

## **ARBITRATION MAY SOON BE COMING TO A FAMILY LAW COURT NEAR YOU:**

**An idea whose time has “finally” come.**

By Larry R. Rute © January 4, 2024

### **Author’s Note:**

Almost a decade ago, I was approached by the American Bar Association Dispute Resolution Section and asked to serve as the ABA Liaison to the Uniform Law Commission Drafting Committee. In 2016 the Uniform Law Commission approved the Uniform Family Law Arbitration Act. In January 2024, the Act will be introduced to the Kansas Legislature for review and, hopefully, Committee approval.

### **A BRIEF INTRODUCTION TO FAMILY LAW ARBITRATION**

For more than a century, arbitration has been principally used to resolve disputes in labor or commercial law. The National Conference of Commissioners of Uniform State Laws (NCCUSL), now known as the Uniform Law Commission (ULC), has supported and improved the use of commercial arbitration by its promulgation of the Uniform Arbitration Act (UAA) in 1956, and the Revised Uniform Arbitration Act (RUAA) in 2000. Forty-nine states have adopted the UAA or enacted substantively similar legislation. To date, 22 states (including Kansas) have adopted the RUAA. The preamble of the RUAA states that “the primary purpose of the Act is to advance arbitration as a desirable alternative to litigation....”

In October 1999, North Carolina became the first state to adopt an arbitration statute specifically designed for family law cases. The North Carolina Act and its amendments are very comprehensive.<sup>1</sup> Other states choosing to follow North Carolina’s lead often provide for family law arbitration under the authority of the UAA or the RUAA but generally are not as comprehensive as the North Carolina Act. Because the Uniform Acts tend to focus on commercial arbitration, they provide insufficient authority to completely address all of the unique public policy issues found in family law.

The North Carolina statute is thought to be the inspiration for the national model Family Law Arbitration Act developed by the American Academy of Matrimonial Lawyers (AAML). In the late 1980’s and early 1990’s, the AAML became involved in an effort to support family law arbitration within various states. The AAML drafted a set of model rules but did not provide a model statute.<sup>2</sup> In 1992 the American Bar Association provided support to family arbitration through articles in the association’s *Family Law Quarterly* and the *Family Advocate*.

Recognizing the increasing use of arbitration in family law matters in sister states, the Uniform Commission began work in promulgating the Uniform Family Law Arbitration Act (UFLAA). The Drafting Committee included jurists, family law practitioners, mediators, and arbitrators. I had the privilege to serve as the American Bar Association’s Liaison to the Drafting Committee under the leadership of Professor Barbara Atwood (University of Arizona)<sup>3</sup> and Professor Linda Elrod

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<sup>1</sup> The North Carolina Family Law Arbitration Handbook, Vols. 1, 2 & 3 can be found at: <https://www.ncbar.org/members/communities/sections/family-law/>

<sup>2</sup> American Academy of Matrimonial Lawyers, Rules for Arbitration of Financial Issues; adopted by Board of Governors, 1990. A copy can be obtained from the AAML office by calling 312-263-6477.

<sup>3</sup> See Barbara A. Atwood *The New UFLAA: Providing Needed Standards for Efficiency and Fairness*, 39(4) FAM. ADVOC. 38 (2017).

(Washburn University School of Law)<sup>4</sup>. In 2016, the ULC approved the UFLAA offering a framework for all states to enact arbitration for family law cases.<sup>5</sup> The Act has received the full support and endorsement of the American Bar Association.

## **A SHORT OVERVIEW OF FAMILY LAW ARBITRATION**

Family law disputes, ranging from relatively routine parenting-time matters to high-conflict custody/property settlement disputes often result in expensive continuances and delays. Family law court dockets may face a significant backlog as the result of increasing numbers of self-represented parties,<sup>6</sup> domestic violence allegations and a toxic mix of high-conflict personality litigants.<sup>7</sup> High-conflict cases may often drag on for years due to crowded court dockets and inadequate staffing resources. Further it is not unusual for judges to be reassigned or, judges new to the bench, to be unfamiliar with domestic relations law or the domestic docket. This can result in judges who are not fully familiar with recent family law case decisions or the rationale for past individual case rulings.

