Public Policy Position
Amicus Brief Curiae in *Lowery v Lowery* (COA Docket No. 371892)

The Family Law Section is a voluntary membership section of the State Bar of Michigan, comprised of 2,615 members. The Family Law Section is not the State Bar of Michigan and the position expressed herein is that of the Family Law Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Family Law Section has a public policy decision-making body with 20 members. On March 24, 2025, the Section adopted its position after an electronic discussion and vote. 15 members voted in favor of the Section's position, 0 members voted against this position, 2 members abstained, 3 members did not vote.

The Section Council voted to support the position of the Appellee in this matter and requests the Court of Appeals affirm the Trial Court's order denying the Appellant's motion to compel arbitration.

Explanation:
The Section Council voted to submit an amicus brief advocating in favor of upholding the clearly described protections for survivors of domestic violence that are outlined in the Domestic Relations Arbitration Act (DRAA, MCL 600.5070, et. seq). The Section Council is uniquely positioned to offer practical insights into the resolution of these disputes, as its members routinely handle complex family law cases involving issues of arbitration and domestic violence. The Section Council requests that the Court of Appeals deny Appellant's requested relief and affirm the Trial Court's order denying the motion for arbitration.

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STATE OF MICHIGAN

IN THE COURT OF APPEALS

ELIZABETH LOWERY,

Plaintiff-Appellant,

V

NATHAN LOWERY,

Defendant-Appellee,

Court of Appeals No. 371892
Washtenaw County Circuit Court
No. 2024-000163-DM

AMICUS CURIAE BRIEF OF THE STATE BAR OF MICHIGAN FAMILY LAW SECTION

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Family Law Section Council ("The Council") is the governing body of the Family Law Section of the State Bar of Michigan. The Family Law Section is comprised of over 2,500 lawyers in Michigan practicing in, and committed to, the area of family law. The Section members elect the members of the Council. The Council provides services to its membership in the form of educational seminars, monthly Family Law Journals (an academic and practical publication reporting new cases and analyzing decisions and trends in family law), advocating and commenting on proposed legislation relating to family law topics, and filing Amicus Curiae briefs in selected cases in the Michigan Courts. Because of its active and exclusive involvement in the field of family law, and as part of the State Bar of Michigan, the Council has an interest in the development of sound legal principles in the area of family law. The Council has determined that the issues raised in the instant case are relevant to its mission. The instant case implicates an issue that is fundamental to the rights and interests of parties who experience domestic violence within a marriage as it presents an issue of first impression regarding the domestic violence protections within the Domestic Relations Arbitration Act.

The Family Law Section files this brief concurrently with its Motion for Leave to File an Amicus Curiae Brief.

ARGUMENT

The Family Law Section Council ("The Council") submits this brief as amicus curiae to advocate in favor of upholding the clearly described protections for survivors of domestic violence that are outlined in the Domestic Relations Arbitration Act (DRAA, MCL 600.5070, et. seq. The Council is uniquely positioned to offer practical insights into the resolution of these disputes, as its members routinely handle complex family law cases involving issues of arbitration and domestic violence. The Counsel requests that this Court deny Appellant's requested relief and affirm the Trial Court's order denying the motion for arbitration.

I. The trial court correctly refused to enforce the parties' prenuptial agreement to arbitrate because Mr. Lowery's allegations of domestic violence and his decision not to waive his right to exclude arbitration prevented the Court from referring the case to arbitration based on MCL 600.5072.

A. The Domestic Relations Arbitration Act and its relation to this case.

The Domestic Relations Arbitration Act ("DRAA"), MCL 600.5070, et seq., sets for specific terms for ensuring that parties entering the process of arbitration are informed and that their opt-in is voluntarily. The statue also clearly states that an allegation of domestic violence by one of the parties in a domestic relations action imposes additional requirements and constraints upon the Court when arbitration is at issue. The key provisions are set forth here.

> (1) The court shall not order a party to participate in arbitration unless each party to the domestic relations matter acknowledges, in writing or on the record, that he or she has been informed in plain language of all of the following:
>
> > (a) Arbitration is voluntary.
> > (b) Arbitration is binding and the right of appeal is limited.
> > (c) Arbitration is not recommended for cases involving domestic violence.
> > (d) Arbitration may not be appropriate in all cases.
> > (e) The arbitrator's powers and duties are delineated in a written arbitration agreement that all parties must sign before arbitration commences.
> > (f) During arbitration, the arbitrator has the power to decide each issue assigned to arbitration under the arbitration agreement. The court will, however, enforce the arbitrator's decisions on those issues.
> > (g) The party may consult with an attorney before entering into the arbitration process or may choose to be represented by an attorney throughout the entire process.

