

Legislative History for Connecticut Act

Act Number:	258	2005	
Bill Number:	1194		
Senate Pages:	Senate: 2271-2286, 3846-3849, 3869-3872		23
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Transcripts from the Joint Standing Committee Public Hearing(s) and/or Senate and House of Representatives Proceedings

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CONNECTICUT
GEN. ASSEMBLY
SENATE

PROCEEDINGS
2005

VOL. 48

PART 8

2271-2626

kam
Senate

May 18, 2005

Mr. Majority Leader. Mr. Majority Leader, would it be possible if as we move through the Calendar, we would be able to make those marking changes at the time that we reach the items?

SEN. LOONEY:

Yes, Mr. President, I believe it would, and that's why I'm doing it now. We're coming to that item very quickly, the first one, at least.

THE CHAIR:

The first one, at least.

SEN. LOONEY:

Yes.

THE CHAIR:

And the first one is, Mr. Majority Leader?

SEN. LOONEY:

Yes, the first one is Calendar Page 5, Calendar 456, S.B. 1306, it was marked Go, would move that it now be marked Passed Temporarily.

THE CHAIR:

Thank you. Mr. Clerk?

THE CLERK:

Turning to Calendar Page 4, Calendar 417, File 567, Substitute for S.B. 1194, An Act Concerning

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Arbitration in Certain Family Relations Matters,
Favorable Report of the Committee on Judiciary. Clerk
is in possession of one amendment.

THE CHAIR:

Senator McDonald.

SEN. MCDONALD:

Thank you, Mr. President. Mr. President, I move
acceptance of the Joint Committee's Favorable Report
and passage of the bill.

THE CHAIR:

Motion is on acceptance and passage. Will you
remark? Senator McDonald.

SEN. MCDONALD:

Mr. President, this bill is intended to make
available to individuals who are becoming involved in
a dissolution action an opportunity to voluntarily
enter into an arbitration proceeding for the purposes
of resolution of that dissolution.

Mr. President, the bill excludes from the scope
of permissible arbitration any consideration of
custody or child support payments within the scope of
the arbitration referral.

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And, Mr. President, I believe that the Clerk has, in his possession, an amendment. And I would ask that LCO 6059 be called and I'd be given leave to summarize.

THE CHAIR:

Mr. Clerk.

THE CLERK:

LCO 6059, which will be designated as Senate Amendment Schedule "A", is offered by Senator McDonald of the 27th District, et al.

THE CHAIR:

Senator McDonald.

SEN. MCDONALD:

Thank you, Mr. President. I move adoption of the amendment.

THE CHAIR:

On adoption, will you remark? Senator McDonald.

SEN. MCDONALD:

Mr. President, the amendment merely would add, in addition to child support and custody issues, issues of visitation, which would be outside of the scope of an arbitration referral in a marriage dissolution action.

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THE CHAIR:

On adoption, will you remark further? If not, all, try your minds, all those in favor, please say "aye".

SENATE ASSEMBLY:

Aye.

THE CHAIR:

Those opposed? The ayes have it. The amendment is adopted. Senator McDonald.

SEN. MCDONALD:

Mr. President, the bill is intended, as amended, to provide a viable economic and efficient alternative for individuals who are seeking to dissolve their marriage or union, but would otherwise have to incur the expense and delay of a court proceeding.

And I should note, Mr. President, that it is, as I indicated, a voluntary opportunity for individuals.

And in order to enter into such an arrangement, a court would first have to determine, independently, that that agreement was voluntary and that it was being entered into without coercion. Thank you, Mr. President.

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Will you remark further? Senator Meyer.

SEN. MEYER:

Thank you, Mr. President. I rise in strong and enthusiastic support of this bill. The trend in the United States has been toward arbitration and resolution of disputes without court action.

The fact is that, in a normal divorce action, the time from the beginning of the case being filed until trial is somewhere between two and three years in Connecticut. And the cost for many litigants, husband and wife, will exceed \$100,000.

Through an arbitration, however, the time in which you can reach an arbitration is reduced to somewhere in several months, often 60 to 90 days, and the cost is a fraction of what a trial would be.

There's the further advantage of the privacy that's more likely to come from an arbitration than from a court proceeding.

In a court proceeding, you're going to have a very public divorce trial, as we all know from the newspapers. In an arbitration, it tends to be more of a private matter.

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There's so many good parts to this bill, I urge your support. I just regret, in some ways, that some areas of matrimonial dispute have been left out of this bill. I think they all should have been included in it. Thank you, Mr. President.

THE CHAIR:

Thank you, Senator. Senator Kissel.

SEN. KISSEL:

Thank you very much, Mr. President. Just a question to the proponent, just to help clarify the legislative history.

THE CHAIR:

Please proceed, Senator.

SEN. KISSEL:

Thank you very much, Mr. President. Through you to the Senate Chair of the Judiciary Committee, it's my understanding from what you stated that the courts would have to pass upon the initial application and make sure that this was entered into voluntarily by both parties.

But I'm just wondering whether this is a binding arbitration, and if one of the parties, after the arbitration, felt that they were aggrieved by one or

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more parts of the arbitrated decision, would they have any rights of appeal and what would those rights be, through you, Mr. President.

THE CHAIR:

Senator McDonald.

SEN. MCDONALD:

Thank you, Mr. President. And through you, in fact, it would be binding. The law, as it currently stands, allows parties to enter into non-binding mediation opportunities.

But this would be, within the scope of the referral, this would be a binding proceeding, subject to confirmation and modification or vacature in a court proceeding, as exists for other binding proceedings.

THE CHAIR:

Thank you, Senator. Senator Kissel.

SEN. KISSEL:

So through you, Mr. President, just by way of, to clarify, if there was just one, let's say they went into arbitration on a variety of issues, but one of the parties walked away from that determination.

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Let's say that had to do with visitation, and they felt that that isolated part of the arbitrated decision, they did not agree with.

What exactly would be their rights to appeal or to contest that portion of the arbitrated decision, through you, Mr. President?

THE CHAIR:

Senator McDonald.

SEN. MCDONALD:

Well, through you, Mr. President, there are, under this bill, as amended, there are three topics which will not be permitted to be referred to an arbitration proceeding, and that includes child support, child custody, and visitation relating to children.

That would not be within the scope of an arbitrator's authority under this bill.

SEN. KISSEL:

Okay.

THE CHAIR:

Senator Kissel.

SEN. KISSEL:

Then let me, if I could, through you, Mr.

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President, the subjects that are potentially arbitrated, if a litigant or a party agreed with all of them but one, and as I read the amendment, I thought we were adding visitation in.

But now, in retrospect, I see that we're taking visitation out, so I apologize for that initial example.

But again, let's say that, out of nine issues, a party, after the arbitration, feels aggrieved or does not agree with the determination of one, what would be that party's rights to appeal, if any, or would they be bound at the end of the arbitration, through you, Mr. President?

THE CHAIR:

Senator McDonald.

SEN. MCDONALD:

Through you, Mr. President, the rights of such an individual would be extremely limited, as exists under current law.

The opportunity to contest an arbitrator's findings and award after the conclusion of the arbitration are very limited under our law and could only be modified or vacated under very narrow

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circumstances, such as when the arbitrator willfully disallowed existing case law.

But as to all matters of equity, fairness, and any interpretation of the relative rights of parties, that arbitration award would be final for all purposes.

SEN. KISSEL:

Thank you very much. And through you, Mr. President, how does that compare and contrast to a litigant's ability to appeal a determination of said rights in the traditional superior court arena?

In other words, if one pursues the path of arbitration, are their appeals' rights more limited, as opposed to if they pursued a course in the superior court?

And ultimately, just to get to the heart of the matter, my concern is, while I agree with Senator Meyer that this is an appealing process, it's more cost-efficient and there is a trend in the United States to move in this direction, if the appeals' rights or the ability to contest the determination is more limited in the arbitration setting, I can see counsel actually urging a party to avoid that if they

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would have better grounds for an appeal after a traditional superior court determination.

And so that's my ultimate question, through you, Mr. President.

THE CHAIR:

Senator McDonald.

SEN. MCDONALD:

Thank you, Mr. President. Well, let me first say that, that is, that Senator Kissel's observation is precisely why we have language in this bill which would require a court to make an independent inquiry of the litigants, prior to the arbitration referral, to make sure that the litigants understood what rights they would be giving up by entering into an arbitration proceeding.

And only after that vetting, if you will, would the court be permitted to allow them to voluntarily enter into an arbitration proceeding and potentially forego procedural, evidentiary, or appellate rights that they might otherwise have available to them in the superior court.

I do think the point Senator Kissel is alluding to in his question is a valid one, that anybody who

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enters into an arbitration proceeding has some benefits and perhaps some disadvantages.

And oftentimes, the benefits outweigh the disadvantages, and that's why they opt for the arbitration proceeding.

The fact is that it is a faster, more economic, and, ultimately, a more final resolution that is achieved in a much more rapid fashion than an extended litigation might take in the courts.

THE CHAIR:

Senator Kissel.

SEN. KISSEL:

Thank you very much. I very much appreciate the explanation offered by Chairman McDonald. I think that helps us, and it certainly helps myself, understand what this bill is trying to accomplish.

For certain litigants, this would be the way to go. And I'm sure that their counsel or even if they studied the law themselves and decided not to go with counsel, that this would be an apt alternative.

But certainly, there's upsides and downsides to this. It's not a panacea. And I think that the points raised in this colloquy were very helpful to

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me, and I support the bill. Thank you very much, Mr. President.

THE CHAIR:

Will you remark further? Senator Roraback.

SEN. RORABACK:

Thank you, Mr. President. I just have a quick question, through you, to Senator McDonald, if I may. Senator McDonald, I'm just looking at Section 2.

Would the law allow people, after they got married, to decide that, in the unhappy event that they chose to part ways, that they would have their dissolution arbitrated?

We're all familiar with prenuptial agreements, and I'm certain that the language in Subsection 2 would apply if someone in a prenuptial agreement agreed to arbitrate a future divorce.

I'm just curious if someone post-marriage wanted to enter into such an agreement, whether that would be enforceable, through you, Mr. President.

THE CHAIR:

Senator McDonald.

SEN. MCDONALD:

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Through you, Mr. President, I'm not certain I understood the question. Perhaps Senator Roraback could restate it.

THE CHAIR:

Senator Roraback, would you care to rephrase the question?

SEN. RORABACK:

I would be happy to. I think, Mr. President, we're all familiar with what are commonly referred to as prenuptial agreements. And I would imagine that one could certainly, if this bill passes, include in a prenuptial agreement a provision which would submit any subsequent dissolution to arbitration.

My question is, suppose individuals got married without the benefit of a prenuptial agreement and thereafter said, you know what, should things sour, we ought to go to arbitration.

Would an agreement made to do that after a marriage be enforceable under the terms of Section 2 of the bill, if Senator McDonald knows? It was just a thought I had as I was reading the bill, through you, Mr. President.

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Senator McDonald.

SEN. MCDONALD:

Through you, Mr. President, I would surmise that anybody would be able to enter into any such agreement. It would still, however, be subject to prior approval by a judge of the superior court before it could be binding or given legal effect.

SEN. RORABACK:

So what I understand Senator McDonald to say is that the outcome of any such arbitration would necessarily be subject to the review of the court, without regard to when people decided to submit to arbitration. Is that correct, through you, Mr. President.

THE CHAIR:

Senator McDonald.

SEN. MCDONALD:

That is my reading of the bill and my understanding of its intent.

SEN. RORABACK:

Thank--

THE CHAIR:

Senator Roraback.

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SEN. RORABACK:

--thank you, Mr. President, and thank Senator
McDonald for his answers.

THE CHAIR:

Will you remark further? Will you remark
further? If not, Senator McDonald.

SEN. MCDONALD:

Mr. President, if there's no objection, might
this item be placed on the Consent Calendar?

THE CHAIR:

Hearing no objection, so ordered.

THE CLERK:

Calendar Page 14, Matters Returned from
Committee. Calendar 122, File 77, S.B. 732, An Act
Concerning Commercial Revolving Loans, Favorable
Report of the Committee on Banks and Judiciary. Clerk
is in possession of amendment.

THE CHAIR:

Senator Finch.

SEN. FINCH:

Mr. President, I move the Joint Committee's
Favorable Report and passage of the bill.

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THE CHAIR:

The bill is passed. Mr. Clerk.

THE CLERK:

Calendar Page 5, Calendar 417, File 567,
Substitute for S.B. 1194, An Act Concerning
Arbitration in Certain Family Relations Matters, (As
amended by Senate Amendment Schedule "A"), Favorable
Report of the Committee on Judiciary.

THE CHAIR:

Senator McDonald.

SEN. MCDONALD:

Thank you, Mr. President. Mr. President, I move
acceptance of the Joint Committee's Favorable Report
and passage of the bill.

THE CHAIR:

On acceptance and passage, will you remark?

Senator McDonald.

SEN. MCDONALD:

Thank you, Mr. President. Mr. President, Members
of the Circle may recall this bill. It was addressed
by us a few days ago, and then it was PT'd while we
worked on the amendment to deal with certain matters
relating to custody and visitation rights and the

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relative positions with respect to dissolution actions and custody and visitation.

And, Mr. President, I believe the Clerk has in his possession LCO 7496. I ask that it be called and I be granted leave to summarize.

THE CHAIR:

Mr. Clerk.

THE CLERK:

LCO 4796, which will be designated as Senate Amendment Schedule "A", correction, Schedule "B", offered by Senator McDonald of the 27th District, et al.

THE CHAIR:

Senator McDonald.

SEN. MCDONALD:

Thank you, Mr. President. I move adoption of the amendment.

THE CHAIR:

Will you remark further on adoption? Senator McDonald.

SEN. MCDONALD:

Mr. President, as I indicated, the Judiciary Committee undertook several bills this year dealing

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with the issue of custody and visitation with respect to family relations matters, and some of them were conflicting.

And frankly, Mr. President, the amendment before us today represents a consensus between all sorts of groups, members of the bar, members of the bench, interest groups relating to domestic violence, a whole host of groups, not the least of which were a number of Legislators.

And I wanted to particularly thank Senator Freedman for her assistance on this issue and Representative Klarides from the House.

Mr. President, the amendment outlines a number of ways in which the courts would consider orders dealing with visitation and custody, all centered around what is in the best interests of the children.

And I believe that the consensus of the group was that all of our children will be better served with the adoption on this amendment.

THE CHAIR:

On the amendment, will you remark further on the amendment? If not, we'll try your minds. All those in favor, please say "aye".

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SENATE ASSEMBLY:

Aye.

THE CHAIR:

Any opposed, "nay"? The ayes have it. The
amendment is adopted. Senator McDonald.

SEN. MCDONALD:

Mr. President, if there's no objection, might
this item be placed on the Consent Calendar?

THE CHAIR:

Hearing no objection, the item will be placed on
the Consent Calendar. Mr. Clerk.

THE CLERK:

Calendar Page 6, Calendar 525, File 530 and 733,
Substitute for H.B. 6579, An Act Concerning Crime
Victims, (As amended by House Amendment Schedule "A"),
Favorable Report of the Committee on Judiciary.

THE CHAIR:

Senator McDonald.

SEN. MCDONALD:

Thank you, Mr. President. I move acceptance of
the Joint Committee's Favorable Report and passage of
the bill in concurrence with the House.

THE CHAIR:

Yes, thank you, Mr. President. I would ask the Clerk to please call for a vote on the first Consent Calendar.

THE CHAIR:

Will the Clerk please read those items on the first Consent Calendar?

THE CLERK:

Mr. President, those items placed on the first Consent Calendar begin on Calendar Page 1, Calendar 604, H.J. 140.

Calendar 605, H.J. 141.

Calendar Page 2, Calendar 606, H.J. 142.

Calendar 607, H.J. 143.

Calendar 608, H.J. 144.

Calendar 609, H.J. 145.

Calendar Page 4, Calendar 261, H.B. 6649.

Calendar Page 5, Calendar 369, H.B. 5586.

Calendar 417, Substitute for S.B. 1194.

Calendar Page 6, Calendar 523, Substitute for H.B. 6829.

Calendar 525, Substitute for H.B. 6579.

Calendar Page 9, Calendar 581, Substitute for H.B. 6893.

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Calendar 582, Substitute for H.B. 6907.

Calendar 583, Substitute for H.B. 6715.

Calendar Page 10, Calendar 588, Substitute for
H.B. 6824.

Calendar 589, Substitute for H.B. 6072.

Calendar 591, Substitute for H.B. 6304.

Calendar Page 11, Calendar 592, Substitute for
H.B. 6602.

Calendar 594, Substitute for H.B. 6744.

Calendar Page 12, Calendar 601, Substitute for
H.B. 6772.

Calendar Page 22, Calendar 519, Substitute for
H.B. 6557.

And Calendar Page 24, Calendar 179, Substitute
for S.B. 31.

Mr. President, that concludes those items
previously placed on the first Consent Calendar.

THE CHAIR:

Mr. Majority Leader.

SEN. LOONEY:

Yes, thank you, Mr. President. For purpose of
removing one item from the Consent Calendar before it

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is voted, and that is, Mr. President, Calendar Page
10, Calendar 591, H.B. 6304.

Would ask that item be removed from the Consent
Calendar, and would ask that item be called
immediately after the vote of the first Consent
Calendar.

THE CHAIR:

The Clerk will please announce the pendency of a
roll call vote on the Consent Calendar. The machine
is open.

THE CLERK:

An immediate roll call has been ordered in the
Senate on the Consent Calendar. Will all Senators
please return to the Chamber.

An immediate roll call has been ordered in the
Senate on the Consent Calendar. Will all Senators
please return to the Chamber.