Arbitration, which uses a highly-experienced arbitrator, is an out-of-court process that most closely resembles a court hearing or trial, but is private, confidential, and conducted in a manner that can be best-suited for family law disputants. Through arbitration, the parties can quickly and efficiently resolve a wide variety of parenting issues, including, but not limited to, custody and access disputes, child support, spousal support, and property division. The parties can and often do provide in their written arbitration agreement that private financial and personal information is confidential. In addition, the parties written arbitration agreement can structure the arbitration procedure to meet the needs of the participants by streamlining and simplifying the process.

Family Law Arbitration provides an attractive dispute resolution process that closely resembles a trial but is generally less expensive, faster, private and more informal than a court hearing. The process is governed by the written arbitration agreement. It is by way of this agreement that the parties define the issues which will be submitted to arbitration, who the arbitrator will be or the process for selecting the Arbitrator, the privacy and confidentiality parameters of the proceeding, and the form of the Arbitrator's decision ("Award"). The parties often agree to share (equally or proportionately to income), the hourly rates of the Arbitrator. It is also not uncommon for parties to include a provision providing for mediation before the dispute is submitted to arbitration.

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<sup>4</sup> See Linda D. Elrod, *Arbitration of Child-Related Issues and the Uniform Family Law Arbitration Act*, 46(2) FAM. ADVOC. 14 (Fall 2023). See also, Carolyn Moran Zak, *Family Law Arbitration: An Underutilized ADR Option*. 48(2) FAM. ADVOC. 18 (2023).

<sup>5</sup> <https://www.uniformlaws.org/viewdocument/final-act-71?CommunityKey=ddf1c9b6-65c0-4d55-bfd7-15c2d1e6d4ed&tab=librarydocuments>

<sup>6</sup> See SRLN Brief: *How Many SRLs?* (SRLN 2019), SELF-REPRESENTED LITIGATION NETWORK; February 17, 2023).

<sup>7</sup> Esther Rosenfeld, et al, *Confronting the Challenge of the High-Conflict Personality in Family Court*, 52 FAM. L.Q. 79 (2019).

## **FAMILY LAW ARBITRATION IN A NUTSHELL**

The UFLAA establishes a comprehensive framework for arbitrating a broad range of family law issues. The only limitations to the Arbitrator's authority under the UFLAA is a status determination pursuant to Section 3(b). The Arbitrator is not authorized by the Act to:

- Grant a divorce, adoption, or guardianship;
- Adjudicate a child in need of care or a juvenile offender matter;
- Determine the existence or nonexistence of a parent and child relationship; or
- Terminate parental rights.

With these exceptions, the Act provides the Arbitrator jurisdiction to rule on a wide variety of family law matters as set out in the arbitration agreement.

A summary of important provisions established under the UFLAA include:

- The selection of the neutral arbitrator will be based upon reputation, experience and expertise;
- The parties choose the issues to be determined by the arbitrator;
- The parties determine the timing and location of the hearing;
- The parties determine the evidentiary and discovery processes to be utilized;
- The parties decide the privacy and confidentiality of the proceeding;
- The parties decide the form of the written Award;
- Child custody and parenting time determinations are subject to limited court review under the "best interests of the child" standard; and
- Protections are provided for victims of domestic violence and abuse.

### **The Agreement to Arbitrate**

An important element in any arbitration is a clear and concise written Agreement to Arbitrate. It is important that all issues to be determined by the Arbitrator be included in the Arbitration Agreement because it is the Agreement that gives the Arbitrator the power to decide the issues. If the Arbitrator makes a decision on an issue not expressly included in the arbitration agreement, that decision may be unenforceable.

### **The Arbitrator**

In litigation, the parties have few options as to which judge will hear their difficult and expensive family case. Matrimonial arbitration permits the parties to select someone who has chosen to be professionally involved in the field of family law and/or has developed both an interest and expertise in the area. Arbitration allows the parties to select and retain a qualified and experienced family law attorney or retired family court judge to act as a private arbitrator. In addition, the parties also have the option to use a licensed clinical psychologist, a family law dispute resolution specialist, a respected tax or business professional, or any experienced individual whom the parties

believe should serve as the arbitrator of their particular dispute(s). Parties embroiled in a high-asset tax matter, for instance, may want an arbitrator with a strong accounting or tax background.

