Family Law Arbitration—A Guide for Providing Sound Counsel to Litigants

by
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Introduction

In the 1989 classic film "Field of Dreams," Iowa corn farmer Ray Kinsella envisions a baseball diamond in his cornfield with baseball legend "Shoeless" Joe Jackson standing in the middle and then hears a voice whispering, "If you build it, he will come." After Ray and his wife Annie plow under their corn crop to build a baseball field, they risk financial hardship, but with the support of some imaginary and real-life characters, they persevere. In addition to reconnecting with his father, Ray finds economic success and personal fulfillment as hundreds of people arrive and pay to watch the National Pastime.

The phrase "If you build it ..." has become a metaphor for the law of attraction, which suggests that using long-term goals to make specific, concrete changes in the present will help you to achieve those goals. Achieving resolution of family law disputes privately, more quickly, more cheaply, and with less adversarial posturing, are goals shared by family lawyers and their clients. Family law arbitration, which is the process by which parties voluntarily submit their claims for adjudication to a third-party neutral, allows parties to effectuate these goals.[1] By recognizing the benefits of family law arbitration and encouraging clients to use this process routinely, family lawyers can shift away from the litigation forum into a trend-setting confidential forum of arbitration. With more family lawyers striving to reap the myriad benefits resulting from family law arbitration, trying it out in their cases, and

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1 *See, e.g.,* Linda D. Elrod, *Arbitration of Child-Related Issues and the Uniform Family Law Arbitration Act*, 46 Fam. Advoc. 14, 14-15 (Fall 2023).

working together to improve the applicable laws and rules, this method of resolving disputes may become the new field of dreams.

This article will help family lawyers guide clients who are trying to decide whether arbitration is appropriate for their case. Part I discusses what lawyers need to know to propose arbitration to their clients and opposing lawyers, including trends and research in favor of arbitration, the laws applicable to arbitration, the cases or issues that are appropriate for arbitration, and its advantages and disadvantages. Part II addresses the essential components of an arbitration agreement, including considerations for child-related awards, and distinguishes private judging. Part III gives an overview of the arbitration process. Part IV discusses techniques that can be used, including final-offer arbitration, mediation-arbitration, single-issue arbitration, and a panel of arbitrators. Finally, Part V argues in favor of the need for family law-specific legislation or rules to provide more reliability in the process and to protect the interests of family law participants.

I. Introduce Family Law Arbitration to Clients and Opposing Counsel

A. *Trends and Research Favoring Arbitration over Traditional Litigation*

According to the American Arbitration Association ("AAA"), arbitration use in the commercial realm in the United States has increased overall in the past several years. The total number of commercial cases submitted for arbitration to the International Centre for Dispute Resolution, AAA's international arm, gradually increased from 9,737 in 2019[2] to 10,273 in 2022,[3] with the number of financial services cases alone reflecting a 65% increase.[4]

Although no similar statistics are available for family law arbitration in the United States, anecdotal evidence suggests that the

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[2] *2019 AAA-ICDR B2B Case Statistics,* AM. ARBITRATION ASS'N, https://www.adr.org/sites/default/files/document_repository/AAA261_2019_B2B_Infographic_0.pdf (last visited Jan. 24, 2024).

[3] *2022 AAA-ICDR B2B Case Statistics,* AM. ARBITRATION ASS'N, https://www.adr.org/sites/default/files/document_repository/AAA423_2022_B2B_Infographic.pdf (last visited Jan. 24, 2024).

[4] *See id.*

use of alternative dispute resolution methods has increased over the past decade, as parties and their counsel have shifted away from high-conflict litigation in court.[5] There is a growing awareness of the negative consequences of high conflict between divorcing or separating parties on their children and a greater focus on restructuring the family to minimize this impact.[6] Client priorities have also changed, with clients looking for representation to protect their well-being along with their legal interests.[7]

Family law arbitration gives clients an alternative to negotiation, litigation, collaborative law, mediation, or court-sponsored dispute resolution methods.[8] In arbitration, the parties agree to submit one or more issues arising from the dissolution of their relationship to an arbitrator—a neutral third party—for resolution.[9] The arbitrator makes a decision, called an award, based on the facts and evidence presented.[10] Unlike litigation, where the decision-maker is randomly assigned and paid by public funds, the parties choose and pay the decision-maker.[11] Arbitration offers an alternative for those who want an experienced decision-maker in a potentially faster, more confidential, and less adversarial proceeding.[12]

Among the alternate dispute resolution ("ADR") options, arbitration enables family law litigants to achieve an expedient and final resolution with a professional of their choosing, without the risks and costs associated with a court adjudication and possible appeal. The private resolution of family law claims permits the

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5 Diana Shepherd, *The Past, Present, and Future of Family Law*, FAM. LAW. MAG. (May 20, 2022), https://familylawyermagazine.com/articles/past-present-future-family-law/.