THE CHAIR:

Have all Members voted? Senator DeLuca. If all
Members have voted, the machine will be closed.
Clerk, please announce the tally.

THE CLERK:

Motion is on adoption of Consent Calendar No. 1.

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Total number voting, 36; necessary for adoption,
19. Those voting "yea", 36; those voting "nay", 0.
Those absent and not voting, 0.

THE CHAIR:

Items on the Consent Calendar passed. Mr. Clerk,
I believe we will return to the item just removed from
the Consent Calendar. You want to re-call it?

THE CLERK:

Turning to Calendar Page 10, matter removed from
the Consent Calendar is Calendar 591, File 461 and
807, Substitute for H.B. 6304, An Act Concerning the
Improvement of Cardiac Care, (As amended by House
Amendment Schedule "A").

THE CHAIR:

Senator Murphy.

SEN. MURPHY:

Thank you, Mr. President. I move adoption of the
Joint Committee's Favorable Report and passage of the
bill in concurrence of the House.

THE CHAIR:

On acceptance and passage, will you remark?

Senator Freedman.

SEN. FREEDMAN:

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CONNECTICUT
GEN. ASSEMBLY
HOUSE

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9536-9846

ngw
House of Representatives

415
June 8, 2005

The House of Representatives is voting by Roll

Call. Members to the Chamber. The House is voting by
Roll Call. Members to the Chamber.

DEPUTY SPEAKER GODFREY:

Have all the Members voted? If so, the machine will be locked. The Clerk please take a tally. The Clerk will announce the tally.

CLERK:

Senate Bill Number 1331, as amended by Senate Amendment Schedule "A", in concurrence with the Senate.

Total Number Voting	149
Necessary for Passage	75
Those voting Yea	149
Those voting Nay	0
Those absent and not voting	2

DEPUTY SPEAKER GODFREY:

The Bill as amended passes in concurrence with
the Senate. Clerk please call Calendar Number 631.

CLERK:

On Page 14, Calendar Number 631, Substitute for
Senate Bill Number 1194, AN ACT CONCERNING ARBITRATION

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House of Representatives

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IN CERTAIN FAMILY RELATIONS MATTERS, Favorable Report
of the Committee on Judiciary.

DEPUTY SPEAKER GODFREY:

Representative Lawlor.

REP. LAWLOR: (99th)

Thank you, Mr. Speaker. I move acceptance of the
Joint Committee's Favorable Report and passage of the
Bill, in concurrence with the Senate.

DEPUTY SPEAKER GODFREY:

Question is on acceptance and passage. Will you
explain the Bill, Sir?

REP. LAWLOR: (99th)

Thank you, Mr. Speaker. The File Copy provides
for arbitration pursuant to the usual arbitration
rules, in dissolution of marriage cases, except for
support and custody matters. Mr. Speaker, the Senate
adopted two Amendments.

The first, LCO Number 6059, I'd ask the Clerk to
please call and I be allowed to summarize.

DEPUTY SPEAKER GODFREY:

Will the Clerk please call LCO Number 6059,
previously designated Senate Amendment Schedule "A".

CLERK:

LCO Number 6059, Senate Amendment Schedule "A",
offered by Senator Williams, et al.

DEPUTY SPEAKER GODFREY:

Is there objection to summarization? Hearing
none, please proceed, Sir.

REP. LAWLOR: (99th)

Thank you, Mr. Speaker. This Amendment adds
visitation to the support and custody issues which may
not be arbitrated. I urge adoption.

DEPUTY SPEAKER GODFREY:

Question is on adoption. Will you remark on the
Amendment? Will you remark on the Amendment?
Representative Rowe. Representative Klarides.

REP. KLARIDES: (114th)

Thank you, Mr. Speaker. I rise in support of
this Amendment. This Bill allows for attorney
arbitration of portions of a dissolution of marriage,
not dealing with custody, visitation or child support.

Pursuant to arbitration statutes, Chapter 909,
any arbitrator's award may be confirmed, set aside or
vacated pursuant to the same Chapter, 909, and I urge
the Chamber's support.

DEPUTY SPEAKER GODFREY:

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Thank you, Madam. Will you remark further on the Amendment? If not, let me try your minds. All those in favor of Senate Amendment Schedule "A", signify by saying Aye.

REPRESENTATIVES:

Aye.

DEPUTY SPEAKER GODFREY:

Opposed, Nay. The Ayes have it, the Amendment is adopted. Representative Lawlor.

REP. LAWLOR: (99th)

Thank you, Mr. Speaker. I urge passage of the Bill.

DEPUTY SPEAKER GODFREY:

Representative Klarides.

REP. KLARIDES: (114th)

Thank you, Mr. Speaker. The Clerk is in possession of LCO Number 7496, previously designated Senate Amendment Schedule "B". I ask that he please call and I be allowed to summarize.

DEPUTY SPEAKER GODFREY:

Clerk has LCO Number 7496, previously designated Senate Amendment Schedule "B". Will the Clerk please call.

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CLERK:

LCO Number 7496, Senate Amendment Schedule "B",
offered by Senator McDonough, Representative Klarides,
et al.

DEPUTY SPEAKER GODFREY:

Is there any objection to summarization? Hearing
none, please proceed, Madam.

REP. KLARIDES: (114th)

Thank you, Mr. Speaker. This Senate Amendment
Schedule "B" implements the Governor's commission on
custody, divorce and children, unanimous
recommendations, I move adoption.

DEPUTY SPEAKER GODFREY:

Question is on adoption. Will you remark? Will
you remark? If not, let me try your minds. All those
in favor signify by saying Aye.

REPRESENTATIVES:

Aye.

DEPUTY SPEAKER GODFREY:

Opposed, Nay. The Ayes have it. The Amendment
is adopted. Will you remark further on the Bill as
amended? Representative Klarides.

REP. KLARIDES: (114th)

Thank you, Mr. Speaker. I will be brief. In making and modifying of any order for custody, this Bill really talks about the best interest of the child, adds some additional factors the court can look at, but is not limited to, and discusses a parental responsibility plan.

I'd like to thank everybody in this Chamber, both sides of the aisle, in the House and the Senate for working on this, and I urge support.

DEPUTY SPEAKER GODFREY:

Thank you, Madam. Are you ready for the question? Are you ready for the question? If so, machine will be opened.

CLERK:

The House of Representatives is voting by Roll Call. Members to the Chamber. The House is voting by Roll Call. Members to the Chamber, please.

DEPUTY SPEAKER GODFREY:

Have all the Members voted? If so, the machine will be locked and the Clerk will take a tally. Representative Urban, how would you like to be recorded? Representative Urban in the affirmative. Clerk will announce the tally.

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House of Representatives

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CLERK:

Senate Bill Number 1194, as amended by Senate
Amendment Schedules "A" and "B", in concurrence
with the Senate.

Total Number Voting	149
Necessary for Passage	75
Those voting Yea	149
Those voting Nay	0
Those absent and not voting	2

DEPUTY SPEAKER GODFREY:

Bill is passed in concurrence with the Senate.

Representative Donovan.

REP. DONOVAN: (84th)

Mr. Speaker, I move suspension of the rules for
immediate consideration of Calendar Number 646.

DEPUTY SPEAKER GODFREY:

Is there objection? Hearing none, please call
Calendar Number 646.

CLERK:

On Page 16, Calendar Number 646, Senate Bill
Number 83, AN ACT REQUIRING DISCLOSURE OF RETAIL DRUG
PRICES, Favorable Report of the Committee on Insurance
and Real Estate.

**JOINT
STANDING
COMMITTEE
HEARINGS**

**JUDICIARY
PART 10
2775-3115**

2005

CRAIG SEGAR: Fortunately, in Vernon I don't have that problem with that type of animal or complaint.

But again, we'd have to have a complaint. We'd respond to the complaint. And if there was an issue with livestock, I'd get somebody that was experienced in handling, with dealing with those things. Another officer or even we have, we call UConn Extension. I'm sure they have some people there that could come out and help us with that, too.

I remember we had a cockfight we raided, and we used the UConn Extension people out there to assist us. So there are people out there to help us, and that's what I would do.

REP. LAWLOR: Thank you. Are there other questions? If not, thank you very much, sir.

CRAIG SEGAR: You're welcome.

REP. LAWLOR: Next is William Fitzmorris.

WILLIAM FITZMAURICE: Good afternoon, Mr. Chair and members of the Committee. My name is Bill Fitzmaurice from Milford, and I am here in support of Raised Senate Bill 1194, which is AN ACT CONCERNING ARBITRATION IN CERTAIN FAMILY RELATIONS MATTERS.

I hold a couple of titles in that regard. I am currently the president of the American Academy of Matrimonial Lawyers in Connecticut. I am a past president of the Family Law Section of the Connecticut Law Association. Both those [Gap

in testimony. Changing from Tape 2A to Tape 2B.]

--relations officers and the people who do the day-to-day work in the system.

The problem is, under our existing arbitration statute, almost everything, despite the family relationship, can be arbitrated, except the statute doesn't clearly cover matrimonial cases.

So today, if you have a dispute with your mother that's a legal dispute, you can arbitrate that dispute, or with one of your siblings. Or with one of your adult children, you can arbitrate that dispute very clearly. Even if, God forbid, your spouse is killed or a sibling is killed, you can arbitrate that dispute.

If you have a dispute where your business is going to be taken away from you, or your house is going to be taken away from you, or your life savings is going to be taken away from you, you can arbitrate that dispute.

Our statutes does not make clear, and we're asking the Legislature to make clear, that you can arbitrate your matrimonial dispute. So this bill is simply to give to matrimonial litigants the same option that is available to most other litigants in other types of contexts in the state of Connecticut.

And frankly, it's an answer to the cry that the people in the field here all the time from people going through the process.

If you talk to therapists, social workers, family relations officers, attorneys, mediators, folks going through the divorce process say to us all the time, this process is so terrible for us. Why does it have to be made more terrible by leaving us with the only resolution of going to the court system if we can't resolve our dispute?

In a different forum we hear the same cry all the time from judges who say to us, isn't it too bad that we can't take this out of our system and have some type of more humane, compassionate organized approach to this case? But our statute doesn't allow for it.

I've submitted some materials, and I'm not going to repeat what is in the materials except to highlight a few points.

First of all, there are at least 11 states, and there may be 12 or 13 states, that allow arbitration in matrimonial cases by statute.

Anecdotally I can tell the Committee that, from my conversations with colleagues from those states, particularly in Colorado and Texas and Wisconsin, they not only like it, they rave about it. This is a solution to lots of problems and lots of types of cases.

So the endorsement from, you know, the CBA and from the Academy is a nice endorsement, but the

fact of the matter is this is really to solve problems that are engaged in by day-to-day litigants who would like to arbitrate as opposed to using the court system.

I'm happy to take questions.

REP. LAWLOR: Thank you very much. Are there questions? Representative Farr.

REP. FARR: The items to be arbitrated, I see that there's an exclusion here for with respect to custody, visitation, support. Is that correct?

WILLIAM FITZMAURICE: Custody and child support, Sir, yes.

REP. FARR: And then, but it seems that, what about educational support? Is that an item?

WILLIAM FITZMAURICE: Well, I would think. Not rendering a full legal opinion, but I would think that's a component of child support. So the financial orders with respect to children would have to be pinned down, and the custodial orders with respect to children would have to be pinned down before the parties could avail themselves of arbitration.

REP. FARR: And how, at what time do the parties, at what point in the process do the parties, do you envision the parties entering into an arbitration agreement?

WILLIAM FITZMAURICE: As early as possible. So if two parties came to lawyers or on their own decided early on in their case that they were

going to use an arbitration methodology, they would know that the first thing they have to do is go to court and have their custody dispute resolved, most often by agreement.

The people who aren't going to be able to resolve their custody dispute by agreement are probably not going to select arbitration. So we're probably talking about parents who are going to up front easily resolve their custody dispute. That happens in a very substantial number of cases. They can easily, particularly pursuant to the guidelines, resolve their child custody, child support issues.

And then all that's left is remaining is a business dispute between two adults. It's now a division of property and a division of cash flow between two adults. And so, it's our suggestion that that type of dispute should be able to be arbitrated, just as if a husband and wife were partners in a business, and they wanted to arbitrate their business dispute because they were taking apart their business.

REP. FARR: Well that may be true, but if there's children involved, there may be an overlap between the issues of support and alimony and property.

WILLIAM FITZMAURICE: In all honesty, there's not as big of an overlap between alimony and child support as there used to be, for two reasons.

There used to be a lot of gamesmanship with respect to that, with respect to shifting cash flow to unallocated alimony and support for tax

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arbitrage reasons. With the condensation of the federal tax brackets, pretty much in both hands the income is going to be taxed the same. So unallocated alimony and support is not used as often as it used to be, and it's not as advantageous as it used to be 10 or 15 years ago.

Secondly, the child support guidelines have made it a lot easier to calculate what the child support portion should be, in any event.

So, what we're hoping and what we envision, and what has happened in other states, because certain other states have these provisions that custody and child support are ruled out, they're finding in those states that parents readily come in with agreements up front dealing with those issues.

So a backhanded advantage of this type of scheme is it has the parents resolving earliest on some of the issues under different bills the Committee has heard about this afternoon, so that the kid issues are dealt with properly, with respect to custody and child support, so that then basically the financial issues could be left for an arbitrator.

REP. FARR: And under this bill would the parties be able to enter into an agreement to arbitrate as part of their prenuptial agreement?

WILLIAM FITZMAURICE: I believe they could.

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REP. FARR: And would there be an examination by the court as to whether that really is truly, freely entered into?

WILLIAM FITZMAURICE: The arbitration, the entry into the arbitration agreement itself, yes.

REP. FARR: When would that be done?

WILLIAM FITZMAURICE: At the same time as now under our act, the Premarital Agreement Act, that that is unfortunately done at the end of the case.

But you're going to have to get divorced anyway, so all of these arbitration awards are going to be submitted to a court after the arbitration has concluded.

At that time, if any participant has questions about the arbitration process or the entry into the arbitration agreement, they're free to raise those concerns to the court at that point.

REP. FARR: And the arbitrators in this case could consist, could be anyone?

WILLIAM FITZMAURICE: Conceivably they could be anyone. That's up to the agreement of the parties. Learning from the other states is primarily they are experienced lawyers who are involved in matrimonial cases on a day-to-day basis. Some people have had great success using accountants, if there are complicated financial disputes. But the act itself does not define who the arbitrator would be.

What's happened, in my discussions with other states is what happens is, after the act is passed, the jurisdiction tends to develop its own practices for how to deal with it in its own handbook, in its own set of forms, in its own practices with respect to that. Just as has happened in other types of areas.

When arbitration came into securities litigation and the concept came forth that you would arbitrate almost always securities cases with your broker. The securities organizations came up with standards and forms and ideas on who the arbitrator should be, and you get to a point where you have approved lists of arbitrations, arbitrators.

And the American Arbitration Association on the commercial side has, over the years, developed forms and practices and different lists of arbitrators for different types of arbitrations. The labor lawyers have their own group for that.

I think over time what would happen, if we got a foothold with respect to this, and what has happened in other states, some of the states who have had it for a long time, nobody would dream of going to a judge for a matrimonial case. They have people who have been professional arbitrators on the matrimonial side for 15, 20, 25 years. And people wait in line to get before these people.

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REP. FARR: And what is the advantage of going to the arbitrator versus the judge? I'm not sure I understand.

WILILAM FITZMAURICE: I put in my materials an actual list from, that they used in North Carolina, which is the latest list of advantages. But the basic is the following.

And I'm not complaining about the judges because the judges are overburdened, and they are overworked, and they don't have enough help to deal with these cases.

But we commonly get a court to, unfortunately, try a case in those few occasions where you can't resolve it. And we're very frequently told by a judge, I know you were assigned today. I'm not going to reach you today. I might be able to give you two hours tomorrow afternoon. But the next day you're going to have is two weeks from now from 3:00 to 5:00. And two weeks from then you go to 3:00 to 5:00 and they say, well, I can only give you from 4:00 to 5:00. How about two weeks later from, you know, 2:30 to 4:30?

And we're dealing with people here that are under enormous pressure and have enormous problems with the whole process. And just the weight and the uncertainty about scheduling, and the uncertainty of which judge you're going to get, and what the personality of that judge is, and what the approach to the judge is, all that does is add to the burdens of these people.

So the advantages you get in arbitration is by agreement the people pick their decision-maker, and then they work with that decision-maker where they do the case on their schedule, on a schedule that makes sense to them. It's almost always done consecutively. Nobody would ever pick a schedule where you would drag out eight hours of testimony over two months in two-hour, three-hour time periods. You just would never do that.

So the mechanics is better. And with all due respect to the judges, and there was a discussion this morning with respect to a different bill about how they rotate through the system, I mean this is the least favorite job of most people who are on the bench. They do not want to sit family.

You get to pick people who actually want to hear matrimonial cases and want to decide matrimonial cases.

REP. FARR: And do they normally use a single judge or a multi-judge? Single arbitrators or multi, or multi-member arbitration panels?

WILLIAM FITZMAURICE: The anecdotal information I have from other states is almost exclusively it's one person.

REP. FARR: Okay.

WILLIAM FITZMAURICE: But then again, you know, it's voluntary. If you don't like, you know, this is only going to be people who select this process. Even if it's only 10% or 20% of the

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folks, they're going to be 10% or 20% who could agree on a person because they have confidence in that person mutually. Or the people who are assisting them have confidence in that person mutually.

And then what it does is that even if it only initially saves the judicial department 10% or 20% of its resources, it can then take those resources and devote them to other cases that need the resources.

REP. FARR: Thank you.

REP. LAWLOR: Thank you very much. Are there other questions? If not, thanks.

WILLIAM FITZMAURICE: Thank you.

REP. LAWLOR: Next is Ms. Fernandez.

