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Uniform Family Law Arbitration Act: Adding Another ADR Option

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> *A significant advantage of arbitration … is the opportunity for the resolution of sensitive matters in a private and informal forum*.[1]

I. Introduction

The Uniform Law Commission adopted the Uniform Family Law Arbitration Act in July 2016 offering a framework for all states to enact arbitration for family law cases. The growing number of highly contested family law cases combined with budget cuts to state courts creating long delays make it necessary for lawyers and judges to consider faster alternative ways to resolve disputes. Along with mediation and collaborative law, arbitration could, and should, be a viable option. Those who cannot settle their family law disputes over money or their children through negotiation or mediation most often have to litigate. Litigation is rarely a good option for these emotionally-charged disputes, especially where children are involved.[2] High conflict cases that often drag on for years due to contentious parties and crowded court dockets with inadequate resources harm both parents and children, financially and emotionally.[3] For parties who want a final decision from an expert on part or all of their case in a timely manner, arbitration offers more privacy and informality and, in most cases, at a lower cost.

Arbitration depends upon the parties entering into an agreement to arbitrate their dispute. The parties select (and pay) the neutral arbitrator based on reputation, experience and expertise. They also choose the issues to be decided, the procedures to be used and the timeline. The parties bypass the delays, formality and time constraints of the public court system by removing the case

from the court.[4] The arbitrator may conduct the hearing(s) in a private informal setting at times convenient to the parties, not just courthouse hours and dates. The parties may agree as to discovery and to submit evidence in whatever form they wish. After hearing each side's witnesses and other evidence, the arbitrator makes a binding decision.[5] There are few grounds to overturn the award, such as the arbitrator engaged in fraud, corruption or other serious misconduct. The award can be enforced or affirmed by the court as part of its judgment.

Family law differs from commercial disputes mainly because of the intimate relationship between the parties and the subject matter – often children - which creates a strained emotional climate. Families also come in varying forms, including unmarried same-sex partners, stepparents, grandparents and other relatives, not all of whom are treated the same under state laws. Arbitration can work for large numbers of complex family law cases. Indeed, parties have been arbitrating property and support issues for decades in several states. Child-related issues, however, raise different concerns because of the court's role as *parens patriae* to protect the best interests of children.[6]

This article begins with a brief history of arbitration generally and then explores the development of arbitration in family law disputes. The article then discusses the drafting history and some of the key provisions of the Uniform Family Law Arbitration Act (UFLAA). The article suggests that the UFLAA provides a strong framework for arbitrating family law matters and includes adequate protections to protect the best interest of children. The article concludes that states should adopt the Uniform Family Law Arbitration Act to give parties an additional avenue to resolve disputes, especially in high conflict cases.

II. Brief History of Arbitration

The ancient roots of arbitration can be found in mythology, religious tribunals, the Bible, Greece, Phoenicia, and Rome. There are references to arbitration in the English judicial system as early as 1281. At early common law, however, agreements to arbitrate were unenforceable because courts found the contracts deprived the courts of jurisdiction. As society became more complex and litigious, the court process was perceived to be too slow, too cumbersome and too expensive. Often the judges had no knowledge of the subject matter and no technical expertise. Many also lacked familiarity with business practices and customs. Modern arbitration developed in the early twentieth century through judicial and legislative action, particularly in the labor and commercial contexts. Today, arbitration's legal status is based on the common law or state statutes or both.

A. *Federal Arbitration Act*

The Federal Arbitration Act (FAA),[7] based on the power of Congress under the Commerce Clause to regulate interstate commerce, provides the source of arbitration law nationally. It limits the defenses available to enforcing arbitration in maritime and commerce-related contracts. The FAA requires courts to enforce arbitration agreements made either before or after a dispute arises unless an exception to enforcement is found in the FAA or other statute.[8] The FAA reflects a liberal federal policy favoring arbitration and freedom of contract - the fundamental principle underlying arbitration.[9] As the Supreme Court has noted "written contracts to arbitrate are valid, irrevocable and enforceable…except on such grounds as exist at law or equity for revocation of any contract."[10]

The FAA applies if the arbitration agreement is in writing, the agreement of the parties involves interstate commerce, and the agreement is not vulnerable to attack under general state

contract law. The FAA enforcement provisions preempt contrary state law.[11] A state cannot single out an arbitration agreement for invalidation or restriction except for grounds that exist for invalidation or restriction of all other types of contracts.[12] The United States Supreme Court has consistently favored arbitration finding that the principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms.[13] The arbitrator's award is subject to limited review and vacation only where the arbitrator engaged in fraud, corruption or other serious misconduct.The agreement to arbitrate "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."[14]

B. *The Uniform Law Commission and Arbitration*

The National Conference of Commissioners on Uniform State Laws, now the Uniform Law Commission ULC), promulgated a modern Uniform Arbitration Act (UAA) in 1955 which an overwhelming majority of states adopted.[15] The UAA follows the FAA and is a relatively short, bare-bones statute. There are seven basic elements to the UAA: (1) enforceability of agreements to arbitrate existing and in some cases, future disputes; (2) courts are given jurisdiction to compel or to stay arbitration; (3) courts can stay litigation pending arbitration; (4) courts can appoint the arbitrator if parties failed to provide a method of appointment; (5) summary procedure is provided for confirmation and for court vacation, modification or correction of awards on limited grounds; (6) courts are authorized to enter enforceable judgment upon awards confirmed, modified or corrected; and (7) the parties are given the right to appeal from the judgments. The UAA, however, failed to address who determines arbitrability, procedural provisions of initiating arbitration, powers of the arbitrator, when costs and fees could be awarded, and which sections were waivable.

