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November 1, 1987

Honorable Helen Gordon Davis
State Representative
178 East Davis Boulevard
Tampa, Florida 33606

Re: F.S. §44.303 - CS/HB 379
Court Ordered Non-Binding Arbitration

Dear Rep. Davis:

During our recent telephone conference you expressed a willingness to sponsor an amendment to the above referenced legislation (which is needed to obviate problems created by subsection 5 of F.S. §44.303 as the legislation applies to family law cases).

As I mentioned to you, I am a member of the Executive Council of the Family Law Section, Co-Chairman of its Rules Committee and and acting Chairman of its Legislation Committee. Following a meeting of the Executive Council, the Legislation Committee met on September 29, 1987, the date we spoke. My comments in this letter reflect the unanimous consensus of the Committee as well as the Executive Council.

In brief, subsection 5 of F.S. §44.303 provides that if a party in a civil action files for a de novo trial after arbitration and the trial judge does not grant a more favorable result to the party seeking relief than the result reached in the arbitration proceedings, then that party shall be assessed the arbitration costs, court costs and other reasonable costs of the opposing party, including attorney's fees, investigation expenses and expert witness fees incurred after the arbitration hearing.

The above provision will seriously prejudice the rights of children and economically disadvantaged or dependent spouses in family law cases. For many years, the law in Florida has been well settled that a spouse is entitled to an award of attorney's fees against the opposing spouse where the applicant spouse proves that she (or he) has a sufficient need to justify the award and the opposing spouse has the present ability to pay. The law is codified in F.S. §61.16 which provides that "the court may from

time to time, after considering the financial resources of both parties, order a party to pay a reasonable amount for attorney's fees, suit money, and the cost to the other party of maintaining or defending any proceeding under this Chapter, including enforcement and modification proceedings".

The new law totally eliminates the need and ability to pay test and instead requires that a spouse who is dissatisfied with the arbitration results have a crystal ball and be able to accurately predict that the result reached in a trial de novo will be "more favorable" to that party than the result reached in arbitration. In equity matters and particularly in family law cases, this is difficult, if not impossible to do. Issues other than dollars and cents are involved. For example, issues concerning changes in visitation schedules, parental responsibility for upbringing of dependent children, division of interchangeable pieces of property, and similar issues, are frequently difficult to quantify.

F.S. §44.303 requires that the parties fully litigate the entire case before the arbitrator. The Rules of Evidence and Rules of Civil Procedure apply in the arbitration proceeding under the new law. The limitation of the costs and expenses of litigation which apparently was intended to be avoided by the arbitration legislation will, in fact, be duplicated in family law cases. The new law will add another level to the litigation and the intended goal of the new law to reduce litigation will be frustrated. Although the new law is referred to as "non-binding" arbitration, as a practical matter, the attorney's fees provision referred to above, will create an insidious chilling effect upon parties desiring to seek de novo review of the arbitration award in family law cases.

Just over a year ago, the Legislature enacted F.S. §61.183 (copy enclosed) which provides for mediation of certain contested issues (those involving custody, primary residence, or visitation of a child). The provision for court ordered non-binding arbitration in F.S. §44.303 is anti-mediation in the sense that arbitration and mediation proceed from completely different premises. In mediation proceedings, the goal is to settle disputes without direct judicial intervention. Communications in mediation proceedings are generally confidential and may not be disclosed without the written consent of all parties. By the same token, the premise underlying arbitration in F.S. §44.303 is that the parties must fully litigate their case before the arbitrator. Communications in the arbitration proceedings are not confidential and for all intents and purposes it is equivalent to a full-blown trial before the judge or a General Master.

The arbitration proceedings become totally confrontational.

The new law says nothing concerning modification proceedings and there is no legislative expression as to whether the arbitration award can be modified under F.S. §61.14 (the latter statute applies only to modification of Orders of the court or agreements of the parties). That statute also provides that no person may commence an action for modification of a support, maintenance or alimony agreement or Order except as provided in F.S. §61.14. This would seem to irreconcilably conflict with the new law, F.S. §44.303.

Subsection 4 of F.S. §44.303 requires that the judge enter an Order automatically on the arbitration award; that is, the judge is required to "rubber stamp" the arbitration award. This removes all judicial discretion which should be retained for the judge to independently determine whether the welfare of the minor children of the parties has been protected and whether support payable for the children or a dependent spouse has been adequately and fairly provided for. The new law does not have the same safeguards as are currently applied to proceedings for the review of reports of General Masters of the Circuit Court under Rule 1.490 of the Florida Rules of Civil Procedure.

To compound the problem, the new law exposes attorneys representing litigants in family law cases to an unfairly high risk of being sued by their own clients for malpractice in the event they guess wrong in recommending that their client seek a trial de novo. It is no more possible for the attorney to be able to accurately predict what the result will be in a trial de novo than it is for the client to do so. Particularly when vast disdiscretion is vested in the trial judge to determine where the equities lay, no accurate predictions can be made, except perhaps in the rarest of cases. This problem does not arise as frequently in actions at law involving money judgments but is inherent in all equity cases.

There is a substantial concern that the new law unconstitutionally delegates judicial authority to non-judges and that it will, in effect, deny access to the courts to economically disadvantaged persons. Since the new law applies to all civil actions, it would ipso facto have to include family law matters in which the Department of Health and Rehabilitative Services is acting on behalf of welfare recipient spouses.

There are several other problems with the new law but they are relatively minor in comparison with the above issues (for example, there is a curious inconsistency between the arbitrators' and mediators' fees provided in F.S. §44.303(2) and F.S. §44.304(3)).

In order to eliminate the problems noted above, it is respectfully suggested that the provisions of F.S. §44.303 be limited to actions at law; that is, F.S. §44.303 should be inapplicable to family and paternity cases as well as other equity actions. Therefore, the language in subparagraph 1 of F.S. §44.303 [which currently reads that a court may refer "any contested civil action" filed in a Circuit or County Court to court-annexed non-binding arbitration.] should be amended so that a Court may refer "any contested civil action at law (excluding equity cases and actions arising under F.S., Chapters 61 and 742) filed in a Circuit or County Court to court-annexed, non-binding arbitration." By this amendment, all family law, paternity and equity cases will be taken out of the ambit of the arbitration law and the law will remain applicable to all civil cases in which only money judgments are sought.

I would be most grateful for your help in correcting what was obviously an unanticipated problem and request that you communicate with the undersigned and with the Family Law Section Chairman, Maurice Jay Kutner. His address is 28 W. Flagler Street, 12th Floor, Miami, Florida 33130, tel. 305/377-9411. Since the Florida Bar Board of Governors Legislation Committee has not yet met to endorse the position which the Family Law Section and its Legislation Committee expressed above, at this juncture it would be appropriate to note that this position is taken by the Family Law Section only.

Your cooperation is most appreciated.

Sincerely yours,

ABRAMS & ABRAMS, P.A.

By: _____
IRA ABRAMS

IA/bl

Encl.

cc: Jack Harkness, Executive Director - Florida Bar
Maurice Jay Kutner, Chairman - Family Law Section
Members of Legislation Committee, Family Law Section