6 *See, e.g.*, Robin M. Deutch et al., *Parenting Coordination: An Emerging Role to Assist High Conflict Families, in* INNOVATIONS IN INTERVENTIONS IN HIGH CONFLICT FAMILIES 187, 213 (Linda B. Fieldstone & Christine A. Coates eds., Ass'n of Family and Conciliation Courts 2008) ("Research is clear that children who are exposed to ongoing conflict between their parents are at risk for short-term and long-term emotional and behavioral problems").

7 Lewis Irwin Landerholm, *What's Changed in Family Law in the Last 10 Years?*, FAM. LAW. MAG. (Apr. 5, 2023), https://familylawyermagazine.com/articles/whats-changed-in-family-law-in-the-last-10-years/.

8 UNIF. FAMILY LAW ARBITRATION ACT prefatory note (UNIF. LAW COMM'N 2016).

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

parties to engage in a healthy reorganization of their family and reduces conflicts that the adversarial process may exacerbate.[13] This reduced tension between parents helps to protect their children from the negative impact of an acrimonious divorce,[14] and to promote their own long-term physical and mental health.[15]

Family law arbitration has gained respect among family court judges and family lawyers in the last thirty years. In 2017, the Conference of Chief Justices, the Conference of State Court Administrators, and the National Center for State Courts launched the Family Justice Initiative ("FJI") project to evaluate and improve how courts handle domestic relations cases.[16] In 2018, the FJI published the first comprehensive examination of how family court cases are litigated in state courts.[17] The FJI reviewed caseload data between July 1, 2016, and June 30, 2017, across eleven large, urban courts and found that the great majority of cases (72%) involve at least one self-represented party, and the amount of time that it takes to litigate cases enhances the public perception that the legal system takes too long to achieve a meaningful resolution.[18] The FJI identified thirteen Principles for Family Justice Reform to guide courts in improving how they process domestic relations cases.[19]

One of these Principles was that courts should encourage parties to reach resolutions themselves, with careful attention to the safety of the parties, rather than to undergo a full adversarial proceeding and receive a determination by a judge.[20] The FJI

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13 *Landscape of Domestic Relations Cases in State Courts*, NAT'L CTR. ST. CTS. (2018), https://www.ncsc.org/__data/assets/pdf_file/0018/18522/fji-landscape-report.pdf (stating that adversarial processes inflame tensions and divide spouses and parents when they need to be making good decisions about children, assets, and future events).

14 *Id.*

15 *How Stress Affects Your Health*, AM. PSYCHOL. ASS'N (Oct. 31, 2022), https://www.apa.org/topics/stress/health.

16 *In Support of the Family Justice Initiative Principles*, CONFERENCE OF CHIEF JUSTICES (2019), https://ccj.ncsc.org/__data/assets/pdf_file/0024/23478/02132019-family-justice-initiative-principals.pdf.

17 *Id.*

18 *Id.*

19 *Family Justice Initiative Principles for Family Justice Reform*, NAT'L CTR. ST. CTS. 1, 1 (2019), https://www.ncsc.org/__data/assets/pdf_file/0021/19173/family_justice_initiative_principles_final.pdf.

20 *Id.* at 2 (citing *Call to Action: Achieving Civil Justice for All*, NAT'L CTR. ST. CTS. 1, 16 (2016), https://www.ncsc.org/__data/assets/pdf_file/0029/19289/call-to-action_-achieving-civil-justice-for-all.pdf).

recognized that "self-determined resolutions are more likely than a court-imposed decision to address both the substantive and underlying interests of the parties; therefore, parties are more likely to comply with and support agreements they reach on their own."[21] The Principles also included a "tailored services pathway" to provide families with access to information on alternative dispute resolution and other services that can help parties reach an agreement in appropriate cases.[22] The Conference of Chief Justices adopted a Resolution in support of these Principles on February 13, 2019.[23] While arbitration proceedings themselves are not self-determined, since the arbitrator makes a decision, arbitration involves self-determination, including the choice of the arbitrator and the rules applicable to the proceeding.[24]

The American Academy of Matrimonial Lawyers ("AAML") endorsed the concept of arbitration in domestic relations matters in 1990;[25] adopted Rules for Arbitration of Financial Issues that same year;[26] and then published the Model Family Law Arbitration Act in 2005, based on the Revised Uniform Arbitration Act.[27] The AAML encourages ADR in general, including arbitration, in its Bounds of Advocacy published in 2000,[28] which recognized that

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21 *Id.*

22 *Id.* at 13.