In 2000, the ULC adopted the Revised Uniform Arbitration Act (RUAA), a lengthier, more detailed and more prescriptive statutory framework. It is now in twenty-one states.[16] Several states that enacted the RUAA, however, did not repeal the UAA.[17] The RUAA sets out a comprehensive procedural framework for arbitration by detailing how to initiate arbitration, authorizing summary dispositions, and setting requirements for notice and hearings. The RUAA establishes judicial and arbitral authority to order provisional remedies to maintain the status quo and authorizes courts to consolidate arbitration hearings. The RUAA requires arbitrators to disclose conflicts, such as known financial interests or personal relationships, that could impair impartiality. The RUAA permits all parties to have a lawyer; authorizes arbitrator subpoenas, deposition orders and arbitrator-supervised discovery; and permits a wide range of arbitral remedies, including punitive damages and attorney fees. The RUAA gives the arbitrator the same powers and immunity similar to that of judges.

The RUAA retains the major benefit of arbitration which is the narrow review of an arbitrator's award. One party may move for confirmation of the award. If there is no challenge, the award will be confirmed. If there is a challenge, judicial review of arbitration awards is limited. The court generally will not review the evidence considered by the arbitrator or review for errors of law.[18] Arbitration awards typically are vacated only for arbitrator misconduct such as fraud or corruption or grounds going to the fairness of the arbitration process. RUAA Section 23(a) allows an award to be vacated on specific statutory grounds, including: (1) the award was procured by corruption or fraud; (2) there was evident partiality, corruption or misconduct of arbitrator; (3) the arbitrator refused postponement despite a showing of sufficient cause; (4) the arbitrator exceeded the powers given; (5) there was no agreement to arbitrate; or (6) arbitration was conducted without proper notice.

While the RUAA provides much more structure than the UAA, neither act is well suited for arbitration of family law disputes. Neither addresses the types of issues that can arise because of the intimate relationship between the parties, the private subject matter, the need for interim relief, concerns for the safety, and public policy issues relating to children.

III. Family Law Arbitration

Family law arbitration is a relatively recent development because there has always been an issue of whether family law disputes, as a matter of public policy, should be permitted to be settled out of court. For decades, family law cases were thought to fall under a judicially-created public policy exception.[19] In the 1980s, the United States Supreme Court rejected the exception.[20] Despite that, some states do not allow parties to agree to arbitrate children's issues. Arguably, FAA preemption could nullify state statutes or court decisions that prohibit arbitration of family law disputes generally or permit de novo review of awards that exceed the FAA's limited review, but that is unlikely given the Supreme Court's strong presumption against preemption in domestic relations matters.[21] FAA preemption would apply, however, if states attempted to preclude parties from arbitrating disputes covering businesses and property located in several states because of the involvement with interstate commerce.

Arbitration, especially of post dissolution disputes, has developed partly because allowing parties to agree to arbitrate keeps them off of congested court dockets. Additionally, in most states without a unified family court, many judges appointed to hear family law cases often have come from litigation or prosecutor's offices with no background, certainly not expertise, in family law.[22] North Carolina has been one of the leaders in the use of arbitration in family law matters using basic arbitration law. It enacted the first comprehensive family law arbitration act in 1999.[23] In 1990, the American Academy of Matrimonial Lawyers (AAML) adopted Rules for

Arbitration of Financial Issues. A 1992 article in the American Bar Association's *Family Advocate* extolled the benefits of arbitration as selection of the decision maker, convenient forum for hearing, procedural flexibility, speedy and less costly proceedings, with final and binding rulings on property issues.[24] Some states began to allow arbitration using the state's basic arbitration law, the UAA or RUAA.[25] Other states expressed hostility to arbitrating family law issues finding no express statutory authority; that the state's *parens patriae* responsibility to protect children could not be ousted by parental agreement and that the narrow grounds traditionally available to vacate an arbitration award are not enough to protect children.

By 2010, several states had added specific family law arbitration provisions.[26] The American Academy of Matrimonial Lawyers approved a Model Family Law Arbitration Act in 2005 which follows closely the RUAA and the North Carolina Act.[27] Although no state has enacted the Act, it is close to North Carolina's act and the AAML Act was the impetus for other states to consider arbitration. The AAML regularly offers annual trainings and certification for family law arbitrators and boasts over 280 trained arbitrators.

Nine states appear to allow all family matters to be arbitrated.[28] In the rest of the states, not all family law issues are arbitrable. Most states allow arbitration of alimony issues and property distribution.[29] Most states also find that permitting parents to arbitrate child support does not interfere with the judicial protection of the best interests of children.[30] Today with presumptive child support guidelines mandating the amount of support, this is particularly true. As one court noted, there is "no valid reason why the arbitration process should not be available in the area of child support; the advantages of arbitration in domestic disputes outweigh any disadvantages."[31]

The major objection to arbitration arises because some states find that only a judge can

determine child-related issues. States which exclude some or all child-related issues from contractual arbitration, either by statute or by case law, follow the traditional view that only a judge can determine what is in a child's best interests.[32]

Many states do approve post decree, parenting-plan provided, arbitration. The parties have a court decree and have specified in their parenting plan to use arbitration as the way to resolve any post-decree disputes about custody and visitation. For example, Florida does not allow arbitration of child custody, but a Florida court upheld enforcement of an arbitration clause in a marital settlement agreement that stated:

> By April 1 of each year, the parties shall reach agreement as to whether or not private school is necessary for the children for the next year. If they cannot agree, they will go to arbitration. . .

