

TESTIMONY OF LINDA D. ELROD

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Written Testimony in Support of HB 2533, House Judiciary Committee

Rep. Fred Patton, Chair

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Chair Patton and Members of the Committee,

I would like to thank the Chair and Members of the Committee for the opportunity to testify today. I believe that arbitration should be an option for family law cases, just as it is a routine feature of labor law, collective bargaining and commercial disputes. The increasing volume of contested family law cases combined with budget cuts to state courts makes it necessary for legislatures, lawyers and judges to think about alternative ways to resolve disputes.

Arbitration in its modern form developed in commercial law because court processes were perceived as too slow, too cumbersome and too expensive. Often the judges had no knowledge of the subject matter, no technical expertise and lacked familiarity with business practices and customs. Parties chose arbitration because of the expertise of the decision maker; finality of the decision; privacy of the proceedings; informality of the procedure; possibility of achieving a more satisfactory or durable resolution in a faster amount of time, and often at a lower cost. The same complaints are often heard about the family law courts today.

Arbitration is more similar to court proceedings than to negotiation and mediation because the parties submit their dispute to a decision-maker. The difference is that the parties choose the decision-maker and the process. Arbitration is a matter of contract. The parties may jointly select the arbitrator. The parties can also select the basic rules to be applied and the procedure to use. The parties select the issues to be arbitrated. The arbitrator may conduct the hearing in a private informal setting. At the hearing, evidence may be submitted in any form to which the parties agree, without regard to the rules of evidence. After the hearing, the arbitrator makes a binding decision. If it has been properly reached, the award can be enforced or affirmed by the court as part of its judgment. Once the arbitrator makes an award, there are very few grounds to overturn an arbitrator's award. The Uniform Family Law Arbitration Act uses the tools of arbitration but incorporates the special provisions needed to protect vulnerable parties and children.

Family Law Arbitration and the Uniform Family Law Arbitration Act

Family law arbitration is a relatively recent development. For years many thought family law cases fell under a judicially-created public policy exception. The United States Supreme Court rejected the exception in the 1980s. In 1992, an article in the ABA *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. Allan R. Koritzinsky, Robert M. Welch, Jr., & Stephen W. Schlissel, *The Benefits of Arbitration*, 14 FAM. ADVOC. 45 (1992).

Colorado added arbitration of family law issues in its 1997 revisions; North Carolina enacted a specific family law its statute patterned on the Revised Uniform Arbitration Act (RUAA) in 1999. The American Academy of Matrimonial Lawyers promulgated a Model Family Law Arbitration Act in 2005. Family law arbitration statutes and rules have been adopted in several states although states differ on what issues can be arbitrated. In New York, child custody and visitation disputes were not arbitrable. In New Jersey, the constitutional guarantee of parental autonomy includes the right of parents to choose arbitration as the forum for resolving their child custody disputes. *Fawzy v. Fawzy*, 973 A.2d 347 (N.J. 2009). Kansas courts have recognized and approved of the use of arbitration in family law cases. The backdrop has been the former Uniform Arbitration Act (UAA). In 2018 Kansas enacted the RUAA.

Arbitration procedures under the UAA or RUAA do not adequately cover the concerns for family law arbitration. Neither provides protection for children and victims of family violence during the arbitration process. Additionally, general arbitration law has limited access to courts or provisions to ensure fairness to the parties.

The Uniform Law Commission approved drafting an arbitration act specifically for family law and created a drafting committee in August 2013. Professor Barbara Atwood was Chair of the Committee and I was Reporter. After three years of lawyers, judges and academics working on committees and drafting, the Uniform Law Commission adopted the Family Law Arbitration Act (UFLAA) in July 2016 and it was approved by the American Bar Association. The UFLAA contains only 29 sections and many mirror the RUAA, which Kansas enacted in 2018.