> (h) If the party cannot afford an attorney, the party may wish to seek free legal services, which may or may not be available.
> (i) A party to arbitration will be responsible, either solely or jointly with other parties, to pay for the cost of the arbitration, including fees for the arbitrator's services. In comparison, a party does not pay for the court to hear and decide an issue, except for payment of filing and other court fees prescribed by statute or court rule for which the party is responsible regardless of the use of arbitration.
>
> (2) If either party is subject to a personal protection order involving domestic violence or **if, in the pending domestic relations matter, there are allegations of domestic violence or child abuse, the court shall not refer the case to arbitration unless each party to the domestic relations matter waives this exclusion**. A party cannot waive this exclusion from arbitration unless the party is represented by an attorney throughout the action, including the arbitration process, and the party is informed on the record concerning all of the following:
>
> (a) The arbitration process.
> (b) The suspension of the formal rules of evidence.
> (c) The binding nature of arbitration.
>
> (3) If, after receiving the information required under subsection (2), a party decides to waive the domestic violence exclusion from arbitration, the court and the party's attorney shall ensure that the party's waiver is informed and voluntary. If the court finds a party's waiver is informed and voluntary, the court shall place those findings and the waiver on the record.
> .....
> MCL 600.5072 (emphasis added).

The DRAA "contains numerous protections for [parties], including mandatory prearbitrary disclosures and detailed procedural requirements." *Harvey v Harvey*, 479 Mich 186, 189; 680 N W2d 835 (2004). The key "detailed procedural requirement" for our purposes relates to the provision in section (2) that allegations of domestic violence in the pending domestic relations matter prohibit the court from ordering a referral to arbitration unless each party to the domestic relations matter waives this exclusion. The verb construction "shall not" in MCL 600.5070(1) underscores the fact that the court would have no authority to issue such an order.

The mechanism of these provisions was demonstrated here in four actions. (1) the parties signed a prenuptial arbitration agreement; (2) Dr. Lowery moved for an order to enforce the agreement; (3) Mr. Lowery, citing alleged domestic violence, objected; and (4) the court, therefore, denied Dr. Lowery's motion.

B. The arbitration agreement alone does not compel an order to refer to arbitration.

Though articulated in various ways, Dr. Lowery's argument essentially focuses on the injustice of allowing a party to renege on a valid arbitration agreement because of an allegation of domestic violence.

But that is not the issue. The issue relates not to the validity of the agreement but rather to the order denying a referral to arbitration and, specifically, whether that order is consistent with the DRAA. This is best analyzed by seeing sections (1), (2), and (3) as an integrated multi-step process.

The first step is the parties 'agreement. Subsection (1) is clear that there can be no order unless there is an agreement[1] to arbitrate in rigorous compliance with subsections (1)(a) through (1)(i).

The second step is advising the parties of the nature of arbitration and effectively screening the matter for the presence of domestic violence or child abuse.

The third step is the possible waiver. It may be that the party alleging domestic violence (or child abuse) waives that circumstance as a reason to exclude arbitration. The court could, for instance, consider such an allegation in a party's prior pleading but determine that there has been an informed and voluntary waiver of its relevance.

The fourth step is for the court--either because none of the excluding abuse circumstances appears or because they have been knowingly and voluntarily waived--to order that the case be referred to arbitration.[2]

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[1] The agreement could be in the form of a proposed stipulated order. See *Miller v Miller,* 474 Mich 27; 707 NW 2d 341 (2005)

[2] Dr. Lowery draws attention in her Reply Brief to the distinction in the statutory verb choice: the predicate is "order" in (1) and "refer" in (2). Far from implicitly conveying some hyper-sophisticated sense that this distinction envisions two different judicial settings, this distinction simply illustrates how the referral is a function of the order. Thus understood, it parallels the process screening cases for domestic violence before referring the case for alternative dispute resolution by the Friend of the Court, to wit:

> MCR 3.224
> (C)Friend of the Court ADR Referral
> **(1)** On written stipulation of the parties, on written motion of a party, or on the court's initiative, the court may **order** any contested custody, parenting time, or support issue in a domestic relations case, including postjudgment matters to the friend of the court mediation by written order.
> **(2)** The court may, by an **order** or through its friend of the court ADR plan, provide that the parties are to meet with a person conducting ADR other than friend of the court domestic relations mediation concerning custody, parenting time, and support issues, unless otherwise provided by statute or court rule.
> **(D)** Cases Exempt from Friend of the Court ADR.
> **(1)** Parties who are, or have been, subject to a personal protection order or other protective order or who are involved in a past or present child abuse and neglect proceeding may not be **referred** to friend of the court ADR without a hearing to determine whether friend of the court ADR is appropriate. The court may **order** ADR if a protected party requests it without holding a hearing.
> (Emphasis added)

These statutory provisions must be read as an integrated whole. This is in keeping with the rule that "in construing a statute, effect must be given to every part of it. One part must not be so construed as to render another part nugatory, or of no effect." *Grand Rapids v Crocker*, 219 Mich 178, 183; 181 NW 221 (1922) (Citation omitted)

This is further substantiated by paying attention to section (1)(c)'s warning that "[a]rbitration is not recommended for cases involving domestic violence." This warning addresses the way domestic violence can potentially undermine the *process of arbitration*, as opposed to the *agreement to arbitrate*. (Otherwise, it might have said something like, "It is not recommended for parties to agree to arbitrate if domestic violence is involved.")

Thus, understanding sections (1),(2), and (3) in a way that gives integrated meaning to each part, it follows that the potentially arbitration-excluding circumstance identified per subsection (2) may include an allegation of domestic violence that took place after the execution of an agreement to arbitrate. This is because of something else that follows from an integrated reading of the statute: that the agreement is only one of the two requisite events for arbitration to lawfully be referred. The second being the court order.

It is a well-established principle that parties cannot stipulate to waive a court's statutory authority. This was articulated in *Allard v Allard II*, 318 Mich App 583; 891 NW 2d 420 (2017), in the context of property distribution. *Allard II*, 601. It was also illustrated in *Harvey v Harvey, supra*. The parties there had agreed to arbitrate child custody issues. However, recognizing that "parties cannot stipulate to circumvent the authority of the circuit court in determining the custody of the children[]," the Supreme Court ruled that such "determinations are not binding until entered by court order." *Harvey*, 194. So, the existence of the agreement, without a court order, was lawfully insufficient to refer their case for arbitration.

Note also that even a decision to waive the domestic violence prohibition on arbitration at § 5072(3) takes effect only after the occurrence of two mandatory actions *on the part of the court*: 1) "ensur[ing] that the party's waiver is informed and voluntary" and 2) "plac[ing] those findings and the waiver on the record." Even an intended waiver will not compel an order to refer to arbitration if the court finds it to be inefficiently informed or voluntary.

C. A prenuptial agreement cannot serve as a decision to waive the domestic-violence exclusion under section (3) because any such waiver could not have been "informed."

It could be argued that Mr. Lowery's agreement to arbitrate at the time he signed the prenuptial contract effectively constituted a decision to waive arbitration under the DRAA. After all, there is no reason to think that his signing wasn't "voluntary" or that he wasn't "informed" as to all relevant circumstances that were in existence at the time of the agreement. However, to the extent of the impossibility of his being informed of circumstances- specifically incidents and dynamics of domestic violence- that might occur between the parties *after* its execution, it is likewise impossible to say any waiver could be sufficiently informed for purposes of the DRAA.

In ruling on a dispute as to the enforcement of an arbitration agreement (though outside the domestic relations context), this Court of Appeals has stated:

> The enforcement of the arbitration agreement involves the denial of the constitutional right to a trial before a court of law. Every doubt, therefore, must be resolved in favor of guaranteeing that there was an intentional, willing, and knowing relinquishment or abandonment of this fundamental right. *Moore v Fragatos*, 116 Mich App 179, 200; 321 NW 2 781 (1982)(Emphasis in original.)

This is surely because "[w]aiver implies the abandonment of a right by a person entitled to exercise it, who has at the time full knowledge of the existence of the fact on which the right depends." *Dow Chemical C. v Detroit Chemical Works*, 208 Mich 157, 172; 175 NW 269 (1920) (Citations omitted)

Therefore, it would be contradictory, quoting *Dow Chemical*, supra, to find that Mr. Lowery was "informed" of a "fact upon which [his] right depend[ed]", that fact not yet being in "existence."

D. The domestic violence exemption at § 5072(2) provides necessary protection to parties who could not anticipate when they signed a prenuptial agreement that they would be subject to domestic violence during their marriage.