The court found that the issue for the arbitrator was "educational need," not custody, and the parties had already decided how expenses were to be paid if the need were found.[33] On the other hand, some courts prohibit even the post-decree tie breaker type of arbitration of children's issues.[34]

New Jersey has found that parents have a constitutional right to choose to resolve their custody disputes by arbitration.[35] The New Jersey Supreme Court stated:

> Parental autonomy includes the right to submit any family controversy, including child-custody and parenting-time issues, to a decision maker chosen by the parents. The right of parents to make decisions regarding custody, parenting time, health, education, and other child-welfare issues between themselves, without state interference, does not evaporate when a marriage breaks down. . . . *Just as parents choose to decide those issues among themselves, they may opt to sidestep the judicial process and submit their dispute to an arbitrator whom they have chosen.* The right to arbitrate serves an important family value by allowing parents the opportunity to choose an arbitrator based on her familiarity with the family or her understanding of the values that the parents hold dear and have tried to follow in raising their child.[36] [Emphasis added].

In between the states which do not allow arbitration of custody at all and those which embrace it are those states which permit arbitration of child custody and child support as long as there is a procedure for meaningful judicial review of the child's best interests.[37] Colorado found that the statute making a de novo review of the arbitrator's award discretionary with the judge did not violate the father's due process rights and the trial court did not abuse its discretion.[38]

III. Uniform Family Law Arbitration Act

In 2016, the Uniform Law Commission approved a Uniform Family Law Arbitration Act (UFLAA).[39] The UFLAA offers states an option for more uniformity and protections for family members choosing to arbitrate disputes. The UFLAA , a free-standing act tailored to family law cases, uses the state's basic arbitration law, UAA or RUAA, as back up for procedure and notice.[40]

A. *Brief History*

Despite the rise in family law arbitration, many states rely on the standards of commercial arbitration law found in the Uniform Arbitration Act(UAA) and the Revised Uniform Arbitration Act (RUAA). As noted earlier, unlike commercial conflicts, family law disputes implicate unique state interests. The state has a *parens patriae* duty to protect children and vulnerable family members and an interest in ensuring that the arbitration process is fair to the participants. Neither the UAA nor the RUAA provide protection for children and victims of family violence during the arbitration process. Neither provide for additional judicial review to ensure that a child's best interests were part of the decision. Additionally, general arbitration law has limited access to courts or provisions to ensure fairness to the parties.

The Joint Editorial Board on Uniform Family Law recommended setting up a committee

to study arbitration in family law cases in December 2011. A Study Committee Report in 2012 unanimously recommended that the appointment of a drafting committee for a uniform act for family law arbitration.

> * * * we recommend a free-standing act— not a set of amendments to either version of the Uniform Arbitration Act. At the same time, we believe a family law arbitration act should contain only the features of arbitration law that are essential for family law arbitration and are typically not addressed by commercial arbitration statutes. . . . .

The ULC established a drafting committee in August 2013 appointing Professor Barbara A. Atwood as Chair and Professor Linda D. Elrod as Reporter. The committee's first meeting flushed out some of the major issues to address such as pre-dispute agreements to arbitrate, subjects to exclude, the standard of judicial review for child-related issues and safeguards for domestic violence.[41] Over a three year period, the drafting committee met nine times face to face, reviewed countless revised drafts, and participated in numerous telephone conferences.

In July 2016, the Uniform Law Commission adopted the Uniform Family Law Arbitration Act (UFLAA). The UFLAA is relatively short with just 29 sections.[42] Many sections, especially the procedural ones, mirror the RUAA. This is because many states still use the UAA as the basic arbitration base.

B. *Types of Family Law Disputes*

1. GENERALLY

The Uniform Family Law Arbitration Act broadly defines a "family law dispute" in Section 2(6) as a contested issue arising under the family or domestic relations law of a state. UFLAA Section 3(a) covers the arbitration of potentially any contested issue arising under the enacting state's family law. In most states, a family law dispute would include the interpretation and enforcement of premarital, cohabitation and separation agreements; the characterization,

valuation and division of property and allocation of debt; awards of alimony or spousal support; custody, parenting time and visitation; child support; and an award of attorney's fees. Recently, pet custody has become an area for arbitration because some states treat animals like property. Many pet owners may want the decision-maker to be a pet owner who uses a "welfare of the pet" standard.[43]

The UFLAA Section 3(b) excludes certain status determinations. The arbitrator cannot divorce the parties, terminate parental rights, grant an adoption or guardianship, or adjudicate a child in need of care or juvenile offender, or the like.

2. CHILD-RELATED DISPUTES

The UFLAA treats child-related issues differently than property and support issues. The UFLAA defines child-related disputes in Section 2(4) as those regarding legal custody, physical custody, custodial responsibility, parental responsibility or authority, parenting time, right to access, visitation, or financial support regarding a child. The UFLAA presumptively extends to child-related disputes and contains numerous safeguards to ensure that an arbitrator follows state law and adequately protects the child's best interests. The UFLAA protects children in various provisions, discussed infra, and ensures the arbitrator considered the child's best interest in making an award. The UFLAA requires a vigorous judicial review of child-related awards that does not exist for property issues.

Because a minority of states oppose arbitration of child-related issues, the UFLAA Section 3 brackets "child-related dispute." This means that a state may choose to enact the UFLAA but exclude arbitration of children's issues. If a state excludes arbitration of children's issues, however, it is unlikely that the huge caseloads facing domestic courts will decrease.

Parenting issues make up a large part of the family court docket. If a state does exclude child-related disputes, it would include them under the status exceptions in Section 3(b).