1. FAMILY LAW DISPUTES CAN BE ARBITRATED

UFLAA Section 2(6) defines a family law dispute as a contested issue arising under the family or domestic relations law of a state. Courts have long allowed parties to arbitrate property and spousal support issues because parties may release property rights by contract. Arbitration awards are subject to limited review and appeal rights. Child-related issues, however, present different issues because of the court's traditional role as *parens patriae* acting to protect the child. Additionally, child-related issues are never "final" because they are modifiable throughout a child's minority. Under the UFLAA, the parties can choose to have an arbitrator decide any family law dispute that could be decided by a judge, except status determinations. A family law dispute would include the interpretation and enforcement of premarital and other agreements, the characterization, valuation and division of property and allocation of debt; awards of alimony; pet "custody;" parenting time; child support; award of attorney's fees and disputes between cohabitants. The arbitrator cannot adjust status, i.e. cannot

divorce the parties, terminate parental rights, grant an adoption or guardianship, or adjudicate a child in need of care or a juvenile offender.

2. AGREEMENT TO ARBITRATE

Section 5 of the UFLAA sets out the basic standards for an arbitration agreement.

- a. It must be in writing.
- b. It must identify the dispute to be arbitrated.
- c. It must identify the arbitrator or a way of selecting the arbitrator.
- d. It contemplates a voluntary, not coerced, decision to arbitrate.

3. PREDISPUTE AGREEMENTS

The Federal Arbitration Act allows predispute arbitration agreements for matters in interstate commerce. Under the UFLAA, parties may enter into a premarital or postmarital agreement to arbitrate financial matters. As with other contracts, the agreement could be attacked for issues relating to duress, fraud or unconscionability. Note, Kansas law currently allows parties in a separation agreement to agree on a dispute resolution method if there is a disagreement over any of the financial issues.

If the agreement includes children's issues, the agreement will have to be reaffirmed at the time the dispute arises. Current parenting plan statutes require that the parties provide a method of dispute resolution if the parties cannot agree on matters relating to their children and the parenting plan.

4. CHILD-RELATED ISSUES

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 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. In particular, 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. There are several protections:

- a. Agreements to arbitration child-related disputes must be made contemporaneously with the dispute. Sec. 5 (c).
- b. The arbitrator shall cause a verbatim record to be made of any part of an arbitration hearing concerning a child-related dispute. Sec. 14(b).
- c. 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 – this means findings of fact and conclusions of law in most states. Sec.16.
- d. To confirm an award with a child-related dispute, the court must determine that the award complies with the law of the state and is in the best interests of the child. Sec. 16(c).
- e. Vacation of award under 19(b)(1) if the award did not comply with section 15 or law of state dealing the best interests of the child

5. DOMESTIC VIOLENCE

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. Additionally, a party may be represented by an attorney (and in arbitration most will be) and a party may also bring a support person to the arbitration. Sec. 10(b). Although the parties may select any arbitrator that they wish, if the court appoints an arbitrator, the court must appoint a lawyer or judge who has had training in identifying domestic violence and child abuse the same as a judicial officer.

If an arbitrator finds that a child is abused or neglected, the arbitrator must report it, and the arbitration is terminated.

6. PROCESS AND POWERS OF THE ARBITRATOR

The UFLAA incorporates by reference each state's arbitration law, which in Kansas is the RUAA. The basic arbitration law will answer many procedural questions that are not family law specific, like the notice provisions.

The UFLAA allows an arbitrator to do anything a family court judge could do unless otherwise agreed by the parties or limited by statute. Section 13 provides a non-exclusive list of arbitrator powers, most of them included in the RUAA. The UFLAA, however, does include the power to interview children and appoint a representative for a child.

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

Section 8 establishes qualifications of arbitrators, subject to waiver by the parties, for example, and Section 25 recognizes arbitrator immunity consistent with general arbitration law.

6. VACATING OR REVIEW AWARD

A court may overturn an arbitral award only where the arbitrator engaged in fraud, corruption, or other serious misconduct. Traditionally, awards are vacated only for arbitrator misconduct or grounds going to the fairness of the arbitration process and not for errors of law. 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.

The UFLAA Sec. 19 follows the RUAA. In family law arbitration, awards of purely financial matters are subject to the same standard as commercial arbitration. 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. 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.

Conclusion

The costs, delays and unpredictability of the family court system are leading many lawyers and their clients to think about alternatives to litigation. The Uniform Family Law Arbitration Act 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. Arizona, Hawaii and North Dakota have already enacted the UFLAA. Kansas should be next.