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BILL



ANALYSIS

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Senate Bill 568 (Substitute S-1 as passed by the Senate)
Senate Bill 569 (Substitute S-1 as passed by the Senate)
Sponsor: Senator Mark C. Jansen
Committee: Families and Human Services

Date Completed: 5-26-10

RATIONALE

Chapter 50b of the Revised Judicature Act governs the arbitration of domestic relations matters, including property distribution, spousal support, child custody, child support, and parenting time. Also known as the domestic relations arbitration act, Chapter 50b allows the parties to a domestic relations matter to stipulate to binding arbitration. After an arbitration award is issued, the plaintiff in the action must file a judgment, order, or motion with the circuit court to "settle the judgment", or enter the award. The court may not modify or vacate (void) an award concerning child support, custody, or parenting time unless the court finds that the award is adverse to the child's best interests. Also, as Michigan Court Rules require for other types of arbitration, the court must vacate a domestic relations arbitration award if it was procured by fraud, the arbitrator exceeded his or her authority, or the arbitrator did not conduct the hearing impartially.

The circuit court's review of an arbitrated child custody award was the subject of a 2004 Michigan Supreme Court decision (*Harvey v Harvey*, 470 Mich 186). The Court's opinion has raised concerns among family law practitioners regarding the scope of the circuit court's review and the stage at which the court conducts a review. According to the Court, regardless of whether the parties submit a child custody dispute to an arbitrator under Chapter 50b or to a Friend of the Court referee (as the Friend of the Court Act allows), "...the Child Custody Act requires the circuit court to determine independently what custodial placement is in the best interests of the children". Family law practitioners believe that the circuit court should review an

arbitration award regarding custody, support, or parenting time based on the record created in the arbitration hearing, and additional evidence the court considers necessary, rather than making a new determination of the child's best interests.

In addition, the Supreme Court referred to a section of Chapter 50b under which a review or modification of a child support, custody, or parenting time award "is subject to the standards and procedures provided in other statutes, in other applicable law, and by court rule...". According to the Court, "[This section] requires the circuit court to review the arbitration award in accordance with the requirements of other relevant statutes, including the language of the Child Custody Act." This holding suggests that the circuit court should conduct a review at the time the arbitrator's award is entered (assuming a party objects to the award). Another interpretation, however, is that *subsequent* modifications of a court order (entering an award) are subject to the standards and procedures in other statutes.

CONTENT

Senate Bill 568 (S-1) would amend Chapter 50b of the Revised Judicature Act to do the following:

- **Require a review of arbitrated child support, child custody, or parenting time to be based on the record of an arbitration hearing, and additional evidence if necessary.**
- **Delete a provision under which such a review is subject to standards and procedures in other applicable statutes and court rules.**

-- **Specify that a review of a court order regarding child support, custody, or parenting time would be subject to other applicable statutes and court rules.**

Senate Bill 477 (S-1) would amend the Child Custody Act to require the court's decision in a child custody dispute to be in accordance with Chapter 50b of the Revised Judicature Act, if the action were arbitrated under that chapter.

The bills are described below.

Senate Bill 568 (S-1)

The bill would require a review of a child support, child custody, or parenting time provision under Section 5080 (the section the bill would amend) to be based on the record made under Section 5077(2) of the Revised Judicature Act. If the court found that the record was insufficient to determine whether the award was adverse to the best interests of the child, the court could take additional evidence.

(Section 5077(2) requires a record to be made of the portion of an arbitration hearing that concerns child support, custody, or parenting time, in the same manner required by the Michigan Court Rules for the record of a witness's testimony in a deposition.)

Chapter 50b provides that a review or modification of a child support amount, child custody, or parenting time must be conducted and is subject to the standards and procedures provided in other statutes, in other applicable law, and by court rule that are applicable to child support amounts, child custody, or parenting time. The bill would delete this provision.

Under Chapter 50b, the court may not vacate or modify an award concerning child support, custody, or parenting time unless the court finds that the award is adverse to the best interests of the child who is the subject of the award, subject to Section 5081 of the Act and the provision described above. Under the bill, this would no longer be subject to the provision that the bill would delete.