C. *Agreement to Arbitrate*

Arbitration is contractual. A court cannot compel arbitration in the absence of an agreement to arbitrate. A court will order arbitration only after finding that the parties have voluntarily agreed to arbitration and that their agreement covers the dispute.[44] UFLAA Section 5 lists the contents and requirements for the agreement to arbitrate. It must be in writing and must identify the dispute to be arbitrated as well as the arbitrator or a way of selecting the arbitrator. Absolute clarity in describing the family law dispute that the parties want to arbitrate will avoid possible time-consuming litigation down the road.

1. INFORMED CONSENT

The UFLAA contemplates a voluntary, not a coerced, decision to arbitrate. The agreement to arbitrate a family dispute must be an informed choice of each party. A lawyer advising a client whether to arbitrate should explain the advantages and limitations of arbitration so that the client makes an informed choice. The agreement should clearly establish that the parties are aware of their rights to a judicial determination and have knowingly and voluntarily waived that right. The New Jersey Supreme Court Rules for family arbitration have specific precautions and require that the agreement to arbitrate state:

> (i) the parties understand their entitlement to a judicial adjudication of their dispute and are willing to waive that right; (ii) the parties are aware of the limited circumstances under which a challenge to the award may be advanced and agree to those limitations; (iii) the parties have had sufficient time to consider the implications of their decision to arbitrate; and (iv) the parties have entered into the Agreement or Consent Order freely and voluntarily, after due consideration of the consequences of doing so.[45]

Family law cases almost always contain private sensitive information about parenting, family finances, and maybe the parties' sex life. The public has no interest in the resolution of others' private family disputes – how much money people have or the custody arrangements for their children.[46] The UFLAA does not include confidentiality provisions so it is important that the parties include those provisions in the agreement to arbitrate.

2. INTIMATE PARTNER VIOLENCE ISSUES

To the extent that domestic violence impairs one party's ability to voluntarily choose arbitration or to present evidence, there may be a lack of informed consent. Because arbitration requires an agreement to arbitrate which is similar to litigation, the parties are more likely to have lawyers than parties in mediation. The presence of a lawyer is a protective factor. UFLAA Section 10(a)(1) makes it clear that each party may be represented by an attorney throughout the arbitration.

The UFLAA also addresses the domestic violence issue in several ways. First, UFLAA Section 12 provides that if a party is subject to an order of protection or if the arbitrator otherwise finds that a party's safety or ability to participate effectively in the arbitration is at risk, the arbitration is suspended unless the party who is at risk reaffirms the desire to arbitrate and a court allows it. Note, a court—not the arbitrator—must decide whether arbitration may proceed. For arbitration to go forward, the party at risk of harm must reaffirm the agreement to arbitrate, and the court must find that adequate procedures are in place to protect the party from risk of harm or intimidation. Under Section 11, the arbitrator is also empowered to issue temporary orders to protect a party if needed. If a party seeks court relief, the court may stay the arbitration and review a determination of temporary award.

UFLAA Section 10 (a)(2) allows a party to have a non-advocating individual present with the party so long as the individual is not a witness in the case. The provision is crafted to make it possible for victims of domestic violence to choose arbitration with the benefit of a support person.

Although the parties are free to choose any arbitrator they wish, if they do not select an arbitrator, the court appoints one. UFLAA Section 8 protects victims by requiring that a court-appointed arbitrator must be a lawyer or judge (can be retired) who has training in identifying domestic violence and child abuse the same as a judicial officer. Family arbitration is new enough that there exists almost no literature on domestic violence in the context of arbitration. A substantial body of literature does exist about domestic violence in mediation.[47] Most standards for mediators requiring screening for the presence of violence and provide special protocols to protect victims in mediation.[48]

3. PRE-DISPUTE AGREEMENTS TO ARBITRATE

Pre-dispute clauses to arbitrate in premarital agreements have been around and enforced for a long time.[49] The UFLAA Section 5(b) allows an agreement to arbitrate issues that arise before, at the time, or after the agreement is made, except on a ground that exists at law or equity for revocation of the contract (FAA language). Additionally, parties may agree in a separation or marital settlement agreement on a dispute resolution method if there is a disagreement over financial issues.[50]

There was debate in the drafting committee whether all agreements should be made at the time the issue arises. The use of pre-dispute agreements in consumer contracts (often contracts of adhesion) has sparked widespread criticism. Family law cases, however, are unlikely to have similar concerns because it is the parties themselves who are agreeing, whether in an earlier

agreement or an agreement entered into at the time of marital dissolution. In addition, there is no built-in bias favoring one party (like the company) over the other. Instead, the neutral arbitrator is selected by the parties or the court, often providing specialized expertise. Additionally, as noted earlier, the FAA may require enforcement of pre-dispute arbitration agreements of property involved in interstate commerce.

Another concern has been the parties agreeing to go to religious tribunal arbitration. The general rule is that if arbitration is conducted pursuant to a valid agreement, parties of the same religion can have religious authorities resolve their disputes in accordance with religious law.[51] State courts, however, do have settled authority to vacate religious arbitral awards that appear "contrary to public policy."[52] Additionally, if a state does not allow the subject matter to be arbitrated in the state, the parties cannot agree to arbitration in a religious tribunal to get around it.

Child-related issues present different problems with pre-dispute agreements. At the time of a premarital agreement, there may be no children. Additionally, the issues may not be clear before the dispute arises. UFLAA Section 5(c) generally bars enforcement of an agreement to arbitrate child-related issues unless the agreement is entered into or reaffirmed *after* the dispute has arisen. A parent's choice to arbitrate is likely to be better informed and based on a fuller understanding of the child's interests at the time the dispute erupts.

