

IN THE SUPREME COURT OF TENNESSEE

IN RE:

PETITION FOR THE ADOPTION OF RULE 31B

NO. _____

**PETITION OF THE TENNESSEE BAR ASSOCIATION FOR THE ADOPTION OF
SUPREME COURT RULE 31B**

The Tennessee Bar Association ("TBA") respectfully petitions the Court to adopt a new Rule 31B, aka, "Domestic Relations Arbitration Rule," based upon the Uniform Family Law Arbitration Act of 2016 ("UFLAA"). Adoption of this new rule would provide a comprehensive framework for the voluntary arbitration of family law matters, while guarding the role of courts with respect to children. It would also delete any references to non-binding arbitration for family law cases in Rule 31A in order to avoid possible confusion to family law practitioners, as Rule 31B would then govern all family law arbitration cases. Petitioners suggest amendments to T.C.A. 36-3-503 and the promulgation of T.C.A. 36-4-136, to enable parties to voluntarily arbitrate their property and spousal support issues, without the court's affirmative finding of an equitable distribution of marital property.

In support thereof, the TBA states as follows:

I. INTRODUCTION

The use of consensual family law arbitration is on the rise as states find alternatives to litigation. The American Academy of Matrimonial Lawyers (AAML) promulgated a Model Family Law Arbitration Act in 2005, and the AAML regularly offers training and certification for family law arbitrators. In recent years, family law arbitration statutes and rules have been adopted

in several states. *See*, Family Law Arbitration, Practice, Procedure, and Forms, Carolyn Moran Zack, 2020 American Bar Association, Appendix F.

With the growing interest in arbitration and the inadequacy of commercial arbitration law, the Uniform Law Commission in 2016 promulgated the Uniform Family Law Arbitration Act (“UFLAA”), which created a procedural scheme for arbitration of family law disputes. The ABA Board of Governors approved the UFLAA in 2017, and four states have adopted the UFLAA. *See*, e.g., Arizona (2017)—Ariz. Fam. Law. Proc. R. 67.2, Hawaii (2017)—Hawaii Rev. Stat. §§658J-I- 658J et seq. and §658A et. seq., North Dakota (2019)—(N.D. Cent. Code § 32-29.4-01 and Chapter 32-29.3, and Montana (2021)—Montana SB104, chapter number assigned 2/26/2021. There are currently three states/jurisdictions considering adopting the UFLAA, namely, Pennsylvania, the District of Columbia, and Massachusetts.

For those couples who have exhausted their efforts at mediation or settlement, voluntary arbitration offers an attractive alternative to court. When arbitration works well, the advantages are significant. Unlike court proceedings, arbitration hearings are not public, and unless the arbitrator’s award is challenged, can remain private. The arbitration process is flexible. The parties identify the precise disputes to be arbitrated and, in conjunction with the arbitrator, structure the rules to be followed, the schedule, and fees. Sometimes arbitration by agreement is used in combination with mediation in a “med-arb” structure. The parties’ ability to select the decision-maker is a key attraction of arbitration as the parties choose arbitrators with uniquely qualified experience in family law cases, which may not be the case with a newly appointed judge on the bench or a judge who handles both criminal and civil cases. For couples who have experienced unpleasant and protracted litigation, arbitration also may be preferred as a method of resolving post-decree issues.

Because arbitration can move forward without regard to judicial calendars, it usually reaches finality more quickly than litigation. For that reason, it also is touted as being less expensive than litigation, even taking into account the responsibility of the parties to pay the arbitrator's fee. As the United States Supreme Court has recognized, "[i]n bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 685 (2010).

The trade-off with arbitration is the limited nature of judicial review. The agreement to arbitrate is a waiver of the right to go to court in the first instance, and the opportunity to challenge an award in court is limited. In commercial arbitration, awards typically are vacated only for arbitrator misconduct or grounds going to the fairness of the arbitration process and not for errors of law. In family law arbitration, likewise, parties who agree to arbitrate relinquish judicial oversight to a significant degree. This proposed Rule 31B would only be effective, if in conjunction with this Rule, the legislature approves amending the statute so that the court is not required to make an affirmative finding of an equitable distribution of marital property. As discussed below, however, judicial review of awards determining child custody or child support must be more rigorous than the review of property distribution. Notwithstanding limited judicial review, voluntary arbitration may be an attractive alternative for many people in light of drawbacks, limitations and restrictions associated with litigation.