The DRAA is one of several domestic relations statutes and court rules mandating screening for domestic violence prior to court referral for alternative dispute resolution and/or exempting cases from ADR on the basis of domestic violence. As noted above, § 5072(2) mirrors the court rule that exempts cases from Friend of the Court alternative dispute resolution on the basis of domestic abuse. See MCR 3.224(D)(2)(b). Likewise, MCR 3.216(D)(3) exempts cases involving domestic abuse from court ordered mediation if a party objects. A court shall not submit a contested issue in a domestic relations action if the parties are subject to a personal protection order unless the court first conducts a hearing to determine whether mediation is appropriate. See MCL 600.1035; MCR 3.216(C)(3). After a case is referred for mediation, the appointed mediator must pre-screen for domestic violence and make reasonable efforts "throughout the mediation process" to screen for dynamics of domestic vio-

lence that would make the process unsafe or otherwise "impede achieving a voluntary and safe resolution of issues." MLC 600.1035(3); MCR 3.216(H)(2). The Uniform Collaborative Law Act also requires domestic violence screening before initiating any collaborative process as well as continued assessment throughout the process. MCL 691.1345. A court cannot order a party to participate in a collaborative law process over that party's objection related to domestic violence or other factors. MCL 691.1335(2).

The requirement to screen for dynamics of domestic violence in the DRAA and other ADR-related statutes and court rules is based on decades of research showing that ADR alternatives in family law matters present a multitude of risks for survivors of domestic violence.[3] In addition to safety concerns, dynamics of coercive control and intimidation inherent in a domestic violence relationships make compulsory ADR alternatives inappropriate for cases involving domestic violence.[4] With arbitration specifically, the risks to the abused party is compounded by a process that removes the usual decision-making authority from a judge, limits the right to appeal, and allows the arbitrator to act independently of judicial precedent, court rules, and statutes in dividing marital property.[5]

Recognizing that mediation is contraindicated in cases involving domestic violence, the State Court Administrative Office developed a screening protocol and required the protocol to be used for the above-summarized domestic relations ADR options. See *Domestic Violence Screening Protocol for Mediators for Domestic Relations Conflicts*, State Court Administrative Office, October 2023. The SCAO protocol emphasizes that the abused party's consent to ADR is the single most important factor.

> Cases in which domestic violence is present are presumed not suitable for mediation. This presumption can be overcome, but only if the abused party desires to participate in mediation and the circumstances of the individual case indicate that mediation will be a safe, effective tool for all concerned. The decision whether to order, initiate or continue mediation despite a presumption against mediation should be made on a case-by-case basis. The most important factor to consider in deciding whether to proceed with mediation is whether the abused party wants to mediate. Mediation should not proceed if the abused party does not wish to participate. *Id.* at 7.

[3] See e.g., Anne M. Sidwell, ARTICLE: Mandatory Child Custody Mediation: A Call on California to Protect Domestic Violence Survivors , 57 U.S.F. L. Rev. 135, 141 (2022); Nancy E. Johnson et al., Child Custody Mediation in Cases of Domestic Violence, 11 VIOLENCE AGAINST WOMEN 1022, 1026 (2005).
[4] Sidwell, supra note 3, at 149.
[5] See e.g. *Konal v Forlini*, 235 Mich App 69, 75; 596 NW2d 630 (1999); *Dick v Dick*, 210 Mich App 576, 588-589; 534 NW2d 185 (1995). See also MCL 600.5081(3) ("The fact that the relief granted in an arbitration award could not be granted by a court of law or equity is not grounds for vacating or refusing to confirm the award.")

In addition to being contrary to the plain reading of MCL 600.5072, Appellant's argument that a court must, due to the existence of a prenuptial agreement, order a case to arbitration over the specific objection of a party alleging domestic violence is inconsistent with the settled understanding that such cases are not suitable for ADR except by mutual consent of the parties. That settled understanding is stated plainly at MCL 600.5072(c), "Arbitration is not recommended for cases involving domestic violence."

The national consensus that arbitration is not suitable for cases involving domestic violence has only grown stronger since Michigan adopted the DRAA. The Uniform Law Commission developed the Uniform Family Law Arbitration Act (UFLAA) in 2016 and the American Bar Association House of Delegates approved the UFLAA in 2017.[6] On March 14, 2024, the American Academy of Matrimonial Lawyers Board of Governors adopted a resolution in favor of the UFLAA, encouraging AAML chapters to work with their legislature to adopt laws consistent with the UFLAA.[7] Michigan is not among the states that have adopted the UFLAA.

