Arbitration Provisions in Family Law CR2A Agreements, a Cautionary Tale

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By Valerie Villacin

Over the years, I have grown used to being the bearer of bad news when speaking to potential clients who are interested in appealing adverse decisions. See November 2020 Bar Bulletin ("Always Appealing: Damned Fools"). But nothing fills me with dread like a potential client who wants to "appeal" from an adverse arbitration decision in a family law matter. I am not referring to arbitration of parenting disputes governed by RCW 26.09.184(4), which provides for de novo review in superior court.1 Nor am I referring to mandatory arbitration of child support or spousal support issues governed by RCW 7.06.020, which provides for a trial de novo.2 I am referring to voluntary binding arbitration governed by RCW ch. 7.04.

First, to be clear, one cannot "appeal" from an adverse arbitration decision. The arbitration decision must first be reviewed in superior court where it may be confirmed,3 modified,4 or vacated.5 Any appeal will be from one of those orders,6 rather than the arbitration decision itself. Such appeals are governed by the same standard used by the superior court in reviewing the arbitration decision — whether or not statutory grounds exist to warrant modifying or vacating the arbitration decision.7

The "extremely limited" judicial review of arbitration decisions under RCW ch. 7.04A 8 is not the only source of my discomfort in advising would-be appellants. Another and more disconcerting aspect of these conversations is that family law litigants not only lack a full understanding of the limits of judicial review of an arbitration decision but also frequently end up with an arbitrator who may have less than an objective view of the facts and the parties.

Family law litigants often bind themselves to arbitration after settling (or partially settling) in mediation. It is not uncommon after a day-long mediation for the parties to reach a settlement in principle. Rather than continuing the mediation to a later date in order to hammer out the details, they enter into a CR2A agreement (often well into the evening) which contains the contours of

their settlement while also agreeing to submit any unresolved details to binding arbitration to be conducted by the mediator.

Commonly found provisions in CR2A agreements not only require the parties to submit “drafting disputes” to the mediator for binding arbitration but also disputes over “any other aspect of this agreement (form or substance), or any issue not discussed”;9 “unresolved issues”;10 “any residual issues or conflicts”;11 “disputes in construing, implementing or effectuating the Agreement”;12 and “all issues/disputes arising out of or related to this Agreement . . . or with regard to any omitted issue.”13 Even if those provisions make no reference to RCW ch. 7.04A, by agreeing to “binding arbitration” the parties have waived their right to judicial redress and become subject to the statutory provisions limiting judicial review to the statutory grounds under RCW 7.04A.230 and RCW 7.04A.240.14

Any agreement which purports to provide for a different standard for judicial review than RCW ch. 7.04A will not be enforced. Once the parties agree to binding arbitration, judicial review will be governed by RCW ch. 7.04A because parties cannot stipulate and “create their own boundaries of review.”15 “The parties to an arbitration contract are not free to craft a ‘common law’ arbitration alternative” to RCW ch. 7.04A.16

Family law litigants frequently sign CR2A agreements with arbitration provisions with no understanding of the consequential limits to obtain relief from an adverse arbitration decision arising from the settlement they reached after mediation.17 An arbitration decision may be vacated or modified only on “very limited statutory grounds.”18 For instance, a court will only vacate an arbitration award if there was evident partiality, corruption, or misconduct by the arbitrator, the arbitration was conducted without proper notice to a party or in a way that substantially prejudices the rights of a party, there was no agreement to arbitrate, or the arbitrator exceeded the arbitrator’s powers,19 sometimes referred to as “facial legal error.”20

The “facial legal error” that may warrant vacating an arbitration award is not one “that depends on the consideration of the specific evidence offered or to an indirect sufficiency of the evidence challenge.”21 Neither the appellate nor superior court can review the merits of the arbitrator’s decision.22 In other words, if a court must consider the evidence presented to the arbitrator to determine whether there is a basis to vacate the arbitration award, then it is not a “facial legal error” and the arbitration decision cannot be vacated.

The standard of review for a decision by an arbitrator is decidedly different than for a decision by a judge, which is usually reviewed for abuse of discretion. A court abuses its discretion if its decision “is outside the range of acceptable choices, given the facts and the applicable legal standard.”23 A court also abuses its discretion if its “factual findings are unsupported by the record” or if its decision is “based on an incorrect standard or the facts do not meet the requirements of the correct standard.”24 An appellate court reviewing a trial court’s decision can thus consider whether its decision is correct based on the evidence that was presented to the trial court, but it cannot do the same in reviewing an arbitrator’s decision. An arbitration award cannot be vacated if the argument by the challenging party “cannot be decided without delving into the substantive

merits of the claim."25 An arbitration award cannot even be reviewed "under an arbitrary and capricious standard."26

While the limited judicial review of arbitration decisions obtains for all litigants, family law litigants are usually less informed about those limits because their agreement to arbitrate often comes at the end of a day-long mediation. The parties will focus more on ensuring all of the details of the parties' agreement are included in the CR2A agreement than on addressing the arbitration provision of the agreement, which may be boilerplate language in a form provided by a mediator whose ADR practice includes serving as an arbitrator.