II. NEED FOR UNIFORM FAMILY LAW ARBITRATION RULE IN TENNESSEE

Although arbitration is an available form of dispute resolution in Tennessee, statutes and rules governing arbitration, e.g., Tennessee Uniform Arbitration Act (1983), ("TUAA"), and Sup.

Ct. Rules 31 and 31A, do not account for the unique characteristics of family law matters, i.e., special standards for child custody, child support, and protections for children and victims of domestic violence. The State’s Parenting Plan Statute, Tenn. code Ann. 36-4-401 et seq., which permits arbitration, lacks procedures to arbitrate parenting plans.

Another shortcoming of arbitration in the family law context derives, in part, from the State’s non-waivable *parens patriae* duty to protect minor children. *See, Tuetken v. Tuetken*, 320 S.W. 3d 262 (Tenn. 2010) (holding that parties may not submit parenting issues to binding arbitration). In *Tuetken* the court noted that the trial court’s duty to protect a child’s best interest “comport[ed] with the longstanding notion that the state stands in *parens patriae* of the minor children within its borders.” *Id.* at 271; *Stricklin v. Stricklin*, 490 S.W.3d 8 (Tenn. App. 2015) (citing *Fletcher v. Fletcher*, No. M2010–01777–COA–R3–CV, (Tenn. Ct. App. Sept. 26, 2011) (“the trial judge, and the trial judge alone, has the solemn duty to determine whether a given parenting arrangement is in the best interest of a child in his charge.”). Accordingly, practitioners are not using arbitration as a dispute resolution process.

However, this Rule does provide a framework for practitioners and litigants to arbitrate family disputes and ensure the court performs its *parens patriae* duty. The Rule also addresses the possibility of domestic violence or child abuse and provides a mechanism for engaging the court process to protect the safety of individuals involved. In addition, the Rule makes available the remedies that are uniquely necessary for families in dissolution, such as temporary orders and post-decree modification.

III. BACKGROUND OF RULE 31B

A TBA Family Law Section subcommittee of judges, arbitrators, and family law attorneys assembled to review the arbitration rules and statutes from other jurisdictions. The TBA

subcommittee heard from Lynn Burleson, a Fellow in the American Academy of Matrimonial Lawyers ("AAML"), certified arbitrator, and a faculty member at the AAML Arbitration Training. Mr. Burleson was instrumental in drafting North Carolina's Family Law Arbitration Act. (N.C. Gen. Stat. §50-41 through §50-62). This TBA subcommittee also reviewed the American Academy of Matrimonial Lawyers Model Arbitration Act of 2005, the Revised Uniform Arbitration Act of 2000 ("RUAA"), the Uniform Family Law Arbitration Act of 2016 ("UFLAA"), and other statutes and rules from other states. Both the RUAA and UFLAA were drafted by the National Conference of Commissioners on Uniform State Laws. In particular, the UFLAA's drafters represented participants from a broad cross-section with those involved in family law, specifically, the American Bar Association Sections of Family Law, Domestic Relations, Commission on Domestic Violence, Litigation, AAML, and the National Center for State Courts. The UFLAA incorporates some of the RUAA provisions necessary to arbitrate family law matters not provided in the Uniform Arbitration Act of 1956 ("UAA"). Examples of these are the arbitrator's power to conduct the arbitration in a manner appropriate to the fair and expeditious disposition of the proceeding, recognition of the parties' right to engage in discovery, and to provide the arbitrator immunity. (UFLAA Prefatory Note, p. 2). The TBA Family Law Section subcommittee decided to incorporate certain sections of the RUAA in the proposed Rule 31B and use the UFLAA as the model for revising to comply with Tennessee law.

IV. SUMMARY AND HIGHLIGHTS OF RULE 31B

Rule 31B offers litigants the following:

- 1) A consensual approach to dispute resolution, *See*, Sec. 5.
 - a. Arbitration occurs after the parties agree on *the issues to address and how the arbitration is conducted*, i.e., selecting the arbitrator, planning discovery, and determining costs.

