

Family Statute Law Amendment Act, 2005

EXPLANATORY NOTE

Existing Ontario law does not differentiate between family arbitrations and other arbitrations under the *Arbitration Act, 1991*. In general, parties to an arbitration agreement can choose the law that will govern the arbitration.

The Bill creates a new regime for Ontario family arbitrations by making amendments to the *Arbitration Act, 1991* and the *Family Law Act*. Some of the features of this regime are:

1. The term “family arbitration” is applied only to processes conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction. Other third-party decision-making processes in family matters are not family arbitrations and have no legal effect.
2. Both the *Arbitration Act, 1991* and the *Family Law Act* apply to family arbitrations, and the *Family Law Act* governs in case of conflict between the two statutes.
3. Family arbitration agreements are domestic contracts under Part IV of the *Family Law Act* and are enforced under that Act, not under the *Arbitration Act, 1991*.
4. A family arbitration agreement must be in writing, and each party must receive independent legal advice before making the arbitration agreement.
5. Power is provided to make regulations under the *Arbitration Act, 1991* to govern family arbitrations. For example, these regulations could require arbitrators who conduct family arbitrations to be members of a specified dispute resolution organization, to undergo training, to submit reports, to inquire into matters such as power imbalances and domestic violence and to keep records.
6. A number of additional rules are provided for family arbitrations (for example, a party’s failure to object to an irregularity in the arbitration will not be considered a waiver of the right to object later).

Subsection 72 (5) of the *Child and Family Services Act* is amended to add mediators and arbitrators to the list of persons who perform professional or official duties with respect to children and are required to report that a child may be in need of protection.

The Bill also rewrites section 24 of the *Children's Law Reform Act*, which deals with the basis on which applications for custody or access are to be determined. The applicant's ability to act as a parent is added to the list of matters to be considered by the court (clause 24 (2) (g)). The court is directed to consider, in assessing a person's ability to act as a parent, the fact that the person has at any time committed violence or abuse against his or her spouse, a parent of the child, a member of the person's household or any child (subsection 24 (4)). Unproclaimed amendments to the Act that were adopted in 1989 are repealed.

An Act to amend the Arbitration Act, 1991, the Child and Family Services Act and the Family Law Act in connection with family arbitration and related matters, and to amend the Children's Law Reform Act in connection with the matters to be considered by the court in dealing with applications for custody and access

Note: This Act amends or repeals more than one Act. For the legislative history of these Acts, see [Public Statutes – Detailed Legislative History](http://www.e-Laws.gov.on.ca) on www.e-Laws.gov.on.ca.

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

ARBITRATION ACT, 1991

1. (1) Section 1 of the *Arbitration Act, 1991* is amended by adding the following definitions:

“family arbitration” means an arbitration that,

- (a) deals with matters that could be dealt with in a marriage contract, separation agreement, cohabitation agreement or paternity agreement under Part IV of the *Family Law Act*, and
- (b) is conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction; (“arbitrage familial”)

“family arbitration agreement” and “family arbitration award” have meanings that correspond to the meaning of “family arbitration”. (“convention d’arbitrage familial”, “sentence d’arbitrage familial”)

(2) The Act is amended by adding the following sections:

Family arbitrations, agreements and awards

2.1 (1) Family arbitrations, family arbitration agreements and family arbitration awards are governed by this Act and by the *Family Law Act*.

Conflict

(2) In the event of conflict between this Act and the *Family Law Act*, the *Family Law Act* prevails.

Other third-party decision-making processes in family matters

2.2 (1) When a decision about a matter described in clause (a) of the definition of “family arbitration” in section 1 is made by a third person in a process that is not conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction,

- (a) the process is not a family arbitration; and
- (b) the decision is not a family arbitration award and has no legal effect.

Advice

(2) Nothing in this section restricts a person’s right to obtain advice from another person.

(3) Section 3 of the Act is repealed and the following substituted:

Contracting out

3. The parties to an arbitration agreement may agree, expressly or by implication, to vary or exclude any provision of this Act except the following:

1. In the case of an arbitration agreement other than a family arbitration agreement,
 - i. subsection 5 (4) (“*Scott v. Avery*” clauses),
 - ii. section 19 (equality and fairness),
 - iii. section 39 (extension of time limits),
 - iv. section 46 (setting aside award),
 - v. section 48 (declaration of invalidity of arbitration),
 - vi. section 50 (enforcement of award).
2. In the case of a family arbitration agreement,
 - i. the provisions listed in subparagraphs 1 i to vi,
 - ii. subsection 4 (2) (no deemed waiver of right to object),
 - iii. section 31 (application of law and equity),

- iv. subsections 32 (3) and (4) (substantive law of Ontario or other Canadian jurisdiction), and
- v. section 45 (appeals).