(Under Section 5081, if a party applies for vacation or modification of an arbitrator's

award issued under Chapter 50b, the court must vacate the award if it was procured by corruption, fraud, or other undue means; there was evident partiality by an arbitrator or misconduct prejudicing a party's rights; the arbitrator exceeded his or her powers; or the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.)

The bill specifies that Section 5080 would not apply to the review or modification of an order or judgment entered by the court. The review or modification of a court order or judgment regarding child support, custody, or parenting time would have to be conducted, and would be subject to standards and procedures, as provided in other applicable law and court rules.

Senate Bill 569 (S-1)

Under the Child Custody Act, in all actions involving dispute of a minor child's custody, the court must declare the child's inherent rights and establish the rights and duties regarding the child's custody, support, and parenting time in accordance with the Act.

Under the bill, the court would have to do so in accordance with Chapter 50b of the Revised Judicature Act if the action were arbitrated under that chapter.

MCL 600.5080 (S.B. 476)
722.24 (S.B. 477)

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Arbitration and mediation are voluntary alternatives to litigation that can resolve a wide variety of civil disputes, including domestic relations matters. Although the Revised Judicature Act (RJA) otherwise provides for the arbitration of civil controversies, and a court rule specifically allows domestic relations matters to be mediated, the arbitration of domestic relations cases was not separately addressed until Chapter 50b of the RJA was enacted in 2000. Because arbitration can

avoid the delay, expense, and acrimony that often accompany courtroom litigation, and offers a private way to resolve highly personal disputes, it can be very suitable for family law issues.

Recognizing the needs and vulnerability of the individual parties, Chapter 50b contains a number of safeguards. For example, before participating in arbitration, the parties must receive specific information, including notice that they are responsible for the costs. Chapter 50b also provides for the production or exchange of information between the parties. In addition, if domestic violence is alleged, the court may not refer the matter for arbitration unless each party waives this exclusion, and a party may not do so unless he or she is represented by an attorney throughout the action.

The information that the parties must receive includes notice that arbitration is binding and the right to appeal is limited. This limitation is a feature of traditional arbitration, where it is generally understood that a court will uphold an arbitrator's award in the absence of such factors as fraud, undue influence, or the arbitrator's lack of impartiality. Due to the nature of domestic relations matters, Chapter 50b includes another standard: The court must not vacate or modify an award concerning child support, custody, or parenting time unless the court finds that it is adverse to the child's best interests. This maintains the court's authority to reject an award that is not in the child's best interests, while otherwise limiting a party's ability to appeal an arbitrator's decision that is not to his or her liking.

The Michigan Supreme Court's decision in *Harvey v Harvey*, however, essentially makes every arbitration award concerning child custody, support, or parenting time subject to a circuit court's independent determination of a child's best interests, based on the factors listed in the Child Custody Act, if a party objects to the award. Senate Bill 568 (S-1) would remedy this by requiring a review or modification of an arbitrated child support, custody, or parenting time award to be based on the record of the hearing concerning that issue. If the record were insufficient, the court could take additional evidence. This would preserve the court's ability to reject an arbitration award that the court believed

was not in the child's best interests, without holding a new hearing or otherwise repeating the arbitrator's decision-making process.

The bill also would delete language under which a review or modification of an arbitrator's child support, custody, or parenting time decision is subject to the standards and procedures provided in other laws. This would remove a reason to conclude that the circuit court must engage in a review pursuant to the Child Custody Act at the time the award is entered, or that the review must consist of what amounts to a new hearing. At the same time, the bill specifies that the review of an order or judgment entered by the court would not subject be to arbitration, while a court order for child support, custody, or parenting time would be subject to other applicable law. This would supply clarity that is lacking in the current language.

Senate Bill 569 (S-1) would reinforce these changes, and provide for consistency between the statutes, by amending the Child Custody Act to require that a court establish child support, custody, and parenting time in accordance with Chapter 50b of the RJA if the action were arbitrated under that chapter.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

The bills would limit the level of court review when parties agree to binding arbitration in child custody matters. The bills would result in indeterminate administration savings to local units of government.

Fiscal Analyst: Bill Bowerman

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.