The one exception to the contemporaneous agreement requirement is when the agreement to arbitrate disputes resulted from an agreement incorporated in an earlier court decree—such as a marital settlement agreement or separation agreement. Current parenting plan statutes require that the parties provide a method of dispute resolution that does not require court intervention if

the parties cannot agree on matters relating to their children.[53] As with other law, the agreement could be attacked for issues relating to duress, fraud or unconscionability.

D. *Protecting Children in Arbitration*

Even though New Jersey considers that the parents have a constitutional right to choose the forum for deciding custody issues, New Jersey requires enough of a record to ensure that the arbitrator's award will not harm the child.[54] The UFLAA stayed with the best interests, rather than the harm to the child, standard. The UFLAA includes several layers of protection to ensure that child-related issues are handled properly. The UFLAA recognizes the state's *parens patriae* responsibility for children in several provisions, some non-waivable.

First, predispute agreements for child-related disputes are not permissible unless arbitration is selected in the parties' parenting plan or separation agreement. Second, UFLAA Section 13(12) allows the arbitrator to appoint a lawyer or guardian ad litem to represent the child. The arbitrator can also meet with or interview the child. Third, if an arbitrator has a reasonable basis to believe that a child is the subject of abuse or neglect, Section 12(c) requires the arbitrator to terminate the arbitration and report the findings to the appropriate state authority. Like mediators, arbitrators are made mandated reporters of abuse.

Section 14(b) requires the arbitrator to cause a verbatim record to be made of any part of an arbitration hearing concerning a child-related dispute. This can be a simple recording or any means of getting a verbatim record. It does not require a court reporter.

Section 15(c) requires that an award determining a child-related dispute must state the reasons on which it is based as required by the law of the state in family law cases. In most states, this means findings of fact and conclusions of law. In contrast to the limited judicial

review in commercial arbitration, the UFLAA requires robust judicial scrutiny of child-related awards. Under Sections 16 and 19, a court cannot confirm an award determining child custody or child support unless it finds that the award complies with applicable law and is in the child's best interests. To confirm an award with a child-related dispute, Section 16(c) requires the court to determine that the award complies with the law of the state and is in the best interests of the child. An award can be vacated if the award did not comply with section 15 or law of state dealing the best interests of the child. While the state could provide for a de novo review, it does not have to.

E. *Arbitration Process*

The UFLAA provides a streamlined set of guidelines for family law arbitration. The UFLAA incorporates by reference each state's arbitration law (UAA or RUAA) for many procedural questions that do not implicate family law concerns, like the basic notice provisions. While the Act is intended to operate against the backdrop of a state's general law on contractual arbitration, it includes provisions essential to a fair and efficient arbitration process. Where a party files suit on a claim covered by an arbitration agreement, the court stays or dismisses the judicial proceeding and issues an order compelling arbitration.

1. QUALIFICATIONS OF ARBITRATORS

The parties are free to pick any one or a panel of persons to arbitrate their dispute and their choice of arbitrator, arbitration organization or method of selection of the arbitrator controls. If the parties cannot agree or leave it to the court to appoint an arbitrator, UFLAA Section 8(a) mandates the court appoint an arbitrator who is an attorney in good standing admitted to practice or a retired attorney or judge, trained in domestic violence and child abuse the same as a judicial officer. The UFLAA does not list any minimum training hours or subject

matter requirements. This may be an area in which states want to provide more detail as to the training. Having minimum qualifications and training listed as part of an arbitrator's credentials would give the arbitration option a more structured and regulated framework, which would hopefully give litigants, attorneys, and judges more confidence in arbitration and help ensure its success. Potentially, training based on the program currently provided by the AAML could be offered prior to and in conjunction with the adoption of the Uniform Family Law Arbitration Act. The AAML urges that lawyers serving as arbitrators comply with all relevant rules relating to judges, including the ABA Code of Judicial Conduct and the AAML Bounds of Advocacy for Family Lawyers § 9.2 (2000).

Not really part of actual qualifications, but certainly important to the parties is the requirement under UFLAA Section 9 that the arbitrator disclose any known fact a reasonable person would believe is likely to affect impartiality or the ability to make a timely award. The parties are selecting arbitration partly because of the speed. If the arbitrator is planning a two month cruise, that needs to be disclosed. If a disclosure is not made, the court on motion of a party may suspend the arbitration, vacate an award or grant other appropriate relief. In a recent Texas case, the court upheld the divorce but vacated the rest of the order based on the arbitration award finding the arbitrator's failure to disclose his close relationship with the husband's attorney could be seen objectively as evident partiality.[55]

2. POWERS OF ARBITRATOR

The UFLAA Section 13 provides a non-exclusive list of arbitrator powers. Basically, the arbitrator can do anything a family court judge could do unless otherwise agreed by the parties or limited by a state choosing not to allow arbitration of child-related disputes. The powers listed in Section 13 are taken from the Revised Uniform Arbitration Act. These powers include to select

the rules for the arbitration; conduct the prehearing conferences and the hearing; administer oaths to parties and witnesses; allow any party to conduct prehearing discovery by interrogatories, deposition, requests for production of documents, or other means; determine the admissibility of evidence; and subpoena witnesses or documents upon the arbitrator's own initiative or request of a party. In addition, the arbitrator is given powers that may be uniquely necessary in the family law context, such as the power to meet with a child, appoint a representative for the child, and impose procedures to protect a party or child from risk of harm.

The parties can set out the powers of the arbitrator in their agreement. The arbitrator does not have power to alter the terms of the arbitration agreement or to award a remedy other than in accordance with the law. Ex parte communications between a party and the arbitrator are prohibited except to the extent permitted under other law. The arbitrator has the power to sanction bad faith conduct according to state law governing misconduct in family law proceedings.

