is more difficult, if the rules are followed.

The burden on the court that may have existed before the 2016 rules were enacted should now be lifted. The burden is clearly on the attorney to carefully craft the agreement to arbitrate pursuant to the rules, and fully explain the process to the client.

The court rules for family part arbitration are comprehensive and designed to safeguard the rights of all participants while allowing for a more expeditious and client-centered dispute resolution process. The arbitration process can alleviate a significant burden on the court system while better accommodating the needs of the litigants and attorneys. Arbitration is a powerful ADR tool when other settlement efforts fail. Knowledge of the rules and an understanding of the process is a necessary tool in the attorney's arsenal. As the court, counsel, and litigants become more aware of and familiar with the process, the full potential of this alternative dispute resolution process may be reached.

Noel S. Tonneman is a partner at the firm of Tonneman & Connors, LLC in Eatontown.

Endnotes

1. 199 N.J. 456 (2009).
2. 204 N.J. 529 (2010).
3. N.J.S.A. 2A:23B-1 *et seq.*
4. N.J.S.A. 2A:23A-1 *et seq.*
5. R. 5:1-5(a) excludes from arbitration certain limited family part issues: the entry of the final judgment of annulment or dissolution; actions involving DCCP; domestic violence actions; juvenile delinquency matters; family crisis actions; and adoption actions.
6. If confirmation is being obtained by attaching the award to a consent order, there is no requirement to submit any of the three otherwise-required documents.
7. N.J.S.A. 2A:23A-12.
8. N.J.S.A. 2A:23A-12(d).
9. N.J.S.A. 2A:23A-18. Case law, however, has carved out certain exceptions. *See, e.g., Mt. Hope. Dev. Assocs. v. Mt. Hope Waterpower Project, L.P.*, 154 N.J. 141 (1998); *Morel v. State Farm Ins. Co*., 396 N.J. Super. (App. Div. 2007).
10. N.J.S.A. 2A:23B-19.
11. N.J.S.A. 2A:23B-20 and -23(a).
12. N.J.S.A. 2A:23B-28(a).
13. R. 5:1-5(a).
14. *See, for example, Fawzy v. Fawzy*, 199 N.J. 456 (2009); *Johnson v. Johnson*, 204 N.J. 529 (2010); *Minkowitz v. Israel*, 433 N.J. Super. 111 (App. Div. 2013).
15. N.J.S.A. 2A:23A-8.
16. N.J.S.A. 2A:23B-7g.
17. Appendix XXIXB, ¶ 2(A); Appendix XXIXC, ¶ 2(A).