CHERYL ANN FERNANDEZ: Good evening, Chairman and members of the Judiciary Committee. My name is Cheryl Ann Fernandez and I'm here on behalf of myself this afternoon.

SB867

I'd like to briefly discuss two bills that I am in support of, Senate Bill 1191, AN ACT CONCERNING THE CREATION OF TRUSTS FOR THE CARE OF DOMESTIC ANIMALS.

As a pet owner and as a single person I would like to know that if I were to pass away and I were to set up a trust for my animals that they would have a contractual agreement and that it would be enforced that they would be taken care of after my death.

complying with the law on a day-to-day basis, and the cost of defending some frivolous lawsuit would be detrimental.

In closing, currently the state and federal laws form a delicate balance, and we ask the Committee to preserve that balance by rejecting this measure before you. Thank you.

SEN. MCDONALD: Thank you. Are there any questions from members of the Committee? Thanks very much.

KYRA NESTERIAK: Thank you.

SEN. MCDONALD: If Representative Farr lets me have the list back. Arnold Rutkin, followed by Ellen Kennedy.

ARNOLD RUTKIN: Good afternoon.

SEN. MCDONALD: Good afternoon.

ARNOLD RUTKIN: Senator McDonald and members of the Committee. I'm an attorney from Westport, Connecticut, and you may have noticed been practicing for a while, 40 years. Thirty of that has been primarily doing matrimonial work.

SB 1194

I want to give you a little bit of my background. I was in legal services when I started out. I've been very active in Bar Association affairs, in the American Academy of Matrimonial Lawyers, the American Bar. I was testifying at the Governor's Commission on Custody a couple of years ago, and I'm co-author of a three-volume series called

Connecticut Family Law and Practice. And I give you that background as a background on the subject of arbitration in family law cases, which, as some of you know, has been widely discussed for years.

You know, in a perfect world, in our court system, were there ample lawyers to represent pro se individuals, we probably wouldn't need arbitration. And in a perfect world, were you to have enough money to fund enough judges who would volunteer to do family work, which they don't do, we probably wouldn't need arbitration.

But in this imperfect world, I think it's time to add to the ADR alternative dispute resolution menu arbitration, along with mediation, conciliation, and negotiation.

Many of us, like myself and Bill Fitzmaurice, who testified earlier, volunteer throughout the State as special master. And I have done it and will continue to do it.

Unfortunately, I am told the family docket represents 60% of cases, but it doesn't represent 60% of the person power. And so there are many, many delays in the judicial, in some of the judicial, districts. Arbitration is a way to alleviate this problem.

Representative Farr, you asked some very good questions to Mr. Fitzmaurice, and I think the answer to most of them is, as with other forms of arbitration, it will evolve as time goes on.

And the rules and forms that people learn to use, arbitrators will be picked.

I have some of the same questions that you asked, including the one on pre-nups. But we need to start somewhere. This is a thing that needs to happen, and it needs to happen now. By allowing arbitration, we're simply allowing grownups to do what they ought to be able to do.

We require these same grownups to do other things, like take part in parent education classes and sign prenuptial agreements, since you raised that. But we don't let them do arbitration.

We've tried to have it occur in the courts, but it's a chance. Without enabling legislation, people who enter into that process and don't like the result, like happens frequently in court, whether it's judges or arbitrators, they've gone through a huge time and expensive procedure for nothing.

This enabling legislation will put that to an end and allow those people who have selected, not everyone will select it, but those who do can have arbitration. Thank you.

SEN. MCDONALD: Thank you. Are there any questions from members of the Committee?

Let me just ask you one of my own, and I apologize for not being here when Mr. Fitzmaurice offered his testimony. And forgive me if I'm duplicating anything that

Representative Farr asked, which I'm sure was brilliant and incisive questioning, because we've talked about this, actually.

But my point, my question is--

UNIDENTIFIED SPEAKER: [Inaudible--microphone not on.]

SEN. MCDONALD: That's right. That's why I said it because--

ARNOLD RUTKIN: That's why you wore a blue shirt.

SEN. MCDONALD: No cameras in here, there's no record of that. Actually, there is.

But my question really deals with the nature of arbitration and when it would be entered into, when the agreement would be entered into. And you mentioned prenuptial agreements.

In your opinion, would it have a helpful or hurtful effect on this concept, whether the arbitration was agreed to in the context of a prenuptial agreement or when the marriage is falling apart at the end of the marriage when people already have heightened emotions, when there might be emotional or physical abuse associated with the collapse of the marriage. Does it matter where on the spectrum the arbitration was agreed to?

ARNOLD RUTKIN: Are you asking, I want to make sure I understand the question, can people agree as part of a prenuptial agreement to an arbitration clause? That's one idea. And by

the way, I think the answer is yes. Whether you could enforce that in Connecticut without your enabling statute is something else.

If you're asking at what point do or should people be allowed to enter into an arbitration agreement, the statute is silent on that, which would infer that they can enter into it anytime after their marriage. I can't answer it any better than that.

For example, I had questions about whether it covered pendente lite agreements, temporary agreements. And I think the way the statute is written the answer is yes. So I think it could be anytime.

SEN. MCDONALD: Well, the statute, I'm sorry, the bill is written in broad language, really as a point of discussion. And one of the things we actually tried to elicit in the context of public hearings is the opinion of members of the public, but in your case a member of the Bar who's been practicing in this area for 40 years.

I don't do matrimonial law. I wouldn't know the first thing about what this would actually result in in the actual world in which you practice daily. So my question is, at the end of a marriage when there are all of those hard, sometimes hard feelings, sometimes it's amicable but oftentimes there are hard feelings, there is not necessarily equal bargaining power, if you will.

There could be a whole host of reasons why the marriage is falling apart. Emotions are at their zenith, perhaps, and you are now asking somebody to make an informed objective decision in an environment that is inherently fraught with emotion and perhaps not the clearest of judgment.

So, and I'm particularly thinking about situations where there is either emotional or physical abuse which is precipitating the dissolution. And if one spouse is using that emotional dominance over another spouse, is the spouse who is being dominated emotionally, is he or she in a position to make an informed decision about arbitration? Should we allow it at that point?

ARNOLD RUTKIN: The short answer is absolutely, yes. The longer answer is, the concerns that you're suggesting are very important, deep concerns that I have and have had over the years for mediation in divorce cases.

And many people will tell you, in the court system, family relations, for instance, that where there's been abuse they won't even take on mediation. But in arbitration, the only difference, Senator McDonald, is that it's a picked arbitrator as opposed to a judge.

The person is going to be, if one of the spouses is abused or if the playing field is not even, they're going to have attorneys, and there is going to be an arbitrator, or arbitrators sometimes, to level that playing field to hear the evidence.

This is still going to be a hearing where someone is represented.

Having practiced all these years I can tell you, I can count on the fingers of one hand, one hand, the number of cases that I've heard of, not my own, but just sitting in court where judges refuse to accept an agreement because of, for example, abuse.

So I think your concerns are right on for mediation, but I think aren't necessarily applicable to arbitration anymore than they are to a court trial.

SEN. MCDONALD: One final question. The, I mean, it seems to me that, with respect to arbitration, first of all there's no requirement that somebody have an attorney in that arbitration proceeding, right?

ARNOLD RUTKIN: That's correct.

SEN. MCDONALD: And so, and unlike a judge, is an arbitrator required to make sure that the arbitration is fair to all sides? Or, I mean, does an arbitrator have the same responsibility as a judge to make sure that the process is ultimately fair to both sides? Or is the arbitrator charged with the responsibility of coming up with a resolution to the case?

ARNOLD RUTKIN: Well yes, an arbitrator is hired to come up with a fair resolution of the case and is subject to appeal only if that award is

arbitrary or capricious, the usual arbitration appellate criteria.

However, just because what you, the concern you say is so, it doesn't mean it doesn't happen in court. As I've said, you know, I've had clients who've signed agreements that I thought were terrible. I threatened to get out of the case. They wanted it done.

I'll tell you this one story. I put on, when I was the younger lawyer a few centuries ago, I put on a case and I warned the judge that I didn't really think this was a great idea, this agreement. And the judge, I learned quick the judge said to me, you don't think it's a good idea and you want me, under 46b-66 to approve it? Uh-uh, not me.

So, I learned quick. Judges want agreements that they believe are signed without duress. They're canvassed that way, as you may or may not know. And I don't think it would change under arbitration.

Over time there will be evolved a body of arbitration rules, we'll call them, that exist now in construction litigation and other kinds of contract actions.

SEN. MCDONALD: Thank you. Apparently my question precipitated more. Representative Farr.

REP. FARR: Yeah, I just wanted to say that I'm a member of the American Arbitration Association and do some arbitration myself, and I just had

a seminar a couple months ago on the whole issue of pro se litigants in arbitration.

And the approach I think the arbitrators and judges is very much the same, which is, namely, when you have a pro se litigant, on the one hand you want to be fair to that litigant; on the other hand, you don't want to be that litigant's advocate. And that's the same problem a judge has.

ARNOLD RUTKIN: Right.

REP. FARR: You can't sit there and one person's represented and the other's not, so you're going to represent the person without counsel, because that's not fair to the one with counsel. So it's a difficult situation, but I don't know that it's really much different with arbitration than it is with judges.

ARNOLD RUTKIN: It isn't. Judges have the exact same problem.

SEN. MCDONALD: Thank you. Thank you very much for your testimony.

ARNOLD RUTKIN: Thank you.

SEN. MCDONALD: Next is Ellen Kennedy, followed by June Pascoe. Good afternoon and welcome.

ELLEN KENNEDY: Thank you. I'm very happy to be able to speak before this Committee. I have had throat surgery, so I'm probably not speaking as well as the other people who spoke, but I will try.

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Thank you for your attention. If you want me to answer any questions I'd be happy to.

SEN. MCDONALD: And thank you for sticking around so long. Are there any questions from members of the Committee? I don't have to look over here anymore. Thank you very much for your time.

BRUCE SHERMAN: You're welcome.

SEN. MCDONALD: Rafie Podolsky followed by John Clapp. Is Mr. Clapp here? Then after Mr. Podolsky is Robert Fromer.

Good evening.

RAPHAEL PODOLSKY: Thank you very much. I'm Raphael Podolsky from the Legal Assistance Resource Center. I came primarily to speak about Senate Bill 1120, and other speakers have pretty much said most of what I want to say, so I'll be very brief on that.

SB1194

I agree with those who have urged you not to take any further action on this bill. The bill is far too rigid. It ignores the best interests of the child. It's fundamentally punitive in nature.

Ultimately what you have is a very genuine concern from people who have not received enough parenting time with their children. But this bill, which is what's in front of you, bears no resemblance to a solution to that problem and will, I think, make things much, much worse.

The second thing is we see a lot of cases that are what I would call true one-parent households. The noncustodial parent essentially has disappeared, sometimes disappeared from the time the child was born. And to create a presumption of joint custody in those kinds of situation is really, really inappropriate. You've got to do case by case, there's just no alternative.

And the last thing I want to say is I just want to mention something on a different bill. I submitted written testimony for a technical amendment on Senate Bill 1194, which is the one that deals with family arbitration.

We don't have a position on the bill. If you do the bill, though, I would suggest you make sure that visitation is treated in the bill the same way as custody is. But on the bill itself we don't have a position.

Thank you very much for the opportunity to testify.

SEN. MCDONALD: Thank you. Any questions? Thank you very much.

RAPHAEL PODOLSKY: Thank you.

SEN. MCDONALD: Robert Fromer, followed by Leigh Standish. Is Leigh Standish here? After that is Robert Young. Is Mr. Young here? Okay. Please proceed.

ROBERT FROMER: Thank you. I want to speak about Committee House Bill 5062 on eminent domain.

Arthur E. Balbirer
P.O. Box 205
Bethlehem, Ct. 06751-0205

March 4, 2005

Senator Andrew J. McDonald
Room 2500
Legislative Office Building
300 Capital Avenue
Hartford, Connecticut 06106

Dear Senator McDonald:

As a member of the Connecticut Bar since 1966 I write in support of Raised Bill No. 1194, AN ACT CONCERNING ARBITRATION IN CERTAIN FAMILY RELATIONS MATTERS.

I think it worthwhile to explain where I'm coming from. For almost my entire career, I've specialized in Family Relations matters. I've written extensively in the field of Matrimonial Law, and, for many years, was co-author of an annual Survey of Family Law in the Connecticut Bar Journal. I've been President of the American Academy of Matrimonial Lawyers; President of the Connecticut Chapter of the American Academy of Matrimonial Lawyers; Chair of the Family Law Section of the Connecticut Bar Association; an Adjunct Professor of Family Law at the University of Connecticut Law School. As a practicing lawyer I've participated in hundreds of difficult Family Relations cases, including too many that were not capable of being resolved by agreement and were caused to be litigated in a Connecticut Courtroom.

It is very much in the interest of the Connecticut public for this Bill to be enacted.

- (1) Compared to many states, Connecticut has a first rate Family Court system and many qualified, hard working, diligent and sensitive Judges. Unfortunately, and for reasons that include economic ones, there are not enough such Judges to handle the volume of Family Relations matters. The trial of a contested matter usually will take more than a day; sometimes many days. Because there are not enough Judges, the presiding Judge may not be able to hear the case continuously and may have to have a number of

continuances, breaking up the continuity of the trial, causing disruption, delays, enormous costs of trial by reason of counsel having to prepare and re-prepare on any number of occasions that might stretch a 4 day trial over a course of many months; inconvenience of the parties and witnesses. Because many cases are interrupted for miscellaneous emergency or routine matters to which the Judge must attend, some trials become more like never-ending, disjointed sagas. Allowing parties, BY AGREEMENT, to litigate their matter with an Arbitrator of their selection allows them to have an uninterrupted hearing, a hearing in a venue convenient to them and their witnesses. It permits them to select the formality or informality that shall apply to the hearing, a stressful situation at best. It saves enormous expense to the litigant by avoiding the need to have their counsel prepare and re-prepare on any number of occasions required because of the disjointed and postponed hearings. Most importantly, it permits the litigants to hire an Arbitrator who they believe has the expertise to determine their fate in a matter that is usually the largest personal business transaction of their entire lives. The cost of the Arbitrator is more than offset by the savings in attorney's costs.

- (2) The adoption of this Act doesn't cost the State of Connecticut anything. In fact, its adoption will likely result in enormous savings because it will cut down on the need for the volume of Judges needed to deal with the myriad of Family matters now and to be in the system in the future. By reasons of the limitations on the availability of appellate rights in arbitrated matters, there will be fewer appeals, another procedure that consumes the time and efforts of our judiciary, not only in the trial but on the appellate levels.
- (3) It is my feeling that present Connecticut Statutes Section 52-508 does NOT exclude Family Relations matters. Unfortunately, not all agree, including members of our judiciary. This act will eliminate any doubts.
- (4) The only criticism I have of the Act is that arbitration of child support issues is forbidden. I believe that it is oftentimes impossible to separate the issues of Alimony (spousal support) and Child Support. If I may offer an idea, perhaps the Bill could be amended to permit the arbitration of child support provided that the Arbitrator adhere to the Connecticut Child Support Guidelines, as interpreted by case law and statute.

I am out of the state and will be unable to speak in favor of Raised Bill No. 1194, thus this letter. I would be happy to expand on my comments, in person or otherwise, if requested and possible.

Respectfully,



cc: Judiciary Committee

ARTHUR BALBIRER

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VIA FACSIMILE AND U.S. MAIL

Senator Andrew J. McDonald
Deputy Majority Leader
State of Connecticut
Legislative Office Building
Room 2500
Hartford, Connecticut 06106-1591

Re: Raised Bill #1194
An Act Concerning Arbitration In Certain Family Relations Matters

Dear Senator McDonald:

I regret that previously scheduled commitments will prevent me from appearing before the Judiciary Committee on Monday, March 7, 2005 to testify in favor of Raised Bill #1194, An Act Concerning Arbitration in Certain Family Relations Matters. Please accept this correspondence in lieu of my personal appearance.

As you may know, I currently serve as Chair of the Connecticut Bar Association Family Law Section. In addition, I am Chair of my firm's family practice group and have practiced family law here in the Connecticut since 1985. Based on this experience, I believe the amendments provided in Raised Bill #1194 will have a positive impact on Connecticut's families. As an experienced commercial litigator, I am certain that you have seen countless occasions where arbitration provisions, voluntarily accepted by two parties, have resulted in a more efficient and less costly resolution of a dispute between two parties. It is nothing short of bizarre to me that this option provided to persons in a business relationship, is not available to persons dissolving the most important of all relationships. Although arbitration may not be for all couples, it should be an option made available to all couples. To those willing to accept it, arbitration as an option is certain to facilitate a more

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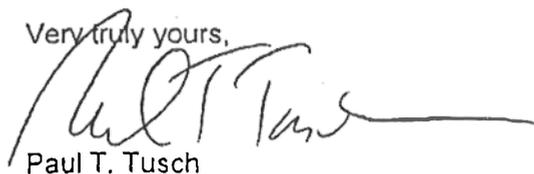
P.03

Senator Andrew J. McDonald
Deputy Majority Leader
State of Connecticut
March 4, 2005
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efficient dissolution of the marriage while, at the same time, reducing the burden placed on the judicial system. I urge you to support this much needed legislation.

If you have any questions or if I can be of any assistance, please feel free to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "Paul T. Tusch", with a long horizontal flourish extending to the right.

Paul T. Tusch

PTT/emc

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March 7, 2005

Senator Andrew J. McDonald
Legislative Office Building
300 Capitol Avenue
Hartford, CT 06106

Re: Public Hearing Raised Bill No. 1194

Dear Senator McDonald:

On behalf of numerous clients that I have represented over my many years of practice, as well as some current clients, I write this letter in support of Raised Bill No. 1194, An Act Concerning Arbitration In Certain Family Relations Matters.