Further, litigants may believe the only disputes which may arise will be drafting disputes for the final orders incorporating the parties' agreement, ignoring broadly written arbitrations provisions which may allow their mediator (now arbitrator) to decide substantive issues not addressed by the parties' agreement. For instance, an agreement providing for binding arbitration on "all issues/disputes arising out of or related to this Agreement" or "any omitted issue" could arguably allow the arbitrator to decide whether the agreement itself is enforceable, to whom an omitted asset should be awarded, the value of an asset, and the parties' incomes for purposes of child support. Even if the arbitration provision were not broadly worded, any doubts regarding whether an arbitration agreement applied to a particular dispute is "resolved in favor of coverage."27

Further, because litigants might not have anticipated arbitration on substantive issues, they might not have considered the disadvantages of having the mediator be the one who decides those issues. The mediator seeks to have the parties reach a consensual settlement, often meeting with the parties separately to try to bring each side closer to the other side's position. These ex parte communications would be impermissible for an arbitrator, but are acceptable for a mediator.

Encouraged by the confidential nature of their communications,28 parties often communicate information to the mediator they might not have disclosed if they knew the mediator might later be deciding a disputed issue. Parties may also engage in behavior they would never engage in before a judge or neutral decision-maker. For instance, a party may react angrily to an opposing party's offer presented by the mediator or express their reasons for taking a position in fairly raw, emotional terms. During such interactions, the mediator may unconsciously form conclusions about the merits of the parties' positions and make certain assumptions about who is in the right and who is in the wrong. While impressions may not matter if the parties' agreement needs no further interpretation, it may matter if the mediator must later make substantive decisions on the issues.

Family law litigants have far more consequential issues to consider than the impressions they made on the mediator at the time they sign the CR2A agreement or even later, when the disputed issue is submitted to binding arbitration. However, it is usually all they can think about when they receive an adverse arbitration decision.

To be clear, I am not saying all family law litigants are uninformed about the limits of judicial review when they agree to arbitration. Nor am I suggesting that arbitration provisions in CR2A agreements which allow mediators to serve as arbitrators are universally a bad idea. There are

certainly advantages to have the mediator resolve drafting disputes for final orders incorporating agreements they helped facilitate. However, attorneys owe their family law clients participating in mediation a duty to ensure they understand what they are agreeing to when they include an arbitration provision in the CR2A agreement. At the very least, I would no longer have to be the bearer of bad news when their clients call asking me to challenge an adverse arbitration decision.

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1 RCW 26.09.184(4)(e); In re Smith-Bartlett, 95 Wn. App. 633, 640, 976 P.2d 173, 178 (1999).

2 RCW 7.06.050; see also Smith-Bartlett, 95 Wn. App. at 637.

3 RCW 7.04A.220.

4 RCW 7.04A.240.

5 RCW 7.04A.230.

6 RCW 7.04A.280(1)(c), (d), (e).

7 Salewski v. Pilchuck Veterinary Hosp., Inc., P.S., 189 Wn. App. 898, 903, 359 P.3d 884, 887 (2015).

8 Morrell v. Wedbush Morgan Sec. Inc., 143 Wn. App. 473, 481, 178 P.3d 387, 391 (2008).

9 Marriage of Pascale, 173 Wn. App. 836, 840, 295 P.3d 805, 808 (2013).

10 Marriage of Baker, Cause no. 81700-1-I, 2021 WL 4523083 (2021) (unpublished).

11 Gamache and Gamache, Cause No. 36653-7-III, 2019 WL 4072510 (2019) (unpublished).

12 Marriage of Collins, Cause No. 52787-1-II, 2020 WL 1034428 (2020) (unpublished).

13 Marriage of Eaton, Cause No. 37938-8-III, 2022 WL 456223 (2022) (unpublished).

14 Godfrey v. Hartford Cas. Ins. Co., 142 Wn.2d 885, 894, 16 P.3d 617, 621 (2001).

15 Barnett v. Hicks, 119 Wn.2d 151, 153, 829 P.2d 1087 (1992)

16 Godfrey, 142 Wn.2d at 896.

17 On January 1, 2024, the Uniform Family Law Arbitration Act (LAWS 2023, ch. 61 (SHB 1088)) will take effect. The Act uses a similar standard of judicial review as RCW ch. 7.04A. Compare RCW 7.04A.230, RCW 7.04A.240 with SHB 1088, §§ 18, 19.

18 Morrell, 143 Wn. App. at 481.

19 RCW 7.04A.230.

20 Salewski, 189 Wn. App. at 904.

21 Salewski, 189 Wn. App. at 904.

22 Morrell, 143 Wn. App. at 481.

23 Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362, 1366 (1997).

24 Littlefield, 133 Wn.2d at 47.

25 Mainline Rock & Ballast, Inc. v. Barnes, Inc., 8 Wn. App. 2d 594, 610, 439 P.3d 662, 671 (2019).

26 Mainline, 8 Wn. App. 2d at 610.

27 Pascale, 173 Wn. App. at 842.

28 RCW 5.60.070; RCW 7.07.030; RCW 7.07.050.