Section 11 allows arbitrators to enter temporary awards as needed under the state's law regarding temporary orders, and resort to court is authorized for urgent matters. These orders typically involve maintaining the status quo - who stays in the house, spousal or child support, custody and parenting time issues.

3. VACATING OR REVIEWING AWARD

The trade-off in arbitration has always been the narrow scope of judicial review. By agreeing to arbitrate, a person is giving up the right to go to court. A court may overturn an arbitral award only where the arbitrator engaged in fraud, corruption, or other serious misconduct (or, in some jurisdictions, also where the arbitrator "manifestly disregarded" the applicable law). Traditionally, awards are vacated only for arbitrator misconduct or grounds going to the fairness

of the arbitration process and not for errors of law. The parties lose the right to appeal an arbitral decision they believe misapprehends the law or the facts. To show an arbitrator exceeded his or her powers, the party must show the arbitrator either acted beyond the terms of the arbitration agreement or acted in complete disregard of the law.[56]

The UFLAA Sec. 19 (a) follows the RUAA but adds some additional grounds consistent with family law concerns for vacating arbitration awards. The UFLAA contains a bracketed (optional) subsection (a)(7) authorizing a court to vacate family law arbitration awards on the basis of those additional grounds. If state law permits parties to agree that an award can be challenged for errors of law, the bracketed language would authorize a court to review an award for errors of law if the parties have so agreed.

In family law arbitration, awards of purely financial matters are subject to the same standard as commercial arbitration although in some states, the law may require courts to comply with domestic relations law.[57] The UFLAA allows the parties to agree to not have a reasoned award of property and alimony issues which could be important to protect confidentiality.[58] One other basis for not enforcing an arbitral award would be violation of clearly defined and dominant public policy.[59]

For child-related issues, however, the award must comply the domestic relations law of the state. This means in most cases, that there must be a record to review (can be recording), findings of fact and the award must be in the best interests of the child.

V. CONCLUSION

The UFLAA offers parties another, often a more desirable, private option for resolving their dispute. Arbitration preserves family autonomy by allowing the parties to select the

decision-maker based on their specialized expertise. The parties tailor the arbitration process to suit their needs by determining the precise issues to be resolved, the rules to be followed, the timetable for the process. The use of an expert decision maker, the more informal, private procedures, and the faster timeline can ease the trauma and tension of family disputes. Usually arbitration will usually end up being less expensive than months and years of litigation, even taking into account the arbitrator's fee.

The UFLAA provides needed standards to ensure that this method of dispute resolution retains the advantages of efficiency while also serving the needs of families in dissolution. The arbitrator, unlike a judge in a court of law, must be compensated by the parties. Arbitration may be an attractive alternative to litigation for couples who are frustrated with crowded court dockets and judges who may have little interest in family law cases. The real advantage to arbitration, however, is probably for post dissolution disputes between high conflict parents. Post dissolution arbitration has the potential to dramatically reduce relitigation.[60]

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[1] Faherty v. Faherty, 477 A.2d 1257 (N.J. 1984).

[2] Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*: 28 WM. MITCHELL L. REV. 495 (2001) (discussing Wingspread Conference recommendations for improving options for high conflict families).

[3] Milfred D. Dale, *Don't Forget the Children: Court Protection from Parental Conflict is in the Best Interests of Children,* 52(4) FAM. CT. REV. 648 (2014). *See also* Catherine C. Ayoub, Robin M. Deutsch, & Andronicki Maraganore, *Emotional Distress in Children of High Conflict Divorce: The Impact of Marital Conflict and Violence*, 37 FAM. & CONCIL. CTS REV. 297 (1999).

[4] Minkowitz v. Israeli, 77 A.3d 1189 (N.J. Super. Ct. App. Div. 2013) (trial court was not permitted to maintain involvement after the parties agreed to binding arbitration).

[5] Court-annexed "binding" arbitration which some courts mandate is actually nonbinding settlement and conciliation. Forcing parties to binding arbitration without their agreement violates the constitutional rights of access to the courts. *See* Warren v. State Farm Mut. Auto. Ins. Co., 899 So. 2d 1090, 1095 n.5 (Fla. 2005). Florida has a nonbinding arbitration process in which the arbitrator makes a determination of the rights of the parties, but the nonbinding determination does not result in an enforceable arbitration award. *See* FLA. STAT. ANN. § 44.103.

[6] Mormon Church v. United States, 136 U.S. 1, 57 (1890) (the parents patriae doctrine is "inherent in the supreme power of every state, . . . a most beneficent function, and often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves).

[7] 9 U.S.C. § 1-16 (1925).

[8] Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. governs arbitration agreements in maritime and in contracts evidencing a transaction involving interstate commerce and spells out limited standards for judicial review. *See* Hall Street Assoc. v. Mattel, 552 U.S. 576 (2008).

[9] Preston v. Ferrer, 552 U.S. 346, 353 (2008).

[10] AT&T Mobility LLC v. Conception, 131 S. Ct. 1740 (2011) (can use generally applicable contract defenses but state law cannot prohibit the arbitration of a particular type of claim).

[11] *See* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); Volt Info. Sciences, Inc. v. Stanford U., 489 U.S. 468 (1989).

[12] *See* Southland Corp. v. Keating, 465 U.S.1 (1984) (finding California statute voiding a contractual agreement violated the Supremacy Clause); Doctor's Associates v. Casarotto, 517 U.S. 681, 687 (1996) (states may not make laws that would hinder arbitration agreements); Allied-Bruce Terminix Cos., 513 U.S. 265, 280-81 (1995) (discussing broad reach of FAA).

[13] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1622 (2018) (savings clause permits courts to invalidate arbitration agreements only by "generally applicable contract defenses, such as fraud, duress, or unconscionability.").