Section 12 of the UFLAA recognizes that "[t]he presence of domestic or intimate partner violence can vitiate the voluntariness of the consent to arbitrate."[8] As such, Section 5(b) provides that arbitration agreements are not enforceable and arbitration must be terminated if there are indicators of domestic violence or child abuse.

> (b) If a party is subject to a protection order or an arbitrator determines there is a reasonable basis to believe a party's safety or ability to participate effectively in arbitration is at risk, the arbitrator shall stay the arbitration and refer the parties to court. The arbitration may not proceed unless the party at risk affirms the arbitration agreement in a record and the court determines:
>
> (1) the affirmation is informed and voluntary;
>
> (2) arbitration is not inconsistent with the protection order; and
>
> (3) reasonable procedures are in place to protect the party from risk of harm, harassment, or intimidation.

[6] Resolution in Support of Divorce and Family Law Arbitration, American Academy of Matrimonial Lawyer's Board of Governors (March 14, 2024) online at https://www.uniformlaws.org/viewdocument/enactment-kit-22?CommunityKey=ddf1c9b6-65c0-4d55-bfd7-15c2d1e6d4ed&tab=librarydocuments.
[7] *Id.* at p. 3.
[8] Uniform Family Law Arbitration Act, with prefatory note and comments, National Conference of Commissioners on Uniform State Laws, July 14, 2016. Online at https://www.uniformlaws.org/viewdocument/enactment-kit-22?CommunityKey=ddf1c9b6-65c0-4d55-bfd7-15c2d1e6d4ed&tab=librarydocuments.

Furthermore, arbitration agreements in prenuptial agreements or similar contracts are not binding with regard to issues relating to the parties' children. Section 5 of the UFLAA emphasizes that, "[a]rbitration as a means of resolving family law disputes must be a voluntary and informed choice of the parties, not an alternative that is the product of coercion or a contract of adhesion." The UFLAA recognizes that the use of arbitration clauses in prenuptial agreements "bars pre-dispute arbitration agreements for child-related awards unless the parties reaffirm the agreement after the dispute arises or the agreement was incorporated in a court decree—such as a marital settlement agreement."[9]

The common theme in Sections 5 and 12 of the UFLAA is that parties cannot waive their right to litigate disputes which were not reasonably foreseeable at the time they signed the agreement to arbitrate. The uniform act bars pre-dispute arbitration agreements of child-related issues because "the state's strong interest in protecting children warrants greater restrictions."[10] Similarly, pre-dispute arbitration agreements are not enforceable once domestic violence dynamics are present because of the interest in protecting "the party's safety or ability to participate effectively in the arbitration."[11]

Experts who work with survivors of domestic violence and intimate partner violence understand that one cannot foresee early in a relationship that an intimate partner will later become controlling, abusive, or violent. Perpetrators of domestic violence may employ a range of tactics to obscure the foreseeability of their abusive behavior including using charm and charisma, "love bombing" the victim with overwhelming positivity at the start of a relationship so as to create a false sense of security and attachment.[12] Recognizing that perpetrators of intimate partner violence gain and maintain control over their partner gradually using a variety of behaviors is key to understanding why a party signing a premarital agreement cannot reasonably be said to have made an informed and voluntary waiver of their right to litigate disputed issues in an eventual divorce.

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[9] *Id.* at p. 10
[10] *Id.* at p. 4.
[11] *Id.* at p. 19.
[12] Duron, J. F., Johnson, L., Hoge, G. L., & Postmus, J. L. (2021). Observing coercive control beyond intimate partner violence: Examining the perceptions of professionals about common tactics used in victimization. Psychology of Violence, 11(2), 144–154. https://doi.org/10.1037/vio0000354

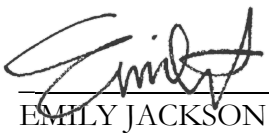
CONCLUSION & RELIEF REQUESTED

A plain reading of MCL 600.5072 supports a determination that it was proper for the Court to consider Mr. Lowery's post-agreement domestic violence allegations. Thus, the Court had no choice but to deny Dr. Lowery's motion to refer the case to arbitration.

Amicus requests that this Court deny Appellant's requested relief and affirm the Trial Court's order denying the motion for arbitration.

Respectively Submitted,

Date: 3/20/25



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WORD COUNT CERTIFICATION

I certify that, pursuant to MCRs 7.212(B)(1), 7.312(A), and 7.312(H)(3), this brief contains 4,283 countable words.