I have been an attorney in Connecticut for almost 40 years. During much of that time, I have practiced family law and have concentrated my practice on family law for over 30 years. I am a member of the Connecticut Bar Association's Family Law Committee, having been its chair for two years and a member of the executive committee for over two decades. I am also an active member of the Connecticut Chapter of the American Academy of Matrimonial Lawyers and the International Academy of Matrimonial Lawyers. I was editor-in-chief for ten years of the Family Advocate, a publication of the Family Law Section of the American Bar Association and am co-author of Connecticut Family Law and Practice, a three volume practice series published by West's Publishing Company.

I mention my above background because the subject of arbitration in family law cases has been widely discussed for years. In a perfect world, where there were ample lawyers to represent all people including the many pro se litigants in the family court, we might not need arbitration to add to the menu of alternative dispute resolutions urged by the public that have evolved over the last 20 years. In that same perfect world, the legislature would have surplus funds in order to appoint and train many more judges to handle the demanding family law docket.

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Unfortunately, there are not enough funds, and Superior Court family judges are already hugely overwhelmed with demanding dockets. The number of pro se litigants is rising and apparently represents 60% of the docket. Frequently families in crisis are not getting adequate time and resources because of a crowded system. In many judicial districts, there are very long delays.

Arbitration is a way to help alleviate this problem. Court sanctioned arbitration as proposed should be authorized and controlled. I have noticed through the years that, by and large, people entering the court system in family law cases look to the court and expect and hope for a fair resolution to their problems. Most people understand the importance of the legislature in a free society and the role that an independent judiciary plays. In recent times, more and more people are opting within and without of the system for the use of forensic experts, mediators and arbitrators for issues such as personal property disputes. In addition, there have been some efforts to arbitrate the entire financial part of dissolution cases by many people. These efforts have largely failed because of the lack of enabling legislation such as proposed here.

We already permit citizens to enter into premarital agreements subject to certain controls imprinted on the legislation by the legislature – controls which I support. We already require parents to participate in parenting education, legislation which I support. Most of the clients I have represented understand and support the care and control the legislature and the courts exert on the family system.

Many of my clients, past and present, would support carefully thought out arbitration. I believe they would understand excluding custody matters. Yet, there are some questions which I have for these bills. A few of these questions are: does arbitration include temporary or pendente lite matters such as alimony, production and discovery disputes? Should the agreement to arbitrate include rules of arbitration in family matters that might be different than other civil matters? Since the arbitrator is going to apply and enforce statutes such as 46b-81 and 82 which have decades of judicial interpretation, what experience and background should a prospective arbitrator possess? Since the court must approve “an agreement in writing between the parties to a marriage to submit to arbitration...”, can the court review the arbitration agreement and/or award to make sure it follows the agreement to arbitrate? In other words, are 46b-66(a) and the new 46b-66(c) mutually exclusive?

The above questions need to be discussed and decided as part of an arbitration process, less the courts, lawyers and litigants be afraid to try arbitration. I am confident these problems can be

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resolved, as other states have apparently done, and that we can offer our citizens another form of alternate dispute resolution. I know many of my present and future clients will avail themselves of this procedure. The fact that I am asking these questions does not mean that I do not fully support a statutory arbitration process. I just want to make sure that when it starts, we can all hit the ground running.

If I can be of any assistance to the Judiciary Committee, please do not hesitate to call upon me.

Very truly yours,



Arnold H. Rutkin

cc: Members of the Judiciary Committee

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S.B. 1194 -- Arbitration in family matters

Judiciary Committee Public Hearing -- March 7, 2005

Testimony of Raphael L. Podolsky

**Recommended Committee action: INSERT "VISITATION" INTO
LINES 27 AND 44**

This bill applies the provisions of Chapter 909 on contract arbitration to arbitration agreements in family matters, "except as to issues related to the custody or support of any child." We assume that this exception reflects the dual concerns of (a) the fundamental constitutional right of parents to the care and companionship of their children and (b) the state's special interest in child support. These are matters which should not be privatized through arbitration. The practical effect of the bill thus seems to be to limit family arbitration to matters of property division and alimony. We take no position on the bill.

We do believe, however, that the exception for custody and child support is too narrow. In particular, visitation, which is inseparable from custody, should also be exempted from arbitration.

As a result, we ask that, if this bill moves forward, visitation be explicitly exempted from arbitration. To accomplish this, "visitation" should be inserted into the text of the bill in lines 27 and 44.

WRITTEN STATEMENT OF
WILLIAM T. FITZMAURICE
RE: RAISED BILL NO. 1194

I am submitting the following written points to supplement my oral remarks:

1. For a long time, participants in the family law system (i.e., judges, lawyers, parties, mediators, family relations officers, etc.) have discussed a statute to authorize binding arbitration in family cases. It is not a new or novel concept. For various reasons, perhaps primarily a lack of focus, no effort was made to finalize appropriate legislation.
2. At a minimum, the discussion dates back to 1986 when our Supreme Court decided Masters v. Masters. A copy of that decision is attached to this submission starting at page 3. The Supreme Court obviously did not have any problem with arbitration in family matters.
3. Despite Masters, virtually no arbitration occurred in family matters in Connecticut. Knowing that the jurisdiction of family courts is created by statute, practitioners were reluctant to participate in arbitration because no statute authorized arbitration in family matters. In family matters, it is quite common for one or both parties to disagree with some or all of any decision imposed upon them. It made no sense to participate in arbitration if both parties remained free to reject the result and repeat the entire process in court.
4. Many family litigants have reasonable and good faith disagreements that they cannot resolve themselves. If it was available, many of them would happily choose arbitration to resolve their dispute instead of the cumbersome and crowded court process. Unfortunately, there is no statute that makes arbitration available.
5. A variety of non-binding alternate dispute resolution options are made available to family litigants. They include: judicial pre-trials, court-annexed special masters, court-annexed mediation, private special masters and private mediation. There is no reason that arbitration should not be on the menu of options available to family litigants.

6. North Carolina appears to be the most recent state to provide for arbitration in family matters. Page 107 of the handbook used in North Carolina provides a "Checklist on Advantages of Arbitration" which I attach at page 16 of this submission.
7. It appears that, with the recent inclusion of North Carolina, eleven (11) states now have statutes authorizing arbitration in family matters. Footnote 8 on page 16 of a recent report from the American Academy of Matrimonial Lawyers provides the citations. That page is attached to this submission at page 17.
8. Assuming that arbitration is made available by statute in Connecticut, forms are readily available to be used to create arbitration agreements that cover all of the appropriate issues. Once arbitration is authorized by statute, it appears that various organizations in each jurisdiction prepare and circulate handbooks to be used in the process. For example, at pp. 38-50 of a recent report, the American Academy of Matrimonial Lawyers approved a set of forms derived from the North Carolina handbook. Those pages are attached to this submission starting at page 18.
9. Arbitration should be available to family litigants who wish to avoid court but have a good faith dispute that needs binding resolution.
10. Even if only 10-20% of cases utilize arbitration, that will effectively increase the resources of our courts by 10-20% and those resources can be expended on difficult cases in which the parties have not chosen arbitration.
11. By not allowing arbitration of child custody or child support, the proposed statute still allows the courts to carefully supervise those issues.
12. The proposed statute is voluntary and simply makes arbitration an option available to the parties if they both agree. Nobody will be forced to arbitrate.
13. Allowing for arbitration has no financial cost to the State. Indeed, there will be an effective savings to the State in that cases will be removed from the system.
14. There is no reason to not have arbitration available as an option.



Westlaw.

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Supreme Court of Connecticut.
 Carole Ann MASTERS
 v.
 Samuel Saunders MASTERS.

Argued June 4, 1986.
 Decided Aug. 12, 1986.

Former husband filed a motion to vacate an arbitration award which resolved a dispute over the former husband's compliance with the terms of the child support provisions contained in a separation agreement which had been incorporated into the judgment dissolving the parties' marriage. The Superior Court, Judicial District of Tolland, Kelly, J., denied the motion, and the former husband appealed. The Supreme Court, Peters, C.J., held that: (1) neither separation agreement as a whole nor child support provisions which were at issue before arbitrator were tainted by alleged fraud committed by the parties with respect to provision concerning children's primary residence and therefore trial court did not err in refusing to vacate arbitration award on the ground that the court's approval of the underlying separation agreement had been induced by parties' fraudulent misrepresentation, and (2) arbitrator's determination of husband's obligation under specific provisions of separation agreement to pay his daughter's nursery school and child care expenses and to pay for both children's enrichment programs did not represent an unacceptable intrusion into the exclusive province of the court.

No error.

West Headnotes

[1] Husband and Wife ⇌278(1)
 205k278(1) Most Cited Cases
 Invalidity or illegality of one provision in a separation agreement will not necessarily defeat the agreement as a whole.

[2] Husband and Wife ⇌278(1)

205k278(1) Most Cited Cases

If fraudulently induced provision of separation agreement can be severed from the rest of the agreement, then only that provision will be invalidated or modified.

[3] Arbitration ⇌76(3)

33k76(3) Most Cited Cases

Neither separation agreement as a whole nor child support provisions which were at issue before arbitrator were tainted by alleged fraud committed by the parties with respect to provision concerning children's primary residence and therefore trial court did not err in refusing to vacate arbitration award resolving disputed issues relating to child support on the ground that the court's approval of the underlying separation agreement had been induced by parties' fraudulent misrepresentation that the children would share the same primary residence.

[4] Arbitration ⇌56

33k56 Most Cited Cases

Arbitrator's determination of husband's obligation under specific provisions of separation agreement to pay his daughter's nursery school and child care expenses and to pay for both children's enrichment programs did not represent an unacceptable intrusion into the exclusive province of the court.

[5] Arbitration ⇌57.1

33k57.1 Most Cited Cases

(Formerly 33k57)

If a challenge to an award is made on ground that arbitrator has exceeded his powers, courts need only examine the submission and the award to determine whether the award conforms to the submission.

[6] Arbitration ⇌29.6

33k29.6 Most Cited Cases

Arbitrator did not exceed his powers as defined by separation agreement in ordering former husband to pay nursery school, child care, and child enrichment expenses in the future.

[7] Arbitration ⇌29.3

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33k29.3 Most Cited Cases

[7] Arbitration ↪ 63.3
33k63.3 Most Cited Cases
(Formerly 33k63)

Where the submission does not otherwise state, arbitrators are empowered to decide factual and legal questions and an award cannot be vacated on grounds that the construction placed upon the facts or the interpretation of the agreement by arbitrators was erroneous.

*51 **105 Bruce S. Beck, Manchester, for appellant (defendant).

Carole Ann Masters, pro se, appellee (plaintiff).

Before *50 PETERS, C.J., and HEALEY, SHEA, SANTANIELLO and CALLAHAN, JJ.

*51 PETERS, Chief Justice.

The principal issues in this appeal are the validity of a separation agreement allegedly procured by fraud and the enforceability of one provision in that agreement authorizing arbitration for disputes over child support. The plaintiff, Carole Ann Masters, and the defendant, Samuel Masters, were granted a decree dissolving their marriage on June 2, 1983. Subsequently, when a dispute arose over the defendant's compliance with the terms of the child support provision contained in a separation agreement which had been incorporated into the judgment, the plaintiff, pursuant to another provision of the agreement, filed a demand for arbitration. Following a hearing, the arbitrator entered an award on January 16, 1985, granting the plaintiff most of the relief she had requested. The defendant then filed a motion to vacate the arbitration award, which the trial court denied on March 4, 1985. The defendant has appealed from the denial of this motion. [FN1]

FN1. At the time the trial court denied the defendant's motion to vacate the award, it simultaneously granted the plaintiff's motion to confirm the award. The defendant has appealed from both rulings under the authority of General Statutes § 52-423 which provides: "Sec. 52- 423. APPEAL. An appeal may be taken from an order confirming, vacating, modifying

or correcting an award, or from a judgment or decree upon an award, as in ordinary civil actions."

*52 The underlying facts are undisputed. In early 1983, in preparation for a mutually agreed-upon divorce, the plaintiff and the defendant contacted an attorney for assistance in drawing up a separation agreement. [FN2] This agreement, signed by both parties on May 31, 1983, provided for a distribution of assets, joint custody of two minor children, the payment of various expenses relative to the children's upbringing, and the arbitration of "[a]ny controversy or claim arising out of our [sic] relating to [the] agreement or the breach thereof."

FN2. This attorney officially represented only the defendant in the dissolution action, while the plaintiff, also an attorney, appeared pro se. The defendant claims, however, that the attorney actually advised both parties on the composition of the separation agreement. Throughout this opinion, we shall refer to this attorney as the defendant's attorney.

Two days after the signing of the agreement, the plaintiff, herself an attorney, and the defendant's attorney appeared before the trial court, *Kelly, J.*, for a hearing on the dissolution action. The trial court expressed concern that the separation agreement appeared to provide that the children would have separate residences, the son to live with the defendant and the daughter to live with the plaintiff. In response to the court's inquiry, the plaintiff testified that it was the parties' intention to continue to share the family residence with the children for "as long as we are able to continue that relationship," and to "do everything to prevent separating the children." At the request of the defendant's attorney, the court then passed the matter to permit the parties to amend the agreement to provide **106 for a common primary residence for both children. [FN3]

FN3. The parties had also failed to submit to the court a sworn financial statement, and the court indicated that it intended to pass the matter to permit the parties to prepare one.

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*53 During the recess, the parties inserted a sentence into the agreement stating that "the primary residence of both children shall be with the wife." When the parties returned to court shortly thereafter, the trial court found the amended agreement to be fair and equitable. See General Statutes § 46b-66. [FN4] The court then rendered judgment dissolving the marriage, granting the parties joint custody of the children with their primary residence with the plaintiff, and incorporating the provisions of the separation agreement into the judgment.

FN4. "[General Statutes] Sec. 46b-66. (Formerly Sec. 46-49). REVIEW OF AGREEMENTS; INCORPORATION INTO DECREE. In any case under this chapter where the parties have submitted to the court an agreement concerning the custody, care, education, visitation, maintenance or support of any of their children or concerning alimony or the disposition of property, the court shall inquire into the financial resources and actual needs of the spouses and their respective fitness to have physical custody of or rights of visitation with any minor child, in order to determine whether the agreement of the spouses is fair and equitable under all the circumstances. If the court finds the agreement fair and equitable, it shall become part of the court file, and if the agreement is in writing, it shall be incorporated by reference into the order or decree of the court. If the court finds the agreement is not fair and equitable, it shall make such orders as to finances and custody as the circumstances require. If the agreement is in writing and provides for the care, education, maintenance or support of a child beyond the age of eighteen, it may also be incorporated or otherwise made a part of any such order and shall be enforceable to the same extent as any other provision of such order or decree, notwithstanding the provisions of section 1-1d."

Immediately after the hearing, the parties, without the court's knowledge, inserted yet another sentence into the agreement deleting the earlier reference to

the children's primary residence. Approximately one month later, the defendant and the minor son moved out of the parties' joint home, where the plaintiff and the minor daughter continued to reside.

In September, 1984, the plaintiff filed with the American Arbitration Association a demand for arbitration, claiming that the defendant had failed to comply with provisions of the agreement relating to child support, *54 alimony, and property division. Following the trial court's denial of the defendant's motion for an injunction staying the arbitration, an arbitration hearing was held on December 13, 1984. On January 16, 1985, the arbitrator entered an award granting the plaintiff most of the relief she had requested. The defendant subsequently moved, pursuant to General Statutes § 52-420, to vacate the award, claiming that the underlying separation agreement had been procured by fraud and that the arbitrator had exceeded his powers. [FN5] After a hearing on March 4, 1985, the trial court, *Kelly, J.*, denied the defendant's motion, holding that the defendant had not "shown [anything] that would ... suggest that the Court should not confirm the award."

FN5. The defendant also claimed that the arbitrator had "imperfectly executed his power" and that he had "failed to consider or take into account the reasons for the Defendant's failure to pay" the disputed expenses. The trial court also denied the motion based on these grounds. The defendant has not pursued these claims on appeal.

On appeal from this ruling, the defendant raises three claims of error. He claims that the trial court should have vacated the arbitration award because: (1) the court's approval of the underlying separation agreement on which the award was based had been procured by fraud; (2) the disputed issues relating to child support were not properly arbitrable as a matter of law and public policy; and (3) the arbitrator had exceeded his authority by issuing an award which did not conform either to the submission or to the agreement. We find no error.

**1071

The defendant first claims that the trial court erred in refusing to vacate the arbitration award because

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the court's approval of the underlying separation agreement had been induced by the parties' "fraudulent misrepresentation" that the children would share the same *55 primary residence. The defendant argues that, as a result, the entire underlying agreement should be voided, and the arbitration award which was premised upon that agreement should be declared a nullity. The defendant first raised this claim in a motion for an injunction to stay the arbitration proceedings, and again in a motion to vacate the arbitration award. Both motions were denied.

Details of the alleged fraud were brought to the court's attention during the March, 1985, hearing on the defendant's motion to vacate the award. At this hearing, the defendant testified that the parties had never intended the children to live together after the dissolution of the marriage. He stated that the parties' contrary representations to the court and their amendment to the original agreement had been motivated solely by their desire to obtain court approval of the agreement in the face of the court's express reluctance to separate the children. He argued therefore that, since the court's approval of the agreement as fair and equitable; see General Statutes § 46b-66; *Costello v. Costello*, 186 Conn. 773, 776, 443 A.2d 1282 (1982); *Hayes v. Beresford*, 184 Conn. 558, 567-68, 440 A.2d 224 (1981); had been predicated on a false assumption, the entire agreement should be voided. The trial court denied the defendant's motion, holding that, even if the alleged misrepresentation to the court was sufficient to vitiate the primary residence provision, it did not affect the agreement as a whole or the individual unrelated provisions at issue in the arbitration.