(4) Section 4 of the Act is amended by adding the following subsection:

Exception, family arbitrations

- (2) Subsection (1) does not apply to a family arbitration.

(5) Section 32 of the Act is amended by adding the following subsections:

Exception, family arbitration

- (3) Subsections (1) and (2) do not apply to a family arbitration.

Same

(4) In a family arbitration, the arbitral tribunal shall apply the substantive law of Ontario, unless the parties expressly designate the substantive law of another Canadian jurisdiction, in which case that substantive law shall be applied.

(6) Section 45 of the Act is amended by adding the following subsection:

Family arbitration award

- (6) Any appeal of a family arbitration award lies to,

- (a) the Family Court, in the areas where it has jurisdiction under subsection 21.1 (4) of the *Courts of Justice Act*;
- (b) the Superior Court of Justice, in the rest of Ontario.

(7) Subsection 46 (1) of the Act is amended by adding the following paragraph:

- 10. The award is a family arbitration award that is not enforceable under the *Family Law Act*.

(8) Subsection 50 (3) of the Act is amended by striking out “or” at the end of clause (b), by adding “or” at the end of clause (c), and by adding the following clause:

- (d) the award is a family arbitration award.

(9) Subsection 50 (4) of the Act is amended by striking out “or” at the end of clause (c), by adding “or” at the end of clause (d), and by adding the following clause:

- (e) the award is a family arbitration award.

(10) The Act is amended by adding the following section:

Family arbitration awards

50.1 Family arbitration awards are enforceable only under the *Family Law Act*.

(11) The Act is amended by adding the following section:

Regulations

58. The Lieutenant Governor in Council may make regulations,

- (a) prescribing standard provisions and requiring that every family arbitration agreement contain those provisions;
- (b) requiring that every arbitrator who conducts a family arbitration be a member of a specified dispute resolution organization, and specifying one or more organizations for that purpose;
- (c) requiring every arbitrator who conducts a family arbitration to provide a copy of the award, from which the names of the parties and any other identifying information have been removed, to a specified person, or to one of several specified persons, and specifying the person or persons;
- (d) prohibiting any arbitrator from conducting a family arbitration unless he or she has previously received training, approved by the Attorney General, that includes training in screening parties separately for power imbalances and domestic violence;
- (e) requiring every arbitrator who conducts a family arbitration to consider or inquire into prescribed matters, including without limitation power imbalances and domestic violence, before beginning the arbitration;
- (f) requiring every arbitrator who conducts a family arbitration to create a record of the arbitration containing the prescribed matters, to keep the record for the prescribed period and to protect the confidentiality of the record;
- (g) prescribing matters for the purpose of clauses (e) and (f).

CHILD AND FAMILY SERVICES ACT

2. Clause 72 (5) (b) of the *Child and Family Services Act* is repealed and the following substituted:

- (b) a teacher, school principal, social worker, family counsellor, operator or employee of a day nursery and youth and recreation worker;
- (b.1) a religious official, including a priest, a rabbi and a member of the clergy;
- (b.2) a mediator and an arbitrator;

CHILDREN'S LAW REFORM ACT

3. (1) Section 24 of the *Children's Law Reform Act* is repealed and the following substituted:

Merits of application for custody or access

24. (1) The merits of an application under this Part in respect of custody of or access to a child shall be determined on the basis of the best interests of the child, in accordance with subsections (2), (3) and (4).

Best interests of child

- (2) The court shall consider all the child's needs and circumstances, including,
 - (a) the love, affection and emotional ties between the child and,
 - (i) each person entitled to or claiming custody of or access to the child,
 - (ii) other members of the child's family who reside with the child, and
 - (iii) persons involved in the child's care and upbringing;
 - (b) the child's views and preferences, if they can reasonably be ascertained;
 - (c) the length of time the child has lived in a stable home environment;
 - (d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessities of life and any special needs of the child;
 - (e) any plans proposed for the child's care and upbringing;

- (f) the permanence and stability of the family unit with which it is proposed that the child will live;
- (g) the ability of each person applying for custody of or access to the child to act as a parent; and
- (h) the relationship by blood or through an adoption order between the child and each person who is a party to the application.

Past conduct

- (3) A person's past conduct shall be considered only,
 - (a) in accordance with subsection (4); or
 - (b) if the court is satisfied that the conduct is otherwise relevant to the person's ability to act as a parent.

Violence and abuse

- (4) In assessing a person's ability to act as a parent, the court shall consider whether the person has at any time committed violence or abuse against,
 - (a) his or her spouse;
 - (b) a parent of the child to whom the application relates;
 - (c) a member of the person's household; or
 - (d) any child.

- (2) **Section 78 of the Act is repealed.**

COURTS OF JUSTICE ACT

4. The Schedule to section 21.8 of the *Courts of Justice Act* is amended by adding the following paragraph:

- 5. Appeals of family arbitration awards under the *Arbitration Act, 1991*.