The key qualities that the parties typically want in an arbitrator include experience, knowledge, fairness, patience, even temperament, diligence, open-mindedness, attentiveness, neutrality and ethical conduct. It is important that the Arbitrator understands the rules and process selected by the parties and be able to control the hearing process fairly and firmly.

The Act provides the parties complete control to appoint the Arbitrator that they have mutually selected. Section 8 of the Act requires that if the court is expected to appoint the Arbitrator, the Arbitrator be an active or retired attorney, or retired judge, who has received training in identifying domestic violence and child abuse. However, in order to maximize the parties' choice of arbitrator, these requirements can be waived. In the event the parties cannot agree on a particular arbitrator in the Agreement to Arbitrate, it is up to the court to appoint a qualified individual.

Under the Act, Arbitrators have the continuing obligation to disclose to the parties any known fact a reasonable person would believe is likely to affect: (1) impartiality of the Arbitrator in the arbitration, such as bias; a financial or personal interest in the outcome of the arbitration; or an existing or past relationship with a party, attorney representing a party or witness; or (2) the arbitrator's ability to make a timely award

### **What Powers does the Arbitrator Possess?**

Section 2(f) of the Act defines a family law dispute as a contested issue arising under the family or domestic relations law of the state. Section 2(d) defines a "child-related dispute" as a family law dispute regarding legal custody, residency, parenting time, visitation, or financial support regarding a child. Apart from limitations to the Arbitrator's authority under status determination (above), a family law dispute would include matters of interpretation and enforcement of pre-marital, post-marital, non-marital and separation agreements; custody and parenting time; division of property; allocation of debt and, awards of spousal support, child support, and attorney's fees. The powers of an arbitrator are set out in Section 13(c) establishing a broad range of powers similar to a state court judge. In other words, the scope of the final Arbitrator's Award is significant and quite broad.

Section 5(c) requires that the Agreement to Arbitrate child-related disputes in a pre-marital or post-marital agreement must be made contemporaneously with the dispute, or the prior agreement reaffirmed at the time of the dispute. Should there be a premarital agreement that submits child custody and support to arbitration, the parties must reaffirm the Agreement to Arbitrate at the time of the dispute.

A verbatim record must be made of the hearing if child-related disputes are to be arbitrated, pursuant to Section 14(b). The verbatim record may be a simple tape recording or a Zoom recording and is not required to be court-reporter transcript.

An Award determining a child-related dispute must state the reasons on which it is based as required by the law of the state. Section 16 requires that the Arbitrator include Findings of Facts and Conclusions of Law in determining child-related disputes.

### **Timing & Informality**

A frequently cited factor in favor of arbitration is the speed of the process. Rather than following the structures of a court schedule, the parties can choose a procedure that is much more informal and less adversarial. The parties decide on the discovery procedure and the location and time of the hearing. For example, arbitration can be conducted informally in a conference room, thereby providing as much time as is necessary for the parties to put on evidence, whether during the day, in the evening, or on the weekend. Under arbitration, the parties have the luxury of scheduling full-day hearings, a process that may not be readily available or accessible during a court process. Arbitration can take place anytime and anywhere, unlike litigation which is normally held at a courthouse during normal workday business hours. The Arbitrator's final award is usually issued within thirty (30) days of the hearing.

The timing of arbitration can overcome delays inherent in the court process. Arbitration can be conducted expeditiously based upon the Arbitrator's and the parties' individual schedules. The parties can also streamline the process by bringing in remote witnesses through Zoom or by telephone. Because arbitration may take place on an accelerated timeline, it may be less expensive than litigation, even taking into account the arbitrator's fee.

A significant benefit of arbitration is that it tends to be far less formal than the traditional court process. The Act permits greater self-determination of the process by the participants. Arbitration can be conducted in the less stressful atmosphere of a private office with relaxed rules of evidence and procedures. The relative comfort of a hearing conducted in an office environment selected by the parties may tend to alleviate the hostilities between the participants.