On appeal, the defendant claims that the trial court's ruling is erroneous both in its holding that the alleged fraud had not vitiated the agreement as a whole, and in its finding that the provision concerning the children's residence was unrelated to the support provisions at issue in the arbitration proceedings.

*56 We begin our analysis of the defendant's claim by agreeing with his basic proposition that any intentional misrepresentation made in the context of a court proceeding is a serious matter with potentially serious repercussions. We have

frequently stated that the trial court's ability to conduct a meaningful inquiry into the substance, fairness, and equity of a separation agreement depends upon the "absolute accuracy of the ... information furnished by the parties to one another and to the court." *Jucker v. Jucker*, 190 Conn. 674, 677, 461 A.2d 1384 (1983); *Baker v. Baker*, 187 Conn. 315, 321-23, 445 A.2d 912 (1982); *Monroe v. Monroe*, 177 Conn. 173, 183-84, 413 A.2d 819, appeal dismissed, 444 U.S. 801, 100 S.Ct. 20, 62 L.Ed.2d 14 (1979). We do not take lightly, nor can we, any misrepresentation or concealment of essential information upon which the trial court must rely in fashioning a decree; *Kenworthy v. Kenworthy*, 180 Conn. 129, 131, 429 A.2d 837 (1980); *Casanova v. Casanova*, 166 Conn. 304, 305, 348 A.2d 668 (1974); and have not hesitated to order an opening or modification of a judgment induced by fraud when the circumstances have warranted it. See *Jucker v. Jucker*, supra, 190 Conn. 677, 461 A.2d 1384; *Baker v. Baker*, supra, 187 Conn. 323, 445 A.2d 912; *Kenworthy v. Kenworthy*, supra, 180 Conn. 131, 429 A.2d 837; *Varley v. Varley*, 180 Conn. 1, 4, 428 A.2d 317 (1980).

Nevertheless, not every allegation of fraud is sufficient to justify the setting aside of all or part of a separation agreement. *Jucker v. Jucker*, supra, 190 Conn. 677-78, 461 A.2d 1384. In this case, for the defendant to prevail on his claim, he must establish first, by clear and satisfactory proof; see *Alaimo v. Royer*, 188 Conn. 36, 39, 448 A.2d 207 (1982); *Miller v. Appleby*, 183 Conn. 51, 55, 438 A.2d 811 (1981); that a fraud was perpetrated on the court, and then, if so, that this fraud induced **108 the trial court to approve the agreement. *Jucker v. Jucker*, supra, 190 Conn. 677, 461 A.2d 1384; *Varley v. Varley*, supra, 180 Conn. 4, 428 A.2d 317.

*57 The defendant contends that the first requirement has been satisfied by the trial court's finding of fraud at the hearing on the motion to vacate. A review of the transcript of the hearing as a whole, however, reveals that, contrary to the defendant's assertion, the trial court made no express finding of fraud. Although at several points the court did discuss the ramifications of such a misrepresentation, most of the references to fraud were couched in conditional or hypothetical

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terms. Significantly, the trial court ruled on the defendant's motion before the plaintiff had even presented her side of the case. [FN6]

FN6. During the hearing on the defendant's motion, the trial court impliedly indicated that, since it considered the provision concerning the children's residence to be severable from the agreement as a whole, it did not have to determine whether a fraud had been committed, or if so, by whom. The Court: "Well, I .. I agree, and I think that if the issue today was whether or not Mrs. Masters is to be held in contempt for failure to allow that child to reside with her, *I'd want to know all these things*. And I'd want [the defendant's former attorney] here. But I don't think that's the issue today." (Emphasis added.) Consequently, the court made its ruling without any testimony from either the plaintiff or the defendant's former attorney. The defendant characterizes one sentence in the course of the entire hearing as a "finding" of fraud. The preceding and subsequent discussion indicates, however, that the trial court specifically refrained from making a finding on this issue, and instead merely assumed fraud *arguendo* as a prelude to denying the defendant's motion on the grounds of severability.

The defendant appears to suggest that his testimony at the hearing, in which he admitted that the parties had intentionally deceived the court, was sufficient to establish fraud on the part of the plaintiff. In fact, the defendant's testimony established nothing more than that *he* had intended to deceive the court. It would be bizarre indeed if the defendant were permitted to profit from his admittedly duplicitous behavior by escaping his obligations to support his children. See *Hooker v. Hooker*, 130 Conn. 41, 50-51, 32 A.2d 68 (1943). It is important to note that the plaintiff has never admitted an intent to deceive the court. On the contrary, at oral *58 argument before this court, the plaintiff presented an explanation for her actions which differed dramatically from the defendant's version, and this explanation was consistent both with her testimony at the dissolution hearing and with the conduct of the parties immediately thereafter. [FN7] Since the

trial court ruled on the defendant's motion before the plaintiff had had an opportunity to deny the defendant's allegations, and since the alleged fraud revolved around the parties' future intentions rather than around readily proven facts, we have no way of reconciling the conflicting versions. Our resolution of the second part of this claim, however, makes it unnecessary for us to resolve this issue. Accordingly, we will assume *arguendo*, as did the trial **109 court, that the defendant satisfied his burden of establishing that a fraud had been perpetrated on the court.

FN7. The plaintiff claimed at oral argument that it was her belief and intent that the parties would continue to share the family home with the children after the dissolution, and that she was surprised when the defendant moved out several weeks later in order to remarry. She stated at oral argument that she had agreed to delete the residency provision at the defendant's urging with a mutual understanding that this action would have no effect on the court's judgment. The plaintiff had also testified at the dissolution hearing that the parties intended to remain in the family home, for "as long as we are able to continue that relationship." The defendant conceded at the hearing on his motion to vacate the award that the parties returned to their joint home after the dissolution and continued to reside together for approximately one month until he moved out.

In his testimony at the hearing, the defendant also claimed that his attorney knew of the parties' intent to separate the children, and yet advised the parties to insert and then delete the clause concerning the children's residence in order to induce the trial court to approve the agreement. This attorney was not called as a witness to provide an explanation for his actions, and the trial court carefully refrained from making any finding concerning his alleged participation in the deception. This opinion is not to be construed as condoning the attorney's actions, if the defendant's allegations are true, nor do we foreclose

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the possibility of further inquiry into his conduct in the proper forum.

The trial court held that any fraud which may have occurred applied only "to the narrow issue of principal *59 residence of the child[ren]," and did not vitiate either the agreement as a whole or the specific provisions at issue in the arbitration. In reaching this conclusion, the court found that the clause allegedly tainted by fraud was severable from the rest of the agreement. Since the provision concerning the children's residence was separate and distinct from the provisions at issue in the arbitration, the court rejected the defendant's argument that the arbitration award should be vacated on this ground.

It is important to note at the outset the procedural posture in which this claim was presented to the trial court. The defendant did not move to open the judgment in full or in part on the ground of fraud. See *Lucisano v. Lucisano*, 200 Conn. 202, 206, 510 A.2d 186 (1986); *Jucker v. Jucker*, supra, 190 Conn. 675, 461 A.2d 1384. Instead, he raised his claim of fraud solely in the context of his opposition to the arbitration proceeding and subsequent award. In denying the defendant's motions, the trial court thus focused primarily on the relationship between the provision establishing the children's residence and the separate and distinct provisions at issue in the arbitration. Although it is beyond dispute that the trial court has the inherent power to open, sua sponte, a judgment which has been procured by fraud; *Baker v. Baker*, supra, 187 Conn. 323, 445 A.2d 912; *Kenworthy v. Kenworthy*, supra, 180 Conn. 131, 429 A.2d 837; it was entirely proper for the court to consider the issue before it in the context in which it was raised. Consequently, our review of the trial court's ruling will take place in the same context.

[1] It is a basic principle of law that the invalidity or illegality of one provision in a separation agreement will not necessarily defeat the agreement as a whole. Clark, *Law of Domestic Relations* (1968) § 16.5, p. 534. "[A]s long as the invalid portions of an agreement are separable from the valid portions, the valid portions remain viable...." 2 Lindey, *Separation Agreements and *60 Ante-Nuptial Contracts* (1986), p. 33-1; *Ferro v. Bologna*, 31 N.Y.2d 30, 36, 334 N.Y.S.2d 856, 286

N.E.2d 244 (1972); see *California State Council of Carpenters v. Superior Court*, 11 Cal.App.3d 144, 157, 89 Cal.Rptr. 625 (1970).

[2] When the issue of severability is raised in the context of a fraudulent misrepresentation concerning one provision of a separation agreement, the rule remains the same: if the fraudulently induced provision can be severed from the rest of the agreement, then only that provision will be invalidated or modified. *Baker v. Baker*, supra, 187 Conn. 323 n. 7, 445 A.2d 912 n. 7 (fraud concerning financial information did not affect the validity of the judgment concerning custody or support of the children); *In re Marriage of Madden*, 683 P.2d 493, 494-96 (Mont.1984) (fraud in financial provisions resulted in modification of property division only, not child custody provision); *Lopez v. Lopez*, 63 Cal.2d 735, 738, 48 Cal.Rptr. 136, 408 P.2d 744 (1965) (fraud in property provisions permitted a modification of the affected sections only, not of the judgment as a whole). The issue before us, therefore, is whether the trial court erred in finding that the alleged fraud concerning the children's residence affected only that individual provision or whether, as the defendant argues, it vitiated the entire agreement.

[3] We conclude that the trial court did not err in deciding that neither the agreement as a whole nor the provisions at issue in the arbitration had been tainted by the alleged fraud. In reaching this conclusion, we attach special significance to the fact that the trial judge who presided at the hearing on the defendant's motion to vacate was the same trial judge who had presided at the dissolution proceeding. While the defendant may speculate about the importance of the residency provision **110 to the trial court's approval of the entire separation agreement, the trial judge who approved that *61 agreement obviously possessed special insight into the relative weight he attached to each provision. His conclusion that the remaining portions of the agreement were unaffected by the alleged misrepresentation is strong evidence that approval of the agreement in toto was not inextricably linked to the provision concerning the children's residence.

This conclusion is buttressed by an examination of the agreement itself. The terms of this document

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express an intent on the part of the plaintiff and the defendant to divide their assets evenly, to split the ordinary expenses occasioned by childraising, [FN8] and to share the decision-making responsibilities connected with their children's upbringing. There is nothing in the agreement to suggest that any of these provisions depended on the location of the children's residence. On the contrary, all of these terms appear equally viable regardless of the actual residence of the children. In fact, we are hard-pressed to imagine what changes the trial court might have made to the remainder of the agreement if it had been aware that the parties planned to provide separate residences for the children. [FN9] The trial court could reasonably have found the remainder of the agreement to be fair and equitable despite a misrepresentation of intent on the issue of the children's residence. We hold, therefore, that the trial court did not err in concluding that the alleged misrepresentation affected only the residency provision and did not vitiate the rest of the agreement.

FN8. As discussed more fully in Part II, *infra*, Section VIII of the agreement provided for the defendant to assume full responsibility for the children's education, child care, and enrichment expenses.

FN9. The judgment as entered states that "the primary residence of both children [will be] with Carole Ann Masters." This judgment was not, of course, affected by the parties' subsequent deletion from the separation agreement of the reference to the children's residence.

The defendant's related argument that the plaintiff should be barred from enforcing the agreement because *62 she has "unclean hands" merits little discussion. In the first place, there was no clear and satisfactory proof that the plaintiff had intentionally deceived the court. More to the point, however, the defendant has admitted that he participated in the alleged fraud on the court. At best, then, the defendant has alleged collusion between the parties. Under general principles of equity in such situations, "[t]he law will leave the parties in the position in which it finds them." *Hooker v. Hooker*, *supra*, 130 Conn. 51, 32 A.2d 68; see *Hall v. Hall*, 455 So.2d 813, 815 (Ala.1984).

We decline to permit the defendant to profit from his admitted fraud by avoiding his responsibilities under the agreement.

II

[4] The defendant next challenges the legality of submitting to arbitration disputes concerning the payment of educational and child care expenses. Under Section VIII of the separation agreement, which details the parties' child support obligations, the defendant was required to "pay all expenses for both children of ... tutoring, enrichment programs (as defined in Section VI above), vacation activities, child care ... [and] all nursery school tuition for [the minor daughter] until she enters kindergarten." Under Section XIV, the parties agreed to submit to arbitration "[a]ny controversy or claim arising out of [or] relating to this agreement or the breach thereof..." Invoking this latter provision, the plaintiff, in September, 1984, filed a demand for arbitration, claiming that the defendant had "failed to pay the sums he owe [d]" relating to the daughter's nursery school and child care expenses, and to both children's enrichment expenses. Although the defendant does not dispute that the agreement authorized arbitration of these issues, he argues that such subjects are exclusively within the province of the trial court as *parens patriae* and are **111 therefore not arbitrable as a matter of law and public policy. The defendant first *63 raised this claim in a motion to vacate the arbitration award. This motion was denied. [FN10]

FN10. The plaintiff contends that the defendant's participation in the arbitration hearing without first having challenged the arbitrability of the disputed issues constituted a waiver of his right to object on this ground following the award. The plaintiff does not dispute that the defendant raised the question of arbitrability during the hearing on his motion to vacate the arbitration award, or that the trial court considered and rejected this objection in denying the defendant's motion. However, citing our decisions in *Schwarzschild v. Martin*, 191 Conn. 316, 323, 464 A.2d 774 (1983); *New Britain v. Connecticut State Board of Mediation and Arbitration*, 178 Conn. 557, 560-61, 424 A.2d 263 (1979); and *Waterbury Board of*

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Education v. Waterbury Teachers Assn., 168 Conn. 54, 61-62, 357 A.2d 466 (1975); the plaintiff argues that the trial court should not have considered this argument by the defendant, and that we "should therefore refuse to consider [this] argument on appeal." A review of the transcript of the hearing on the defendant's motion, however, reveals that, although the plaintiff did object to the defendant's raising of the issue of arbitrability on other grounds, she did not distinctly raise the claim of waiver before the trial court. Consequently, we decline to consider it on appeal. Practice Book § 3063; *Bieluch v. Bieluch*, 199 Conn. 550, 554, 509 A.2d 8 (1986).

It is important to clarify precisely what the defendant does and does not claim. The defendant does not argue that child support per se is not arbitrable, nor does he claim that the arbitrator directly considered the issue of the children's custody in fashioning his award. Instead, the defendant focuses on the provision of the agreement giving him the right to "consult and agree" with the plaintiff on matters relating to the children's upbringing. [FN11] According to the defendant, that provision affords him custodial rights that bear upon his obligation to pay nursery school, child care, and enrichment expenses and that require any inquiry into *64 such support obligations to consider the best interests of the child in a manner resembling a custody determination. Because as we conclude a court may not delegate its judicial responsibility for the resolution of custody disputes, and because judicial review of arbitration awards is statutorily limited; see § 52-418; [FN12] the defendant argues that the arbitrator in this case lacked the authority to award support payments to the plaintiff.

FN11. Section VI of the separation agreement provides in relevant part: "VI. *CUSTODY*: The parties shall consult and agree with each other with respect to the childrens' education and religious training, summer camp and other vacation activity selection, illnesses and operations (except in emergencies), health, welfare, enrichment programs, (music, skating,

dance, skiing, tennis, etc., with equipment appropriate to the level of achievement); academic tutoring; and other matters of similar importance affecting the children, whose well-being, education and development shall at all times be the paramount consideration of the Husband and Wife."

FN12. "[General Statutes] Sec. 52-418. *VACATING AWARD*. (a) Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when the court is not in session, any judge thereof, shall make an order vacating the award if it finds any of the following defects: (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of any arbitrator; (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made. "(b) If an award is vacated and the time within which the award is required to be rendered has not expired, the court or judge may direct a rehearing by the arbitrators."

The trial court rejected this argument. It held that the issues of support considered by the arbitrator were not "so necessarily entwined with custody and with approval of ... the defendant that [they] deprive[d] the arbiter of jurisdiction." The issue before us, therefore, is whether the trial court erred in its conclusion that the arbitrator's determination of the defendant's support obligations under the separation agreement did not represent an unacceptable intrusion into the exclusive province of the court.

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**112 We agree with the defendant that the ultimate responsibility for determining and protecting the best interests of children in family disputes rests with the *65 trial court and not with the parties to a dissolution action. Although General Statutes § 46b-66 recognizes the right of private parties to enter into agreements "concerning the custody, care, education, visitation, maintenance or support of any of their children," that same statutory provision empowers the trial court to reject or modify any such agreement which it determines is not "fair and equitable." *North v. North*, 183 Conn. 35, 38, 438 A.2d 807 (1981); In addition, § 46b-56 [FN13] grants the trial court continuing jurisdiction to "make or modify any proper order regarding the education and support of the children and of care, custody and visitation"; General Statutes § 46b-56(a); according to the court's perception of the "best interests of the child." General Statutes § 46b-56(b); *66*Sillman v. Sillman*, 168 Conn. 144, 149, 358 A.2d 150 (1975). This judicial responsibility cannot be delegated, nor can the parties abrogate it by agreement. *Guille v. Guille*, 196 Conn. 260, 263-64, 492 A.2d 175 (1985); *Yontef v. Yontef*, 185 Conn. 275, 292-93, 440 A.2d 899 (1981); see 1 Lindey, *supra*, pp. 14-90, 14-168; Clark, *supra*, § 16.10, p. 549. In the final analysis, the court retains jurisdiction to determine and advance the best interests of the child.