FAMILY LAW ACT

5. (1) Subsection 33 (4) of the *Family Law Act* is amended,

- (a) **by striking out "or paternity agreement" and "or agreement" in the portion before clause (a); and**

(b) by striking out “or agreement” in clause (c).

(2) Subsection 35 (1) of the Act is amended,

(a) by striking out “or paternity agreement”; and

(b) by striking out “contract or agreement” wherever it appears and substituting in each case “contract”.

(3) Subsection 35 (2) of the Act is amended by striking out “or agreement” in the portion before clause (a).

(4) Subsection 35 (3) of the Act is amended by striking out “or agreement”.

(5) Subsection 35 (5) of the Act is amended by striking out “and agreements”.

(6) The definition of “domestic contract” in section 51 of the Act is repealed and the following substituted:

“domestic contract” means a marriage contract, separation agreement, cohabitation agreement, paternity agreement or family arbitration agreement; (“contrat familial”)

(7) Section 51 of the Act is amended by adding the following definitions:

“family arbitration” means an arbitration that,

(a) deals with matters that could be dealt with in a marriage contract, separation agreement, cohabitation agreement or paternity agreement under this Part, and

(b) is conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction; (“arbitrage familial”)

“family arbitration agreement” and “family arbitration award” have meanings that correspond to the meaning of “family arbitration”; (“convention d’arbitrage familial”, “sentence d’arbitrage familial”)

(8) Subsection 56 (1.1) of the Act is amended by striking out “or paternity agreement” and “or agreement”.

(9) Section 59 of the Act is amended by adding the following subsection:

Transitional provision

(6) A paternity agreement that is made before the day section 4 of the *Family Statute Law Amendment Act, 2005* comes into force is not invalid for the reason only that it does not comply with subsection 55 (1).

(10) Part IV of the Act is amended by adding the following sections:

Family arbitrations, agreements and awards

59.1 (1) Family arbitrations, family arbitration agreements and family arbitration awards are governed by this Act and by the *Arbitration Act, 1991*.

Conflict

(2) In the event of conflict between this Act and the *Arbitration Act, 1991*, this Act prevails.

Other third-party decision-making processes in family matters

59.2 (1) When a decision about a matter described in clause (a) of the definition of “family arbitration” in section 51 is made by a third person in a process that is not conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction,

- (a) the process is not a family arbitration; and
- (b) the decision is not a family arbitration award and has no legal effect.

Advice

(2) Nothing in this section restricts a person’s right to obtain advice from another person.

Contracting out

59.3 Any express or implied agreement by the parties to a family arbitration agreement to vary or exclude any of sections 59.1 to 59.7 is without effect.

No agreement in advance of dispute

59.4 A family arbitration agreement and an award made under it are unenforceable unless the family arbitration agreement is entered into after the dispute to be arbitrated has arisen.

Status of awards

59.5 A family arbitration award may be enforced or set aside in the same way as a domestic contract.

Conditions for enforceability

59.6 (1) A family arbitration award is enforceable only if,

- (a) the family arbitration agreement under which the award is made is made in writing and complies with any regulations made under the *Arbitration Act, 1991*;
- (b) each of the parties to the agreement receives independent legal advice before making the agreement;
- (c) the requirements of section 38 of the *Arbitration Act, 1991* are met (formal requirements, writing, reasons, delivery to parties); and
- (d) the arbitrator complies with any regulations made under the *Arbitration Act, 1991*.

Certificate of independent legal advice

(2) When a person receives independent legal advice as described in clause (1) (b), the lawyer who provides the advice shall complete a certificate of independent legal advice, which may be in a form approved by the Attorney General.

Secondary arbitration

59.7 (1) The following special rules apply to a secondary arbitration and to an award made as the result of a secondary arbitration:

1. Despite section 59.4, the award is not unenforceable for the sole reason that the separation agreement was entered into or the court order or earlier award was made before the dispute to be arbitrated in the secondary arbitration had arisen.
2. Despite clause 59.6 (1) (b), it is not necessary for the parties to receive independent legal advice before participating in the secondary arbitration.
3. Despite clause 59.6 (1) (c), the requirements of section 38 of the *Arbitration Act, 1991* need not be met.

Definition

(2) In this section,

“secondary arbitration” means a family arbitration that is conducted in accordance with a separation agreement, a court order or a family arbitration award that provides for the arbitration of possible future disputes relating to the ongoing management or implementation of the agreement, order or award.

COMMENCEMENT AND SHORT TITLE

Commencement

6. (1) Subject to subsection (2), this Act comes into force on the day it receives Royal Assent.

(2) Sections 1, 4 and 5 come into force on a day to be named by proclamation of the Lieutenant Governor.

Short title

7. The short title of this Act is the *Family Statute Law Amendment Act, 2005*.