### **Pre-Hearing Conference**

The parties, with their lawyers, or just the lawyers individually, may choose to meet through a telephone conference, by Zoom or in person with the Arbitrator, to mutually determine the best orderly and predictable procedure to streamline the process. Through the pre-hearing conference, the parties will work with the arbitrator to determine what evidence needs to be exchanged and provided in advance of the hearing date. The hearing date(s) may be calculated to meet the needs and expectations of the parties.

### **Confidentiality & Privacy**

With the exception of child custody/parenting time and support, which require the Award to be reduced to judgment, the Agreement to Arbitrate may include strict privacy provisions.<sup>8</sup> The parties may also agree to a joint Protective Order designed to further protect the privacy and confidentiality that the parties require.

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<sup>8</sup> Linda. D. Elrod, *The Need for Confidentiality in Evaluative Processes: Arbitration and Med/Arb in Family Law Cases*, 58(1) Fam. Ct. Rev. 26 (2020)

## **Protection for Victims of Domestic Violence & Abuse**

Section 12 of the Act provides that if a party is subject to an Order of Protection or if an Arbitrator otherwise finds that a party's safety or ability to participate effectively in the arbitration is at risk, the Arbitration will be suspended unless the person who is at risk reaffirms his or her desire to arbitrate and the court allows it. Section 10 of the Act allows a party to bring an emotional support person to the arbitration. That person, however, cannot serve as a witness.

### **Interim/Temporary Awards**

Before an arbitrator is selected and able to act, Section 11 provides that the court may enter a temporary order. After the arbitrator is selected, the arbitrator may issue a temporary award(s) (Order) as needed under the law of the state permitting temporary orders. Resort to the court is authorized under Section 11 for urgent matters.

### **Arbitration of Child-Related Disputes**

The Act recognizes the states' *parens patriae* responsibility for children and vulnerable family members. Accordingly, the Act requires ultimate judicial scrutiny of child-related awards. Under Section 16 and Section 19, a court cannot confirm an award determining child custody or child support unless, it finds that the Award complies with the applicable law of the state and is in the child's best interests. This section requires that a record of the hearing be maintained, and that the Arbitrator issue findings of fact and conclusions of law as demonstrated through the testimony provided on the record.

In the leading case of *Crutchley v. Crutchley*<sup>9</sup>, the Supreme Court of North Carolina stated that:

While there also exists no prohibition to parties settling the cases of custody and child support by arbitration, the provision of an award for custody or child support will always be reviewable and modifiable by the courts. It is a well-established rule that the parties cannot, by agreement, deprive the court of its inherent and statutory authority to protect the interests of *their* children.

Child-related awards are subject to limited review and appeal rights. By contrast, property division may be arbitrated and the result will be final and binding on the parties. After the award is issued, either party can ask the court to confirm the award. It then becomes part of the official court order and enforceable as an order.

In addition, if the Arbitrator finds a reasonable basis to believe that a child is the subject of abuse or neglect, Section 12 requires the Arbitrator to terminate the arbitration and report the findings to the appropriate state authorities. In such an instance, a court, not the Arbitrator, must decide whether the arbitration may proceed. In order for the arbitration to go forward, the party at risk of harm must reaffirm the Agreement to Arbitrate and the court must find that appropriate procedures are in place to protect the party from risk of harm or intimidation.

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<sup>9</sup> *Crutchley v. Crutchley*, 293 SE 2d at 793 at 797 (N.C. 1982) (emphasis added).

## **Arbitrator Immunity**

Consistent with modern arbitration rules, Section 25 recognizes arbitrator immunity. Arbitrators are also generally accorded immunity from process when subpoenaed or summoned to testify in a judicial proceeding in a case arising from their service as an arbitrator.

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The UFLAA was established to provide needed standards to ensure that arbitration retains the traditional advantages of efficiency, while also serving the needs of families desiring speed, efficiency, and confidentiality. In January of 2024, the Kansas Bar Association will reintroduce the UFLAA with the Kansas Senate and House Judiciary Committees. Passage will provide an important new dispute resolution tool heretofore not available to Kansas families.

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