[14] Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614, 628 (1985) (the agreement "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration)."
[15] UNIF. ARBITRATION ACT (UAA).
[16] REV. UNIF. ARBITRATION ACT (2000) (RUAA), http://www.uniformlaws.org.
[17] *See* Audrey J. Beeson, *Arbitration: A Promising Avenue for Resolving Family Law Cases?*, 18 PEPP. L.J. 211, 214-216 (2018) (noting that Arizona, Delaware, District of Columbia, New Jersey and New Mexico did not repeal the UAA).
[18] Krist v Krist, 631 N.W.2d 53 (Mich. Ct. App. 2001); Brinckerhoff v. Brinckerhoff, 889 A.2d 701, 704 (Vt. 2005); DeChellis v. DeChellis, 213 A.3d 1 (Conn. App. Ct. 2019).

[19] Stewart E. Sterk, *Enforceability of Agreement to Arbitrate: An Examination of the Public Policy Defenses,* 2 CARDOZO L. REV. 481 (1981) (indicating child related issues were off limits partly because children were not parties to the agreement).
[20] Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).
[21] Egelhoff v. Egelhoff, 532 U.S. 141, 156-57 (2001) (reiterating that the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the State and not to the laws of the United States).
[22] Joan F. Kessler, et al., *Why Arbitrate Family Law Disputes?,* 14 J. AM. ACAD. MATRIM. LAW. 333, 336 (1997).
[23] N.C. GEN. STAT. §§50-41-50-69 (1999), amended 2003 and 2005. *See* George K. Walker, *Family Law Arbitration: Legislation and Trends*, 21 J. AM. ACAD. MATRIM. LAW. 521 (2008); Paula D. Dean, Comment, *The Enforceability of Arbitration Clauses in North Carolina Separation Agreements,* 15 WAKE FOREST L. REV. 487 (1979).

[24] Allan R. Koritzinsky, Robert M. Welch, Jr., & Stephen W. Schlissel, *The Benefits of Arbitration*, 14 FAM. ADVOC. 45 (1992) (noting the detriments are lack of discovery, non applicability of evidentiary rules, nonbinding on child custody and support issues, and lack of enforcement powers of arbitrator).
[25] Walker, *supra* note 23.
[26] COLO. REV. STAT. § 14-10-128.4; IND. CODE § 34-57-5-1 et seq. (2018); MICH. COMP. L. § 600.5071 (2018); N.C. GEN. STAT. § 50-41 et seq. (2018); N.J. SUP. CT. R. 5:1-5 (2018).
[27] www.aaml.org/files/public/Model_Fam_Law_Arbitration_Act_1.htm. *See* Kessler, *supra* note 22. The *AAML Bounds of Advocacy* 1.4 requires an attorney to be "knowledgeable about different ways to resolve marital disputes, including negotiation, mediation, arbitration and litigation."
[28] Colorado, Georgia, Indiana, Michigan, Missouri, New Hampshire, New Jersey, New Mexico, North Carolina, Wisconsin. Utah, Vermont and Washington allow arbitration of existing parenting plans.
[29] *See e.g.* CONN. GEN. STAT. §46b-66(c); DEL. FAM. CT. R. CPR. 16.1(a); FLA. STAT. ANN. §44-104(14). *See also* Spencer v, Spencer, 494 A.2d 1279 (D.C. Ct. App. 1985) (parties may release property rights by contract).

[30] Gravlin v. Gravlin, 49 N.E.3d 677 (Mass. App. Ct. 2016); Goldberg v. Goldberg, 1 N.Y.S. 3d 360 (App. Div. 2015). *But see In re* Marriage of Bereznak, 2 Cal. Rptr. 3d 351 (Ct. App. 2003). "Such [arbitration] agreements, to the extent that they purport to restrict the court's jurisdiction over child support, are void as against public policy),

[31] Kelm v. Kelm, 623 N.E.2d 39 (Ohio 1993) (Kelm I).

[32] Kelm v. Kelm, 749 N.E.2d 299 (Ohio 2001) (Kelm II) (noting " determinations of custody go to the very core of the child's welfare and best interests.."). *See also* CONN. GEN. STAT. ANN. § 46b-66; Weisz v. Weisz, 999 N.Y.S.2d 133 (App. Div. 2014); Goldberg v. Goldberg, 1 N.Y.S. 3d 360 (App. Div. 2015) (child custody and visitation were not subject to arbitration before rabbinical tribunal).

[33] Schulberg v. Schulberg, 883 So. 2d 352 (Fla. Dist. Ct. App. 2004).

[34] Nasshid v. Andrawis, 847 A.2d 1098, 2001-02 (Conn. App. Ct. 2004).

[35] *See* Fawzy v. Fawzy, 973 A.2d 347 (N.J. 2009).

[36] *Id.*

[37] *See* COLO. REV. STAT. ANN. § 14-10-128.5; GA. CODE ANN. § 19-9-1.1; MO. REV. STAT. §435.405(5) (de novo); N.M. STAT. ANN. § 40-4-7.2; TEX. FAM. CODE § 153.0071(b) (court shall render award reflecting arbitrator's award unless could determines it is not in best interest of child); WIS. STAT. ANN. § 802.12. *See* Rivera v. Rivera, 300 P.3d 994 (Colo. App. 2013) (provisions of an arbitration award pertaining to parenting issues are subject to the supervisory power of the trial court); Harvey v. Harvey, 680 N.W.2d 835 (Mich. 2004) (arbitrator can make award of child custody subject to de novo review to determine the best interest of the child without extensive fact finding).

[38] Vanderborgh v. Krauth, 370 P.3d 661 (Colo. App. 2016).