FN13. General Statutes § 46b-56 provides in relevant part:

"Sec. 46b-56. (Formerly Sec. 46-42).
SUPERIOR COURT ORDERS RE
CUSTODY AND CARE OF MINOR
CHILDREN IN ACTIONS FOR
DISSOLUTION OF MARRIAGE,
LEGAL SEPARATION AND
ANNULMENT. ACCESS TO RECORDS
OF MINOR CHILDREN BY
NONCUSTODIAL PARENT. (a) In any
controversy before the superior court as to
the custody or care of minor children, and
at any time after the return day of any
complaint under section 46b-45, the court
may at any time make or modify any
proper order regarding the education and
support of the children and of care,
custody and visitation if it has jurisdiction
under the provisions of chapter 815o.

Subject to the provisions of section 46b-56a, the court may assign the custody of any child to the parents jointly, to either parent or to a third party, according to its best judgment upon the facts of the case and subject to such conditions and limitations as it deems equitable. The court may also make any order granting the right of visitation of any child to a third party including but not limited to grandparents.

"(b) In making or modifying any order with respect to custody or visitation, the court shall be guided by the best interests of the child, giving consideration to the wishes of the child if he is of sufficient age and capable of forming an intelligent preference, provided in making the initial order the court may take into consideration the causes for dissolution of the marriage or legal separation if such causes are relevant in a determination of the best interests of the child.

"(c) In determining whether a child is in need of support and, if in need, the respective abilities of the parents to provide support, the court shall take into consideration all the factors enumerated in section 46b-84."

The trial court's continuing jurisdiction to assure the best interests of the child does not, however, resolve the question before us. What we must decide is whether each and every post-dissolution disagreement concerning child support is so centrally related to the best interests of the child that only a judge can resolve child support disputes. In addressing this question, we must recognize that conflicts frequently develop over relatively minor decisions relating to the day-to-day upbringing and support of minor children, conflicts which in reality reflect little more than a difference of opinion or preference between sometimes hostile parties. Exacerbated by the emotion charged atmosphere surrounding marital dissolutions; *Yontef v. Yontef*, *supra*, 185 Conn. 292, 440 A.2d 899; such differences of opinion may quickly reach an impasse. Frequent litigation of these minor disagreements leads to frustrating court delays; *Faherty v. Faherty*, 97 N.J. 99, 107-108, 477 A.2d 1257 (1984); and, because of the adversarial nature

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of traditional court proceedings, can work to heighten tensions and engender further conflict. Philbrick, "Agreements to Arbitrate Post-Divorce Custody Disputes," 18 Columbia J.L. & Soc.Probs. 419, 422-28 (1985). Where the issues involved do not themselves impact directly on the child's best interests, judicial resolution of each disagreement has been characterized as **113 burdensome and counterproductive. See *Faherty v. Faherty*, supra, 107-108, 407 A.2d 1257; Philbrick, supra, 424-33. In such situations, therefore, we should not categorically require the parties to submit all controversies about child support to a court.

*67 As in the case presently before us, arbitration proceedings are often represented to offer an effective and desirable alternative to judicial resolution of family disputes. Arbitration offers the disputants an informal setting, a muted adversarial tone and a speedy resolution of the issues that divide them. *Crutchley v. Crutchley*, 306 N.C. 518, 523, 293 S.E.2d 793 (1982); Philbrick, supra, 442-44; Spencer & Zammit, "Reflections on Arbitration Under the Family Dispute Services," 32 *Arbitra. J.* 111, 116 (1977); Holman & Noland, "Agreement and Arbitration: Relief to Over-Litigation in Domestic Relations Disputes in Washington," 12 *Willamette L.J.* 527, 527-28 (1976). When the best interests of children are at stake, however, these advantages must be balanced against the ramifications of limited judicial review of arbitration awards. In attempting to strike a proper balance between the two, courts and commentators have distinguished between issues relating to child custody and those relating to child support. Because determinations of custody go to the very core of the child's welfare and best interests, most courts prohibit arbitration of custody disputes. See *Nestel v. Nestel*, 331 N.Y.S.2d 241, 243, 38 A.D.2d 942 (2d Dept.1972); 1 *Lindey*, supra, pp. 29-19 through 29-20; Clark, supra, § 16.8, p. 545; Spencer & Zammit, supra, 116. On the other hand, because questions of child support generally do not involve "the delicate balancing of the factors composing the best interests of the child" required in custody determinations; *Nestel v. Nestel*, supra, 331 N.Y.S.2d 243; a number of courts permit support disputes to be resolved through arbitration. *Faherty v. Faherty*, supra, 97 N.J. 109, 407 A.2d 1257; *Nestel v. Nestel*, supra, 331 N.Y.S.2d 243; 1 *Lindey*, supra, p. 29-18; Spencer

& Zammit, supra, 116; Holman & Noland, supra, 535; annot., 18 A.L.R.3d 1264, 1269 (1968). To ensure that the court's ultimate, nondelegable responsibility to protect the best interests of the child is not shortcircuited by this process, some courts *68 have devised special provisions for court review, permitting a full de novo hearing under certain specified circumstances. See *Faherty v. Faherty*, supra, 97 N.J. 109-10, 407 A.2d 1257 (permitting de novo review if arbitration award adversely affects substantial best interests of child); *Sheets v. Sheets*, 254 N.Y.S.2d 320, 323-24, 22 A.D.2d 176 (1st Dept.1964) (permitting court review if award would have adverse affect on child).

In the present case, we conclude that the trial court correctly determined that the disputed issues were proper subjects for arbitration. These issues required a determination of the defendant's obligation under specific provisions of the separation agreement to pay his daughter's nursery school and child care expenses and to pay for both children's enrichment programs. [FN14] Such matters relate primarily to the defendant's support obligation. See *Hardisty v. Hardisty*, 183 Conn. 253, 261-65, 439 A.2d 307 (1981); *Cleveland v. Cleveland*, 165 Conn. 95, 98-101, 328 A.2d 691 (1973). The trial court was not bound to accept the defendant's effort to convert these questions into issues of custody. Arguably, even some child support disputes may require a best interests determination which is inappropriate for an arbitrator, but the defendant has not shown such special circumstances in this case. He has not **114 alleged that the nursery school his daughter attended, the babysitter hired to care for her, or the enrichment programs engaged in by both children in any way adversely *69 affected the children's welfare. Had such allegations been made, the court would have been required to undertake a further examination of the merits of the dispute. See *Faherty v. Faherty*, supra, 97 N.J. 109-10, 407 A.2d 1257. Here, however, the trial court could reasonably have concluded that the defendant's refusal to pay the contested expenses stemmed solely from his failure to agree with the plaintiff over the choice of the particular school or babysitter, [FN15] and that such a difference of opinion about fundamentally acceptable choices did not so implicate the best interests of the children as to require a judicial decision of this support dispute.

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Accordingly, we hold that the trial court did not err in finding that the child support issues presented to the arbitrator were properly arbitrable.

FN14. Section VIII of the separation agreement provides in relevant part: "VII. *SUPPORT* ... During precollege years, the Husband shall pay all expenses for both children of private school agreed upon for both children or required for either child due to extraordinary circumstances, tutoring, enrichment programs (as defined in Section VI above), vacation activities, child care and medical and dental care not paid by the insurance required hereunder to be maintained by Wife (including orthodonture, prescription drugs, corrective lenses, etc.) In addition, Husband shall pay all nursery school tuition for [the minor daughter] until she enters kindergarten."

FN15. The record before us does not contain the reason for the defendant's objection to the expenses. The defendant has not provided as part of the record the transcript of the hearing before the arbitrator.

III

The defendant's third claim is that, in ordering the defendant to pay nursery school, child care, and child enrichment expenses in the future, [FN16] the arbitrator exceeded his powers as defined by the separation agreement and the plaintiff's demand for arbitration. The defendant raised this claim in a motion to vacate the award. [FN17] This motion was denied.

FN16. The arbitration award provided in relevant part:

"6. The plaintiff's current expenses for child care ... Montessori School and enrichment programs are specifically found to be fair and reasonable and those contemplated by the parties at the time of making their original agreement, and, as such, an order of specific performance shall enter requiring the defendant to pay said expenses in the future or reimburse the plaintiff for the same within fifteen

(15) days of the demand being made during the term of their Agreement.

"7. The plaintiff's other prayers for relief have been considered by the Arbitrator and are denied. Her requests for educational and vacation expenses may be renewed for expenses which are incurred in the future providing said expenses can be shown to be reasonable and providing the defendant has consented to said expenses. The defendant's consent shall not be unreasonably withheld. The defendant's withholding of consent to expenses usually afforded children of parents of similar economic situations shall be deemed per se unreasonable."

FN17. The plaintiff argues that this claim is not reviewable on appeal because the defendant did not distinctly raise it before the trial court. A review of the transcript of the hearing, in conjunction with the defendant's motion and memorandum in support, indicates that the defendant raised this issue with sufficient clarity to alert the trial court to the nature of the claim. Consequently, we will review the claim on appeal.

[5] The principles governing the arbitration of disputes are well established. Because arbitration is a "creature of contract," the parties themselves ordinarily determine the issues to be decided and define the scope of the arbitrator's power. *Administrative & Residual Employees Union v. State*, 200 Conn. 345, 348, 510 A.2d 989 (1986); *Caldor, Inc. v. Thornton*, 191 Conn. 336, 341, 464 A.2d 785 (1983), *aff'd.*, 472 U.S. 703, 105 S.Ct. 2914, 86 L.Ed.2d 557 (1985); *Carroll v. Aetna Casualty & Surety Co.*, 189 Conn. 16, 20, 453 A.2d 1158 (1983). If a challenge to an award is made on the ground that the arbitrator has exceeded his powers, "courts need only examine the submission and the award to determine whether the award conforms to the submission." *Board of Education v. Waterbury Teachers Assn.*, 174 Conn. 123, 127, 384 A.2d 350 (1977); *Board of Education v. AFSCME*, 195 Conn. 266, 271, 487 A.2d 553 (1985); *Waterbury v. Waterbury Police Union*, 176 Conn. 401, 404, 407 A.2d 1013 (1979); *Ramos Iron Works, Inc. v. Franklin Construction Co.*, 174

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Conn. 583, 587-88, 392 A.2d 461 (1978); comment, "Arbitration in Connecticut: Issues in Judicial Intervention Under the Connecticut Arbitration Statutes," 17 Conn.L.Rev. 387, 406-407 (1985); note, "Judicial Interpretations **115 and Applications of the Connecticut Arbitration Statutes," 7 Conn.L.Rev. 147, 172-74 (1974).

*71 [6] After comparing the award to the submission, we conclude that the trial court correctly determined that the arbitrator did not exceed his powers in issuing his award. The defendant argues that, because the plaintiff, in her demand for arbitration, characterized the dispute as a controversy over sums *owed* by the defendant, she was precluded from obtaining an award of future payments. The defendant, however, takes too narrow a view of the submission. Since there was a written agreement between the parties to arbitrate all disputes arising from the separation agreement, [FN18] the submission in the present case consisted of a composite of the authorizing clause in the separation agreement and the plaintiff's demand for arbitration, [FN19] including her claim for relief, in which she asked, *inter alia*, for "[a]n order for specific performance of the Agreement *in the future* in accordance with its terms, with payment ... to be made: (a) by the first of each month for nursery school and child care expenses coming due that month; and (b) within ten (10) days after demand therefor in the case of all other expenses owed by [the defendant] pursuant to the Agreement." [FN20] (Emphasis added.) See *Ramos Iron Works, Inc. v. Franklin Construction Co.*, supra, 174 Conn. 588, 392 A.2d 461. The disputed arbitration *72 award ordered "specific performance ... requiring the defendant to pay [the disputed child care, nursery school, and child enrichment] expenses in the future ... within fifteen days of the demand being made." It is obvious from a comparison of this provision with the plaintiff's request for relief that the award conforms to the submission.

FN18. Section XIV of the separation agreement provides: "XIV. *ARBITRATION*: Any controversy or claim arising out of our [sic] relating to this agreement or the breach thereof shall be settled by arbitration in accordance with the rules then obtaining of the American Arbitration Association."

FN19. In her demand for arbitration filed with the American Arbitration Association, the plaintiff describes the "nature of the dispute" as: "NATURE OF DISPUTE: Samuel S. Masters has failed to pay the sums he owes pursuant to Sections VIII and X of the above-referenced contract (the 'Agreement') despite repeated requests therefor."

The plaintiff subsequently amended this statement to include alleged violations by the defendant of Section IX and an addendum to the agreement.

FN20. In her request for relief, as restated on December 13, 1984, the plaintiff also asked for reimbursement of the contested expenses, consequential damages, the return of certain property and bank accounts, the payment of two dollars in alimony as provided in the agreement, arbitration fees and expenses, and "[a]ll such other relief as the Arbitrator deems justified."

The defendant further argues, however, that, because the separation agreement entitles him to "consult and agree" with the plaintiff over issues relating to the children's education and welfare, the award of future payments deprives him of the power to participate in childraising decisions and thereby contradicts the express terms of the agreement itself. The trial court rejected this argument at the hearing on the defendant's motion.

[7] As the plaintiff vigorously argues, it is not at all clear that this claim is reviewable on appeal. The defendant appears to suggest that the arbitrator misinterpreted or misapplied the "consult and agree" provision in the agreement and thereby entered an erroneous award. Appellate review of arbitration awards, however, is statutorily limited to certain specific issues. See General Statutes § 52-418. "Where the submission does not otherwise state, the arbitrators are empowered to decide factual and legal questions and an award cannot be vacated on the grounds that the construction placed upon the facts or the interpretation of the agreement by the arbitrators was erroneous." *Waterbury v. Waterbury Police Union*, supra, 176 Conn. 404, 407 A.2d 1013; comment, "Arbitration in

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Connecticut," **116supra, 405- 409; see Domke, Commercial Arbitration (Rev.Ed.1984) §§ 34:00 through 34:02, pp. 475-79. The instant submission contains no limitations on the power of the arbitrator to interpret the agreement. To the extent that the defendant claims that the arbitrator misapplied or overlooked part of the agreement, then, appellate *73 review is foreclosed. However, since this is a case involving important issues of child care and support, we will interpret the defendant's claim broadly as a challenge to the arbitrator's authority to enter the award in the first place. Accordingly, we will address the merits of the claim on this basis.

The defendant's claim is premised on the assumption that, because the arbitration order requires him to pay the specified expenses as they accrue, he is effectively precluded from having any voice with regard to these aspects of his children's upbringing, regardless of what may happen in the future. This argument, however, misinterprets both the substance and the effect of the arbitrator's award. The disputed order states that "[t]he plaintiff's *current* expenses for child care ... [nursery school] and enrichment programs are specifically found to be fair and reasonable and those contemplated by the parties at the time of making their original agreement, and, *as such*, an order of specific performance shall enter requiring the defendant to pay said expenses in the future...." (Emphasis added.) Contrary to the defendant's assertion, this order does not foreclose his right to object to these payments in the future or to suggest changes if the circumstances warrant. Instead, by its terms, the order is based on the arbitrator's determination of the reasonableness of the expenses under the facts and circumstances *as they existed* at the time of the arbitration hearing. If those underlying facts or circumstances change, the defendant has the right to object to the payment of the expenses or to suggest alternatives, and to demand a new hearing to resolve the issue as it then exists.

The fact that the award looks to the future, in this limited respect, is no more than a recognition of the nature of the disputed expenses themselves. Since nursery school, child care, and enrichment programs are ongoing, it would be impractical and burdensome to *74 have a separate determination of

the reasonableness of the choices or expenses each time a related bill had to be paid. Consequently, the arbitrator's award can reasonably be construed as applicable only as long as the underlying circumstances support it. So interpreted, the arbitrator's award did not exceed the terms of the agreement. Consequently, the trial court did not err in denying the defendant's motion to vacate the award.

There is no error.

In this opinion the other Justices concurred.

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XVI. CHECKLIST ON ADVANTAGES OF ARBITRATION

With mutual consent, arbitration can be used to settle disputes both big and small between the two parties to a domestic dispute. The parties usually split the cost of the arbitrator. Here are some pointers to remember about why arbitration is worth considering in your case:

- Arbitrate anything. Other than the granting of a divorce, an arbitrator can do just about everything that a judge can do – custody, visitation, child support, alimony and equitable distribution. We can even use arbitration for decisions in disputes that involve just a part of a case, such as decisions in a joint custody dispute or valuation of items of personal property.
- No courtroom. The hearings are held outside the courthouse at a place of the parties' own choosing. Usually this is in the conference room of one of the lawyers' offices. Privacy is ensured; there is no audience of onlookers and the atmosphere is comfortable and less formal than a courtroom.
- You pick the decision maker. Instead of having the court system pick the judge for you, as in many judicial districts, the parties and their lawyers can actually choose who will decide their case. They frequently will choose a Fellow of the American Academy of Matrimonial Lawyers or a Family Law Specialist who is certified as an arbitrator, giving them a "judge" with the knowledge and expertise - - in family law and arbitration - - to handle the case properly. In fact, the arbitrator doesn't even have to be a lawyer - - you can choose an arbitrator whose background matches that of your case. If it's a visitation arbitration, why not try a psychologist or social worker? If the case involves a difficult business valuation, appoint a CPA or an economist.
- Efficiency. Efficiency means saving time and money - - and making smart use of the money and time you have. With arbitration we don't have to wait for the calendar to be printed and the court administrator to set your case for a hearing several months down the line. We don't have to show up for calendar call and then sit around and wait for the case to be heard – assuming it isn't "bumped" by another case. Ours is the only case on the docket! We get to choose the date and the time with most arbitrators, and there isn't a 30-60 day wait to get on the docket, either. Most of the time we can set a case on for an arbitration within two to four weeks of the request. All of that translates into 'money efficiency' for the client. It usually costs a client less money if the case is concluded promptly. That's just what arbitration can do. There are none of the delays associated with 'going to court.' You'll probably find that the money we save more than pays for the cost of the arbitrator, which is usually split 50-50 between the parties.
- Preparation. Preparation means we can take the case in stages if it's one with several issues, and setting up into separate hearings on different days. This gives us time to prepare separately for each one. In a custody case, we could deal with school issues on Monday, the psychologist's testimony on Wednesday, moms issues on Friday and dad's issues the following Tuesday. With an equitable distribution case, we can separately hear the issues of valuation, classification and distribution at different times, or we can put on evidence on separate dates as to the home, the spouse's business, the pension, and the personal property.
- Flexibility. There's much more flexibility available when the case is arbitrated, instead of tried in court. You don't have to stop at 5 p.m., which is when the courtroom closes down. You can work through lunch if you want. In fact, with the agreement of the parties and the arbitrator, the case can be heard in the evenings so that the parties don't have to take off time from work, or even on a Saturday. Try doing that in district court!

provide for other ADR methods if the parties contract for them.

