

## A New Horizon in Family Law Arbitrations

by RICHARD R. ORSINGER

The right to arbitrate has always existed under Texas common law, and it has been recognized by statute since 1846.

The Texas Arbitration Act (TAA) gives the judiciary limited grounds to set aside an arbitration award where: 1. the award was obtained by corruption, fraud or other undue means; 2. the rights of a party were prejudiced by the

Title 1 of the Texas Family Code (TFC) governs marital relations and the dissolution of marriage. Title 1 permits the parties to agree to arbitrate a pending divorce; if they agree that the arbitration is binding, then the trial court “shall render an order reflecting the arbitrator’s award.” There is no explicit incorporation of the grounds for vacatur stated in TAA §171.088(a).

TAA §171.088(a). However, courts of appeals have applied TAA standards to SAPRCs.

Many family law clients, who would like to arbitrate — for privacy, convenience or to select by mutual agreement the person who will resolve their dispute — have been discouraged from doing so for fear that arbitration would eliminate the right to appellate review of an erroneous decision based on reversible error. Some practitioners attempted to embed normal judicial review into the arbitration process by agreeing that the arbitrator could not render an award that constituted reversible error.

In *Hall Street Associates LLC v. Mattel Inc.* (2008), the U.S. Supreme Court held that parties could not agree to expand judicial review of an arbitration award beyond the statutory grounds for vacatur listed in the Federal Arbitration Act (FAA). In *NAFTA Traders Inc. v. Quinn* (2011), the Texas Supreme Court rejected the rationale of *Hall Street* for purposes of the TAA. A unanimous court held that, under the TAA, parties can agree that the arbitrators may not reach a decision based on reversible error, and if that happens, the award may be set aside by the trial or appellate court on the TAA §171.088(a)(3)(A) ground that

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arbitrator’s evident partiality, corruption, misconduct or willful misbehavior; 3. the arbitrators exceeded their powers, refused to postpone the hearing for sufficient cause, refused to hear evidence material to the controversy or conducted the hearing in a manner that substantially prejudiced the rights of a party; and 4. Where there was no agreement to arbitrate and the complaining party did not participate in arbitration without objecting. The TAA does not provide for an arbitration award to be set aside because reversible error was committed, either in determining the facts or applying the law to the facts.

Title 5 of the TFC governs suits affecting the parent-child relationship. Title 5 permits the parties to agree to arbitrate a pending suit affecting the parent-child relationship (SAPCR). According to TFC §153.0071(b), if the parties agree that the arbitration is binding, then the court “shall render an order reflecting the arbitrator’s award unless the court determines at a non-jury hearing that the award is not in the best interest of the child. The burden of proof at a hearing under this subsection is on the party seeking to avoid rendition of an order based on the arbitrator’s award.” There is no explicit incorporation of the grounds for vacatur stated in

“the arbitrators exceeded their powers.” Such an agreement is no more, Justice Nathan Hecht wrote, than agreeing to limit an arbitrator’s power to that of a judge.

Family lawyers now can “have their cake and eat it too” — they can have the privacy, convenience and quality of the arbitration process, while preserving the right to appellate review for reversible error. The language in the *NAFTA Traders* arbitration agreement said: “The arbitrator does not have authority (i) to render a decision which contains a reversible

error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law.” Adapted to a family law case, the language might read: “The arbitrator has no authority to render a decision that contains a reversible error, whether of procedure or evidence, or by making an award that is not supported by or is against the legal or factual sufficiency of the evidence, or by misconstruing or misapplying the law.”

Although perhaps not required, it would be advisable

to explicitly state that the arbitration agreement is governed by the TAA and TFC, not the FAA.



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