[39] *See* http:www.uniformlaws.org/Acts.aspx?title=Arbitration. Arizona, Hawaii and North Dakota have enacted it. Barbara A. Atwood, *The new UFLAA: Providing Needed Standards for Efficiency and Fairness*, 39(4) FAM. ADVOC. 38 (Spring 2017). *See also* Linda D. Elrod, *The Case for Arbitration in Family Cases – and for the Uniform Act*, 23(2) DISP. RESOL. MAG. 18 (Winter 2017); Barbara A. Atwood & Linda D. Elrod*, Arbitration as a Tool for Family Dispute Resolution*, ABA LITIGATION J. (June 7, 2017).

[40] UFLAA Section 4 incorporates by reference a state's existing law and procedure applicable to arbitration which is the UAA in a majority of states, but the RUAA which contains more detailed procedures than the UAA.

[41] Barbara Atwood and Linda Elrod, October 2013 Meetings Issue Memo, Uniform Law Commission (Oct. 22, 2013), http://www.uniformlaws.org/shared/docs/Family%20law%arbitration.2013oct.

[42] These section include: definitions (Sec. 2); scope (Sec. 3); applicable law (Sec. 4); agreement requirements (Sec. 5); notice (Sec. 6); motion for judicial relief (Sec. 7); qualifications of arbitrator (Sec. 8); disclosures by arbitrator (Sec. 9); parties (Sec. 10); temporary orders (Sec. 11); protections for vulnerable parties (Sec. 12); powers and duties of arbitrator (Sec. 13); and when a recording is needed (Sec. 14). Sections 15 -19 deal with the unconfirmed award (Sec.15); confirmation (Sec. 16); correction by arbitrator (Sec; 17); correction (Sec. 18); and vacation or amendment by court (Sec. 19). Sections 20-24 go to the confirmed award – clarification (Sec. 20); judgment on the award (Sec. 21); future modification (Sec. 22);

enforcement (Sec. 23) and appeal (Sec. 24). Section 25 grants the arbitrator the same immunity as a family court judge. Sections 26-29 deal with housekeeping issues like uniformity (Sec. 26); electronic signatures (Sec. 27); transitional provision (Sec. 28); and effective date (Sec. 29).

[43] Alaska, California and Illinois have enacted statutes allowing judges to consider the welfare of the animal. *See also* BARBARA J. GISLASON, PET LAW AND CUSTODY: ESTABLISHING A WORTHY AND EQUITABLE JURISPRUDENCE FOR THE EVOLVING FAMILY (2017) (suggesting arbitration as a way of resolving pet issues).

[44] Budrawich v. Budrawich, 115 A.3d 39 (Conn. App. Ct. 2015) (trial court did not have authority to order divorced parties to submit to arbitration to resolve child support dispute where they did not agree to arbitration and statute prohibited arbitration of child support).

[45] N.J. SUP. CT. R. 5:5-1(b). If child-custody and parenting-time issues are involved, the Agreement or Consent Order shall provide that: (i) a record of all documentary evidence shall be kept; (ii) all testimony shall be recorded verbatim; and (iii) the award shall state, in writing, findings of fact and conclusions of law with a focus on the best-interests of the child standard. *Id.* at (B). If child support issues are involved, the Agreement or Consent Order shall provide that the award shall state, in writing, findings of fact and conclusions of law with a focus on the best-interests standard and child support guidelines. *Id.* at (C).

[46] *See* Linda D. Elrod, *The Need for Confidentiality in Evaluative Processes: The Case of Arbitration and Med/Arb in Family Law Cases*, 58 FAM. CT. REV. 26 (2020).

[47] *See* Nancy Ver Steegh et al, *Look Before You Leap: Court System Triage of Family Law Cases Involving Intimate Partner Violence*, 95 MARQ. L. REV. 955 (2012).

[48] Amy Holtzworth-Munroe et al., *The Mediator's Assessment of Safety Issues and Concerns (MASIC): A Screening Interview for IPV and Abuse Available in the Public Domain*, 48 FAM. CT. REV. 646, 647 (2010).

[49] *See, e.g.,* Kelm v. Kelm, 623 N.E.2d 39 (Ohio 1993); LaFrance v. Lodmell, 144 A.3d 373 (Conn. 2016).

[50] Faherty v. Faherty, 477 A.2d 1257 (N.J. 1984).

[51] *See, e.g.,* Zar v. Yaghoobzar, 76 N.Y.S.3d 625 (App. Div. 2018) (confirming rabbinical court's arbitral award in divorce proceedings).

[52] *See* Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1293 (2011) (noting that if the arbitration is conducted pursuant to a valid agreement, parties of the same religion could have religious authorities decide their disputes in accordance with religious law).

[53] *See e.g.* KAN. STAT. ANN. § 23-3213(b)(3).

[54] N.J. SUP. CT. R. 5:5-1.

[55] *In re* Marriage of Piske, 578 S.W.3d 624 (Tex. App. 2019).

[56] *See* UFLAA Sec. 19(a)(4).

[57] MICH. COMP. LAWS ANN. §§ 600.5080(1), 600.5081(2)(c). *See* Eppel v. Eppel, 912 N.W.2d 584 (Mich. App. 2018) (in order for a court to vacate an arbitration award in a divorce action because

of an error of law, the error must have been so substantial that, but for the error, the award would have been substantially different).

[58] UFLAA Sec. 15(b).

[59] See United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987) (does not include general considerations of public interest).

[60] Joan B. Kelly, *Psychological and Legal Interventions for Parent and Children in Custody and Access Disputes: Current Research and Practice*, 10 VA. J. SOC. POL'Y & L. 129, 146-47 (2002). check