There are three possible exceptions to the principle of nonmodification of substantive law. The Model Act recites "substantial change of circumstances," reflecting one State's principles for changing alimony, postseparation support, child support and child custody, in the special provisions for modifying awards involving these factors.⁵ Depending on a jurisdiction's⁶ rules on punitive damages and attorney fees, the Model Act may vary from those rules.⁷ *Commentaries* on these provisions note these possibilities and offer options. There may be other variances in the Act and proposed forms and rules between their texts and a jurisdiction's law; drafters should be alert to this possibility. There is no intent in the Model Act and its forms and rules to introduce substantive law changes. That is a job for the courts and the legislature of a particular jurisdiction.

Less than a dozen jurisdictions have legislation for family law arbitration, perhaps provisions added to their versions of the UAA.⁸ One of the more recent enactments is the North Carolina Family Law Arbitration Act, comprehensive, UAA-based legislation in force as

⁵ Model Act § 124A, following N.C. Gen. Stat. § 50-56 (2003); *see also* Part III.A.24A; 2004 AAML Arbitration Comm. Rep., note 1, Part III.A.16.

⁶ "Jurisdiction" is used throughout the analysis, rather than "State," which appears in Model Act texts taken from the RUAA; there are U.S. territories that are not states which may choose to adopt the Model Act, *e.g.*, the District of Columbia.

⁷ Model Act §§ 121(a), 121(b); *see also* Part III.A.21.

⁸ Colo. Rev. Stat. § 14-10-128.5 (Lexis/Nexis 2003) (incorporates by reference UAA, note 1; court retains ultimate control of custody, support issues, *In re Marriage of Popack*, 998 P.2d 464, 467-69 [Colo. App. 2000]); Mo. Ann. Stat. § 435.405.5 (West 2004 Cum. Ann. Pocket Pt.) (UAA amendment); Domestic Relations Arbitration Act, Mich. Comp. Laws Serv. §§ 600.5070-600.5082 (LexisNexis 2004 Supp.), construed in *Harvey v. Harvey*, 680 N.W.2d 835, 838-39 (Mich. 2004) (*per curiam*) (although Domestic Relations Arbitration Act allows arbitrating child custody, child support or parenting issues, circuit court retains authority to modify award to insure best interests of child; property settlement not before court); N.H. Rev. Stat. Ann. § 542:11 (1997); Okla. Stat. Ann. tit. 43, § 109H (West 2001); S.D. Codified Laws § 21-25B-2 (Lexis/Nexis 2003 Pocket Supp.); Tenn. Code Ann. §§ 36-6-402(1), 36-6-409 (LexisNexis 2001 Repl., 2003 Supp.); Tex. Fam. Code §§ 6.601, 153.0071 (Vernon 1998, 2002); Wash. Rev. Code §§ 7.06.020(2), 26.09.175 (West 1992, 2004 Cum. Ann. Pocket Pt.) (court-annexed arbitration); Wis. Stat. Ann. §§ 766.58(10), 802.12 (West 2001, 2003 Cum. Ann. Pocket Pt.) (arbitration under UAA). A New York bill would require mediation or arbitration in child custody disputes. Mark Boyko, *State Legislatures See Flood of ADR Bills in First Quarter of 2003*, 9 Disp. Res. Mag. 29 (No. 3, 2003). Fla. Stat. Ann. § 44.104(1-14) (West 2003) forbids voluntary binding arbitration of child custody; visitation or child support disputes.

model05.3 Dec. 27, 2004 draft

B. Suggestions for Forms Associated with Family Law Arbitration Act Practice

The suggested forms reprinted here follow those before the NCBA Board of Governors and the North Carolina General Assembly when the NCBA promoted, and the General Assembly adopted, the North Carolina Family Law Arbitration Act. The forms follow those commonly employed in arbitration, *e.g.*, forms prepared by the AAA. It is not necessary to enact these forms as legislation. The promoters of the FLAA submitted them to the NCBA and the General Assembly in the interest of transparency, to acquaint those less familiar with arbitration with what forms for FLAA arbitrations would look like and to explain the process of arbitration by agreement.

After the General Assembly enacted the FLAA, the forms were incorporated in a Handbook²³ that included the FLAA as enacted, and rules for arbitrations and other materials, to guide parties in a choice for arbitration under the Act. If the General Assembly enacts the FLAA amendments in 2005, the NCBA Family Law Section proposes publishing a revised Handbook.

Organizations analogous to the NCBA might consider publishing similar materials to promote Model Act passage and to help parties considering family law arbitration under the Model Act after its passage.

The suggested forms should work in jurisdictions choosing the RUAA-based Model Act (Parts II.A, III.A). For analysis of proposed forms, *see* Part III.B. Forms drafters should be aware of differences in their jurisdiction's Model Act version; developments in the law, *e.g.*, newer versions of forms; and practice needs of a particular jurisdiction. The North Carolina Handbook and its suggested forms were developed with family law practice of that State in mind and may not respond to family law arbitration issues elsewhere.

1. Basic Forms

a. Form A. Matters To Be Arbitrated; Number of Arbitrators (Two Options):

A. Arbitration. Any controversy or claim arising out of or relating to this contract, or the breach of this contract, shall be settled by arbitration, and judgment on the award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction, unless parties to the arbitration agree in writing pursuant to [Model Act § § 122] as to some or all issues submitted to arbitration that some or all parts of the award shall not be confirmed by any court having jurisdiction.

A. Arbitration. We, the undersigned parties, hereby agree to submit to arbitration the following controversy: [here describe briefly the controversy]. We agree that the controversy

²³ Handbook, note 9.

shall be submitted to one arbitrator. We agree that we will faithfully observe this Arbitration Agreement and the rules incorporated by reference or stated in this Arbitration Agreement, that we will abide by and perform any award the arbitrator renders, and that a judgment of a court having jurisdiction may be entered on the award, unless parties to the arbitration agree in writing pursuant to [Model Act § 122] as to some or all issues submitted to arbitration that some or all parts of the award shall not be confirmed by any court having jurisdiction.

b. Form B. Rules for Arbitration (Six Options):

B.1. Rules for Arbitration. The [name of jurisdiction] Basic Rules for Arbitrating Family Law Disputes (Basic Rules) shall apply to this Arbitration Agreement. The [name of jurisdiction] Optional Rules for Arbitrating Family Law Disputes shall not apply to this Arbitration Agreement.

B.2. Rules for Arbitration. The [name of jurisdiction] Basic Rules for Arbitrating Family Law Disputes (Basic Rules) shall apply to this Arbitration Agreement, except Basic Rules [here list numbered Basic Rules that the parties agree shall not apply]. The [name of jurisdiction] Optional Rules for Arbitrating Family Law Disputes shall not apply to this Arbitration Agreement.

B.3. Rules for Arbitration. The [name of jurisdiction] Basic Rules for Arbitrating Family Law Disputes (Basic Rules) and the [name of jurisdiction] Optional Rules for Arbitrating Family Law Disputes (Optional Rules) shall apply to this Arbitration Agreement.

B.4. Rules for Arbitration. The [name of jurisdiction] Basic Rules for Arbitrating Family Law Disputes (Basic Rules), and the [name of jurisdiction] Optional Rules for Arbitrating Family Law Disputes (Optional Rules), except Optional Rules [here list numbered Optional Rules that the parties agree shall not apply], shall apply to this Arbitration Agreement.

B.5. Rules for Arbitration. The [name of jurisdiction] Basic Rules for Arbitrating Family Law Disputes (Basic Rules), except Basic Rules [here list numbered Basic Rules that the parties agree shall not apply], and the [name of jurisdiction] Optional Rules for Arbitrating Family Law Disputes (Optional Rules) shall apply to this Arbitration Agreement.

B.6. Rules for Arbitration. The [name of jurisdiction] Basic Rules for Arbitrating Family Law Disputes (Basic Rules), except Basic Rules [here list numbered Basic Rules that parties agree shall not apply], and the [name of jurisdiction] Optional Rules for Arbitrating Family Law Disputes (Optional Rules), except Optional Rules [here list numbered Optional Rules that parties agree shall not apply].

c. Form C. Ethical Standards for Arbitrators:

C. Arbitrator Ethics. The [title of ethics code] shall apply to this Arbitration Agreement.

d. Form D. Site of Arbitration:

D. Place of the Arbitration. The arbitration shall be held at [here designate place of

arbitration, city, state, country if not within the United States].

e. Form E. Additional Provisions or Terms (Two Options):

E.1. Additional Provisions or Terms. These additional provisions or terms shall apply to arbitration pursuant to this Agreement, any provision in the Basic Rules or Optional Rules to the contrary notwithstanding: [NONE; alternative:

[1. Here state additional provisions, etc., in numbered paragraphs, with each subject in a separate paragraph.]

E.2. Additional Provisions or Terms. These additional provisions or terms shall apply to arbitration pursuant to this Agreement: [NONE; alternative:

[1. Here state additional provisions, etc., in numbered paragraphs, with each subject in a separate paragraph.]

2. Optional Forms

a. Rules for the Arbitration:

AA. Rules in Force for Arbitration. Notwithstanding Rule 1, the rules in force for the arbitration shall be the [complete title of] Rules for Arbitrating Family Law Disputes in force as of [the date of this agreement] [or a specific date selected by the parties], except as modified by ¶ [B. ---].

b. Number of Arbitrators:

BB. Number of Arbitrators. This controversy shall be submitted to [here insert odd number, e.g., three (3)] arbitrators. Each party shall choose one arbitrator, and the third arbitrator shall be chosen by the arbitrators chosen by the parties.

c. Consolidation:

CC. Consolidation of Arbitrations. This arbitration shall not be consolidated with other arbitrations.

C. Suggestions for Rules Associated with Family Law Arbitration Act Practice

The suggested rules reprinted here follow those that were before the NCBA Board of Governors and the North Carolina General Assembly when the NCBA promoted, and the General Assembly adopted, the FLAA. The rules follow those commonly employed in arbitration, e.g., rules prepared by the AAA. It is not necessary to enact these rules as legislation. The promoters of the FLAA submitted them to the NCBA and the General Assembly in the interest of transparency, to acquaint those less familiar with arbitration with what rules for FLAA

arbitrations would look like, and to explain the process of arbitration by agreement.

After the General Assembly enacted the FLAA, the rules were incorporated in a Handbook²⁴ that included the FLAA as enacted, forms for arbitrations and other materials, to guide parties in a choice for arbitration under the Act. If the General Assembly enacts the FLAA amendments in 2005, the NCBA Family Law Section proposes publishing a revised Handbook.

Organizations analogous to the NCBA might consider publishing similar materials to promote Model Act passage and to help parties considering family law arbitration under the Model Act after its passage.

The suggested rules should work in jurisdictions choosing the RUAA-based Model Act (Parts II.A, III.A). For analysis of proposed rules, *see* Part III.C. Rules drafters should be aware of differences in their jurisdiction's Model Act version; developments in the law, *e.g.*, newer versions of rules; and practice needs of a particular jurisdiction. The North Carolina Handbook and its suggested rules were developed with family law practice of that State in mind and may not respond to family law arbitration issues elsewhere.

Basic Rules for Arbitration of Family Law Disputes

1. Agreement of Parties; Primacy of Rules. These [name of jurisdiction] Basic Rules for Arbitrating Family Law Disputes (Basic Rules, or Rules) shall be a part of any arbitration agreement that states that these Rules shall apply to transactions covered by that agreement. If the parties execute two or more agreements to arbitrate, and other agreements to arbitrate declare that they are governed by other rules, these Rules shall govern if there is a conflict between the other agreements to arbitrate and other rules incorporated by reference in them. These Rules and any amendment of them shall apply in the form when a demand for arbitration or submission agreement is received by an opposing party. The parties may vary procedures set forth in these Rules by written agreement.

2. Number of Arbitrators. Unless the parties agree otherwise in writing, a single arbitrator shall be chosen by the parties to arbitrate matters in dispute.

3. Initiation Under Arbitration Provision in a Contract.

(a) Arbitration under an arbitration provision in a contract, *e.g.*, a premarital agreement, shall be initiated by the initiating party (the claimant), within the time specified in the contract(s), give written notice to the other party (the respondent) of claimant's intention to arbitrate (demand), which notice shall contain a statement setting forth the contract containing the agreement to arbitrate, the nature of the dispute, the amount involved, if any, the remedy or remedies sought, and the place of hearing designated in the contract. A respondent shall file with the claimant an answering statement, including any counterclaim, 30 days after receiving notice

²⁴ See note 9 and accompanying text.

from claimant.

(b) If respondent asserts a counterclaim, the counterclaim shall set forth the nature of the counterclaim, the amount involved, if any, and the remedy or remedies sought. Claimant may make an answering statement to a counterclaim.

(c) Failure to make an answering statement within 30 days after receiving notice from claimant shall be treated as a denial of the claim. Failure to make an answering statement within 30 days after receiving a counterclaim shall be treated as denial of the counterclaim.

(d) If an arbitrator has been appointed, the parties shall file copies of the demand and answering statement, including any counterclaim, at the same time a demand or answering statement is filed with the other party.

4. Initiation Under a Submission. Parties to an existing dispute may begin an arbitration under these Rules by filing a copy of the arbitration agreement or submission to arbitrate under these Rules, signed by the parties, with the arbitrator they have chosen pursuant to the arbitration agreement or submission to arbitrate. The agreement or submission shall contain a statement of the matter in dispute, the amount involved, if any, the remedy or remedies sought, an agreement on the arbitrator's compensation and expenses, and the place of the hearing.

5. Changes of Claim. After a claim or counterclaim has been filed, if either party desires to make any new or different claim or counterclaim, this claim or counterclaim must be in writing and sent to the other party, who shall have 30 days from the date of mailing to file an answer. If an arbitrator has been chosen, the arbitrator shall be mailed a copy at the same time. After the arbitrator has been appointed, no new or different claim or counterclaim may be submitted without the arbitrator's consent.

6. Administrative Conference; Preliminary Hearing; Mediation Conference.

(a) At any party's request or at the arbitrator's discretion, an administrative conference with the arbitrator and the parties and/or their counsel shall be scheduled in appropriate cases to expedite arbitration proceedings. The arbitrator may approve holding a conference by conference telephone call or similar means.

(b) In a large or complex case, at any party's request or at the arbitrator's discretion, the arbitrator may schedule a preliminary hearing with parties and/or their counsel to specify issues to be resolved, to stipulate as to uncontested facts, or to consider other matters to expedite the arbitration proceedings. The arbitrator may approve holding a preliminary hearing by conference telephone call or similar means.

(c) Consistent with the expedited nature of arbitration, at an administrative conference or preliminary hearing the arbitrator may establish (i) the extent of and schedule for production of relevant documents and other information, (ii) the scheduling of depositions, (iii) the scheduling of third party discovery, (iv) the scheduling of other discovery, (v) the identification of witnesses to be called, and (vi) a schedule for further hearings to resolve the dispute.

(d) If economic issues are involved, each party in the arbitrator's discretion shall exchange and file with the arbitrator, before the administrative conference or other hearing as the arbitrator directs, a full and complete financial statement on forms specified by the arbitrator.

Each party shall update these statements as necessary, unless the parties otherwise agree and the arbitrator approves. The arbitrator may set the schedule for filing and exchange of these statements and may require production and exchange of any other such information as the arbitrator deems necessary. Corruption, fraud, misconduct or submission of false or misleading financial information, documents or evidence by a party shall be grounds for imposing sanctions by the arbitrator or the court, and for vacating an award by the arbitrator.

(e) With the parties' consent, the arbitrator may arrange a mediation conference under principles stated in the [courts of the jurisdiction's] mediation rules. The mediator may not be an arbitrator appointed to the case. A consent under this rule must provide for the rules to be followed in the mediation and compensation for the mediator.

7. Site of the Arbitration.

(a) Parties may mutually agree in writing on a place where the arbitration shall be held.

(b) If parties have not mutually agreed in writing on a place the arbitration shall be held, and where any party requests that the arbitration be held in a specific place and the other party files no objection within 30 days after notice of the request has been sent to the arbitrator, that place shall be the one requested. If a party objects to the place requested by the other party, the arbitrator may determine the place, and the arbitrator's decision shall be final and binding.

(c) If the parties have mutually agreed in writing on a place where the arbitration shall be held, and a party later requests that the arbitration be held in another specific place because of serious inconvenience of a party or parties or of a witness or witnesses such that justice in the arbitration cannot be had, the arbitrator may, after receiving the request and a response from the other party filed within 30 days after receiving the request, determine the other place requested by a party, or a neutral site or sites. The arbitrator's decision shall be final and binding.