- b. Since the parties have significant input on how the arbitration is conducted, the chance of unfair outcomes in arbitration is minimized.
 - c. The agreement to arbitrate is a voluntary and informed choice of each party, not an alternative product of coercion or ordered by the Court absent full agreement of the parties.
- 2) A process that promotes timely outcomes and cost-efficiency.
- a. Arbitration enables parties to tailor the process to fit the unique needs of their domestic relations matter and bypass more traditional litigation procedures:
 - i. Set deadlines that coincide with the parties' schedules, e.g., weekend hearings.
 - ii. Establish a strict discovery schedule focused on the prompt and early exchange of necessary information.
 - iii. Select an arbitrator with specialized knowledge and expertise to handle issues unique to a particular domestic relations matter.
 - b. Arbitration encourages parties and counsel to make decisions based on cost-benefit or return on investment (ROI) analyses, which furthers timely outcomes and cost-efficiency.
 - c. Child-custody arbitration has the potential to minimize the harmful effects of divorce litigation on both children and parents. *Fawzy v. Fawzy*, 973 A2d 347 (NJ, 2009). “Arbitration conducted in a less formal atmosphere, often in a shorter time span than a trial, and always with a fact-finder of the parties’ own choosing, is often far less antagonistic and nasty than typical courthouse litigation.” Joan F. Kessler et. al, *Why Arbitrate Family Law Family Matters?* 14 J. Am. Acad. Matrimonial Law, 333, 343 (1977). Christine Albano, *Comment, Binding Arbitration: A Proper Forum for Child Custody?*, 14 J. Am. Acad. Matrimonial Law 419 (1997).
- 3) Preserve judicial review of arbitral awards.
- a. Any award determining a Child-Related Dispute has a heightened review. *See*, Sec. 16(a)¹. Accordingly, Courts have the final say on whether arbitral awards concerning a Child-Related Dispute are in the child's best interest. *See*, Sec. 18(c)(3).
 - b. Courts may elect to hear additional evidence or conduct a re-hearing when reviewing an award concerning a Child-Related Dispute. *See*, Sec. 18(e); and
 - c. Court's may vacate or modify arbitral awards under certain circumstances. *See*, Sec. 18(b) and (d).
- Note: Judicial review of parenting issues is different from child support. *See*, Sec. 18(f).

1. Because Rule 31A only permits non-binding arbitration whereas proposed Rule 31B provides for both binding and non-binding arbitration, all references to family case in Rule 31A should be deleted. *See*, Sup. Ct. R. 31A, Sec. 13(c).

This proposed Tennessee Supreme Court Rule provides parents with a framework and process to choose arbitration as their form of ADR to avoid the high emotional and financial costs of the court process. Audrey J. Beeson, *Arbitration. A Promising Avenue for Resolving Family Law Cases?* 18 Pepp. Disp. Resol. L. J. 211 (2018). *See attached*, Exhibit A.

This proposed Tennessee Supreme Court Rule provides an alternative dispute resolution that complements Tenn. Sup. Ct. R. 31 for Mediation and Tenn. Sup. Ct. R. 53 for Collaborative Family Law. Rule 31A also has judicial settlement and case evaluation components. This proposed Rule 31B establishes a process not addressed by the current arbitration statute, Tenn. Code Ann. §29-5-301 *et. seq.* enacted in 1983 and brings Tennessee up-to-date with the Uniform Family Law Arbitration Act (2016) and other family law arbitration statutes and Rules across the country. By eliminating non-binding arbitration from Tenn. Sup. Ct. R. 31A, the litigants and practitioners will understand that all family law arbitration would be found in the Rule 31B and in the proposed statutory amendments below. *See attached*, Exhibit B.

V. STATUTORY FRAMEWORK

A statutory framework is needed to ensure that certain arbitral awards pursuant to Tennessee Rule 31B, concerning issues of property and spousal support, are binding. Accordingly, the TBA Family Law Committee has proposed the following amendment to Tenn. Code Ann. 36-3-501 and the promulgation of a new statute titled Tenn. Code Ann. 36-4-136 which specifically address Rule 31B Arbitration. Both proposed statutory amendments took language from the Enforcement of Antenuptial Agreements statutes, where the parties contractually agree to bind themselves to the property distribution and where the court does not have to make an affirmative finding of an equitable distribution of property. *See attached*, Exhibit C.

VI. CONCLUSION

For all the reasons set forth above, the TBA petitions this Court to adopt Rule 31B, the Domestic Relations Arbitration Rule, attached hereto as Exhibit A, and to delete from Rule 31A all references to non-binding arbitration family law cases as attached hereto as Exhibit B.

Further, the TBA requests the costs of filing this Petition be waived in the public interest and given the purpose for which submitted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been served upon the individuals and organizations identified in Exhibit "D" by email, within seven (7) days of filing with the Court.



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