8. Date, Time and Place of Hearing. The arbitrator shall set the date, time and place for each hearing, unless the agreement to arbitrate or other written agreement of the parties specifies otherwise. The arbitrator shall send a notice of hearing at least 20 days before the hearing, unless otherwise agreed in writing by the parties. Attendance at a hearing waives notice of the hearing.

9. Representation. Any party may be represented by counsel. A party intending to be so represented shall notify the other party and the arbitrator of the name, postal and e-mail addresses and telephone and facsimile numbers of counsel at least 7 days before the date set for the hearing at which counsel is first to appear. When such counsel initiates an arbitration or responds for a party, notice is deemed to have been given.

10. Record of Arbitration.

(a) Unless the parties agree otherwise in writing, a party desiring a stenographic or other record shall make direct arrangements with a stenographer or other recording agency and shall notify other parties of these arrangements 7 days in advance of the hearing. Unless the parties agree otherwise in writing, the requesting party or parties shall pay the cost of the record.

(b) If the transcript or other recording is agreed by the parties to be, or is determined by

the arbitrator to be, the official record of the proceeding, the transcript or other recording must be made available to the arbitrator and to the other parties for inspection at a date, time and place determined by the arbitrator.

11. Attendance at Hearings. The arbitrator, the parties and their counsel shall maintain the privacy of the hearings unless the parties agree otherwise in writing, or the law provides otherwise. Any person having a direct material interest in the arbitration may attend hearings. The arbitrator shall otherwise have the power to require exclusion of any witness, other than a party or other essential person, during any other witness' testimony. The arbitrator has discretion to determine the propriety of attendance of any other person.

12. Postponements. The arbitrator, for good cause shown, may postpone any hearing upon a party's request in writing or upon the arbitrator's own initiative. The arbitrator shall grant a postponement upon written request of all parties. The arbitrator may impose costs incurred by parties or the arbitrator in connection with a postponement.

13. Oaths. Before proceeding with the first hearing, an arbitrator may take an oath or affirmation of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath or affirmation administered by any duly qualified person and, if required by law or requested by any party, shall do so. The arbitrator's oath or affirmation shall state names of parties to the arbitration agreement and shall be substantially in this form: [Name], being duly sworn or affirmed, hereby accepts this appointment, attests that the biography or other information submitted by the arbitrator to the parties [and the court] is accurate and complete; will faithfully and fairly hear and decide matters in controversy between the above-named parties, in accordance with their arbitration agreement, the [jurisdiction's code of arbitrator ethics, if any], and the rules incorporated into the parties' arbitration agreement; and will make an award according to the best of the arbitrator's understanding." The oath or affirmation shall be signed and dated by the arbitrator, who shall send copies to the parties and the court.

14. Majority Decision. All decisions of the arbitrators must be by a majority, unless the arbitration agreement provides otherwise. The award must also be made by a majority unless the concurrence of all is expressly required by the arbitration agreement or by law.

15. Order of Proceedings; Communication with Arbitrator.

(a) A hearing shall be opened by filing of the oath of the arbitrator, where required; by recording the date, time and place of the hearing, and the presence of the arbitrator, the parties, and their counsel, if any; and by the arbitrator's receipt of statement of the claim and answering statement, including any counterclaim, if any.

(b) At the beginning of the hearing the arbitrator may ask for statements clarifying the issues involved. In some cases part or all of these statements may have been submitted at the preliminary hearing conducted by the arbitrator pursuant to Rules 6(b), 6(c).

(c) The complaining party shall then present evidence to support that party's claim. The defending party shall then present evidence supporting its defense and counterclaim, if any, after

which the complaining party may present evidence supporting its response to the counterclaim. Witnesses for each party shall submit to questions or other examination. The arbitrator has the discretion to vary this procedure but shall afford a full and equal opportunity to all parties for presentation of material and relevant evidence.

(d) The arbitrator may receive exhibits in evidence when offered by a party.

(e) All witnesses' names and addresses and a description of exhibits in the order received shall be made a part of the record.

(f) There shall be no direct communication between parties and a neutral arbitrator other than at oral hearings, unless the parties and the arbitrator agree otherwise. Parties and a neutral arbitrator may agree in writing to simultaneous postal mail, electronic mail (e-mail), facsimile, telegram, telex, hand delivery or similar means of simultaneous communication.

(g) In custody-related issues, the arbitrator is authorized to interview a child privately to ascertain the child's needs as to custodial arrangements and visitation rights. In conducting such an interview, the arbitrator shall avoid forcing the child to choose between parents or to reject either of them. The arbitrator shall conduct this interview in the presence of counsel for the child, if the child has separate counsel, but not in the presence of the parents or their counsel.

(h) With approval of both parties in writing, the arbitrator may obtain a professional opinion relevant to the best interests of the child. Such an opinion shall be submitted to both parties and to counsel for the child if the child has separate counsel, in sufficient time for them to comment on the opinion to the arbitrator before the hearings are closed. The cost of the opinion shall be shared by the parties as agreed by the parties in writing; absent such agreement, the arbitrator shall decide on apportionment of this cost.

16. Arbitration in the Absence of a Party or Counsel for a Party. Unless the law provides to the contrary, the arbitration may proceed in the absence of a party or counsel who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

17. Evidence and Procedure.

(a) The parties may offer such evidence as is relevant and material to the dispute and shall produce evidence that the arbitrator deems necessary to an understanding and determination of the dispute.

(b) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon a party's request or independently.

(c) The arbitrator shall be the judge of the relevance and materiality of evidence offered.

(d) The rules of evidence and civil procedure shall be general guides in conducting the hearing. The arbitrator has discretion to waive or modify these rules to permit efficient and expeditious presentation of the case. The rules of privilege shall apply as in civil actions.

(e) Evidence shall be taken in the presence of all arbitrators and all parties, except where a party is absent in default or has waived the right to be present.

18. Evidence by Affidavits; Post-Hearing Filing of Documents or Other Evidence.

(a) The arbitrator may receive and consider evidence of witnesses by affidavit but shall give this evidence only such weight as the arbitrator deems it entitled to after considering objections made to its admission.

(b) If the parties agree in writing or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the arbitrator. All parties shall be afforded an opportunity to examine such documents or other evidence.

19. Inspection or Investigation. An arbitrator who finds it necessary to make an inspection or investigation in connection with the arbitration shall advise the parties. The arbitrator shall set the date, time and place and shall notify the parties. Any party desiring to do so may be present at such an inspection or investigation. If one or more parties are not present at the inspection or investigation, the arbitrator shall make a written report, unless the parties have agreed in writing to accept an oral report, to the parties and afford them opportunity to comment.

20. Provisional Remedies. The grant of provisional remedies shall be governed by the [name of jurisdiction] Family Law Arbitration Act.

21. Closing of Hearing.

(a) The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer, witnesses to be heard, or whether they wish to be heard in final argument. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed.

(b) If briefs are to be filed, the hearing will be declared closed as of the final date the arbitrator sets for receipt of briefs. If documents are to be filed as provided in Rule 18 and the date set for their receipt is later than that set for receipt of briefs, the later date shall be the date of closing the hearing.

(c) Unless the parties agree otherwise, the time limit within which the arbitrator must make the award shall begin to run upon the closing of the hearing.

22. Reopening Hearing. The hearing may be reopened on the arbitrator's initiative, or upon any party's application, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed by the parties in the contract out of which the controversy has arisen, the matter may not be reopened unless the parties agree in writing on an extension of time. When no specific date is fixed in the agreement to arbitrate or other written agreement, the arbitrator may reopen the hearing and shall have 30 days from the closing of the reopened hearing within which to make an award.

23. Waiver of Oral Hearing. The parties may provide by written agreement for waiver of oral hearings in any case. If the parties are unable to agree on the procedure, the arbitrator shall specify a fair and equitable procedure.

24. Waiver of Rules. A party who proceeds with the arbitration after knowledge that a

provision or requirement of these Rules has not been complied with and who fails to object in writing shall be deemed to have waived the right to object. An objection must be timely filed with the arbitrator with a copy sent to other parties.

25. Extensions of Time. The parties may modify any period of time by mutual agreement in writing. The arbitrator may for good cause extend any period of time established by these Rules, except the time for making the award. The arbitrator shall notify parties in writing of any extension.

26. Serving Notice.

(a) Parties shall be deemed to have consented that any papers, notices or process necessary or proper for initiation or continuation of an arbitration under these Rules; for any court action in connection therewith; or for entry of judgment on any award made under these Rules may be served on a party by mail addressed to the party or the party's counsel at the last known address or by personal service, in or outside the State where the arbitration is to be held, provided that reasonable opportunity to be heard with regard thereto has been granted to the party.

(b) The arbitrator and the parties may also use facsimile transmission, telex, telegram, electronic mail (e-mail), or other written forms of electronic communication to give notices permitted or required by these Rules.

27. Time of Award. The arbitrator shall make the award promptly and, unless otherwise agreed in writing by the parties or specified by law, no later than 30 days from the date of closing the hearing. If oral hearings have been waived pursuant to Rule 23, the arbitrator shall make the award no later than the day the arbitrator receives the parties' final submissions.

28. Form and Scope of Award.

(a) The award shall be in writing and dated and shall be signed by a majority of the arbitrators, with a statement of the place where the arbitration was conducted and where the award was made. It shall be executed in the manner required by law.

(b) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the parties' agreement, including but not limited to specific performance.

(c) Unless the parties agree otherwise in writing, the award shall state the reasons upon which it is based. Notwithstanding the parties' agreement in writing that an award shall not be reasoned, an arbitrator may determine that a reasoned award is appropriate, in his or her discretion.

(d) Unless the parties agree otherwise in writing, the arbitrators may not award punitive damages but may award interest and costs as permitted by law.

29. Award upon Settlement. If parties settle their dispute during the arbitration, the arbitrator may set forth the agreed settlement terms in an award, termed a consent award. A consent award shall allocate costs, including arbitrator fees and expenses.

30. Delivery of Award to Parties. Parties shall accept the placing of the award or a true copy of the award in first-class mail or electronic mail (e-mail) and addressed to a party or a party's counsel at the party's or counsel's last known address, personal service of the award, or filing of the award in any other manner permitted by law, as legal and timely delivery.

31. Release of Documents for Judicial Proceedings. The arbitrator, upon a party's written request, shall furnish to the party at that party's expense certified copies of any papers in the arbitrator's possession that may be required in judicial proceedings relating to the arbitration.

32. Applications to Court; Exclusion of Liability.

(a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) The arbitrator or an arbitration institution in a proceeding under these Rules are not necessary parties in judicial proceedings relating to the arbitration.

(c) Parties to proceedings conducted pursuant to these Rules shall be deemed to have consented that the judgment upon the arbitration award may be entered in any federal or State court having jurisdiction, unless the parties have agreed otherwise in writing as permitted by [Model Act § 122].

(d) The arbitrator and an arbitration organization shall be entitled to immunity as provided by law.

33. Expenses, Costs and Fees.

(a) Expenses of witnesses shall be paid by the party producing such witnesses. The parties shall bear equally all other expenses of the arbitration, including required travel and other expenses of the arbitrator and any witness and the cost of any proof produced at the arbitrator's direct request, unless the parties agree otherwise, or the arbitrator assesses these expenses or any part of them against a specified party or parties.

(b) To the extent provided by law, fees and expenses of counsel shall be included among costs of the arbitration.

(c) Other expenses, fees and costs, and sanctions, shall be paid as required by the [name of jurisdiction] Family Law Arbitration Act or other law, unless agreed in writing by the parties as permitted by that Act or other law.

34. Arbitrator's Compensation. The compensation of the arbitrator shall be agreed upon in writing by the parties and the arbitrator when the parties select the arbitrator.

35. Deposits. The arbitrator may require the parties to deposit, in advance of any hearing, such sums of money as the arbitrator deems necessary to cover expenses of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance at the close of the case.

36. Interpretation and Application of Rules. The arbitrator shall interpret and apply these Rules and any Optional Rules or special rules incorporated in the arbitration agreement. If

there is more than one arbitrator and a difference arises among them concerning the meaning or application of these Rules, and any Optional Rules or special rules incorporated in the arbitration agreement, the decision on meaning or application shall be decided by majority vote.

37. Time. Time periods prescribed under these Rules or by the arbitrator shall be computed in accordance with [jurisdiction's procedural rules or statutes].

38. Judicial Review and Appeal. No judicial review of errors of law in the award [as Model Act §§ 124(a)(7) and 128(b) provide] is permitted.

Optional Rules for Arbitrating Family Law Disputes

101. Nationality of Arbitrator. Where the parties are nationals or residents of different countries, any neutral arbitrator shall, upon either party's request, be chosen from among the nationals of a country other than that of any of the parties. This request must be made 30 days before the time set for appointment of the arbitrator as agreed by the parties or set by these Rules.

102. Interpreters. A party desiring an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the interpreter, unless the arbitration agreement specifies otherwise.

103. Language. The language of the arbitration shall be that of the documents containing the arbitration agreement. The arbitrator may order that any documents submitted during the arbitration that are in another language shall be accompanied by a translation into the language of the arbitration. The proponent of the document shall bear the cost of the translation, which may be assessed as a cost in the arbitration.

104. Experts.

(a) The arbitrator may appoint one or more independent experts to report in writing to the arbitrator on specific issues designated by the arbitrator and communicated to the parties.

(b) The parties shall provide the expert with any relevant information or produce for inspection any relevant documents or goods that the expert may require. A dispute between a party and the expert as to relevance of the requested information or goods shall be referred to the arbitrator for decision.

(c) Upon receipt of an expert's report, the arbitrator shall send a copy to all parties and shall give the parties an opportunity to express their opinion on the report in writing. A party may examine any document upon which the expert has relied in the report.

(d) At any party's request, the arbitrator shall give the parties an opportunity to question the expert at a hearing. Parties may present expert witnesses to testify on the points at issue during this hearing.

105. Law Applied. Subject to any choice of law clause or clauses in an applicable contract or other agreement and any law governing choice of law, the arbitrator shall apply the

substantive law of [jurisdiction whose Model Act is invoked] exclusive of [jurisdiction whose Model Act is invoked] conflict of laws principles.

106. **Class Actions.** Arbitrations under this agreement shall not be subject to consolidation with any class action subject to arbitration.

End of model05.3 go to model05.4

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March 6, 2005

Hon. Gerald M. Fox III
State Representative
Fox & Fox LLP
607 Bedford Street
Stamford, CT 06901-1502

Re: *Raised Bill No. 1194*
An Act Concerning Arbitration in Certain Family Relations Matters

Dear Representative Fox:

It is my understanding that the referenced bill enabling arbitration in divorce cases will be considered by the Judiciary Committee next week. The pending legislation is of sufficient importance that I feel compelled to communicate my strong support for this legislative change. I practice in a firm that devotes virtually all of its endeavors to matrimonial law. However, this legislation will be of no direct benefit either to me or my fellow family law attorneys. Rather, the beneficiaries will be our present and future clients, i.e. the members of the public. In this regard, I ask that you consider the following:

1. The opportunity to arbitrate is provided to all Connecticut civil litigants with one significant exception – those parties engaged in divorce cases. If one suffers personal injury; if there is money owed or property not delivered in a commercial venture; if one has a boundary dispute with his or her neighbor, the option of arbitration is available under C.G.S. §52-408. There is no logical reason why divorcing parties should be deprived of this option. Under the proposed bill, custody and child support will not be subject to the arbitration process. Arbitration would be limited solely to financial matters after issues of custody have been resolved. Thus, the proposed legislation provides an implicit incentive for those who want to engage in arbitration to reach agreement regarding issues concerning children. As children are often the innocent victims of divorce, the negotiated settlement of matters involving them can only inure to their advantage.

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State Representative
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2. Facilitating the use of arbitration in dissolution of marriage and legal separation actions is in keeping with a national trend increasing the use of alternative dispute resolution. Connecticut's family courts would enjoy lighter dockets, thus freeing judges to address in a speedier manner matters such as petitions under C.G.S. §46b-15 (involving spousal abuse) and custody disputes. Many divorcing parties experience the frustration of not being able to have pressing matters heard in an expeditious manner because of crowded dockets. As indicated, this bill would no doubt alleviate some of the docket pressure on our hardworking judiciary.

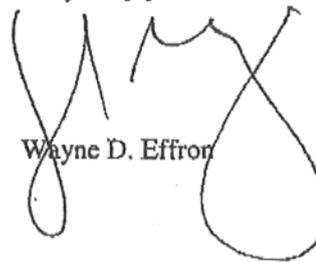
3. The arbitration process is less formal. This relative informality would likely ease tension for parties who are all too often already emotionally overburdened. In addition, arbitrated cases are often less expensive for the parties than are similar matters brought to trial. The arbitration process is frequently less time-consuming and can be concluded more quickly than cases which are litigated before a court.

4. Divorce cases are becoming increasingly complex. It is not uncommon for there to be difficult issues regarding business evaluation, taxation, patents, pensions and other financially challenging areas. Parties in complex commercial cases have the opportunity to select arbitrators with particular expertise. That choice should be similarly available to members of the public seeking a divorce or legal separation. My firm recently represented one of the parties in a divorce of substantial financial complexity. This case was resolved by a mediator who was not trained in law but rather was an investment banker. At the final uncontested hearing, the mediator was complimented by the trial judge for his imaginative solution to the difficult issues in the case.

5. Finally, under the proposed bill, arbitration is voluntary. Neither party in a matrimonial action would be compelled to participate. That is, arbitration would require the agreement of both parties before an arbitrator is engaged. Under these circumstances, there is little to lose and a great deal to be gained by giving the citizens of Connecticut this choice.

I thank you for taking the time to read this letter and trust you see the advantages in adopting this legislation. Should you have any questions or comments, I would be more than happy to speak with you.

Very truly yours,



Wayne D. Effron

WDE/sak