23 *In Support of the Family Justice Initiative Principles*, *supra* note 16; *see also* Audrey J. Beeson, *Arbitration: A Promising Avenue for Resolving Family Law Cases?*, 18 PEPP. DISP. RESOL. L.J. 211, 234-35 (2018) (summarizing results of a survey of twenty family court judges of Nevada's Eighth Judicial District Court and concluding that the judges, overall, support family law arbitration and that 46% supported arbitration of child custody-related issues).

24 *See, e.g.*, Michael J. Broyde, Ira Bedzow, & Shlomo C. Pill, *The Pillars of Successful Religious Arbitration: Models for American Islamic Arbitration Based on the Beth Din of America and Muslim Arbitration Tribunal Experience,* 30 HARV. J. RACIAL & ETHNIC JUST. 33, 53 (2014) ("because jurisdiction to arbitrate is premised on the voluntary agreement of the parties to arbitrate, arbitral tribunals must accept the contractual choice of the parties as to the substantive and procedural rules that will govern the arbitration").

25 Joan F. Kessler et al., *Why Arbitrate Family Matters?*, 14 J. AM. ACAD. MATRIM. LAW. 333, 333 (1997).

26 UNIF. FAMILY LAW ARBITRATION ACT, *supra* note 8, prefatory note.

27 *Id.*

28 *See* AM. ACAD. OF MATRIMONIAL LAWYERS, BOUNDS OF ADVOCACY GOALS FOR FAMILY LAWYERS 4-5 (2012). Goal 1.4 states "An attorney should be knowledgeable about different ways to resolve marital disputes, including negotiations, mediation, arbitration, and litigation." *Id.* at 4. Goal 1.5 states "An attorney should

the matrimonial lawyer serves many functions, including the role of a skilled litigator to help clients achieve their goals in "court or in arbitration."[29] The family lawyer's job includes discussing with the client the personal and financial decisions that must be made and may consist of serving as a mediator or arbitrator or representing a client in arbitration.[30] The family lawyer should act as an arbitrator only if competent to do so.[31] The AAML provides high-level training for arbitrators, including the AAML Arbitration Institute and webinars by experienced arbitrators, to provide attorneys with the necessary knowledge and skills to act as arbitrators and to represent parties in a family law arbitration.[32]

On March 14, 2024, the Board of Governors unanimously adopted a Resolution Supporting Divorce and Family Law Arbitration.[33] The Resolution reinforced the AAML's decision to support the use of arbitration of divorce and family law issues, endorsed the adoption of family law-specific legislation to address the unique needs of vulnerable family law participants and, if a state does not have in place a family law-specific arbitration statute or rule, encouraged the state's AAML chapter to work with their legislature to introduce the Uniform Family Law Arbitration Act, with modifications as appropriate to codify or incorporate any established family law arbitration caselaw, statutes, policies or procedures, with the goal of helping family law litigants resolve their matters expeditiously, competently, cost-efficiently, and confidentially in this alternative dispute forum. The Resolution further encouraged AAML lawyers to similarly support and encourage the use "of arbitration of divorce and family law issues to the extent permitted by the laws of each state, recognizing that a goal of our judiciary is to help family law litigants resolve their matters expeditiously, competently, and cost-efficiently."[34]

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attempt to resolve matrimonial disputes by agreement and should consider alternative means of achieving resolution." *Id.* at 5.

29 *Id.* at iv.

30 *Id.*

31 *See id.* at 65 (Goal 9.1).

32 *See Upcoming Events, Seminars and Webinars,* AM. ACAD. MATRIM. LAW., aaml.org/events/ (last visited Feb. 20, 2024).

33 *See Resolution in Support of Divorce and Family Law Arbitration,* AM. ACAD. MATRIM. LAW. (Mar. 14, 2024), https://aaml.org/wp-content/uploads/AAML-Arbitration-Resolution_FNL_3.14.2024.pdf.

34 *Id.* at 4.

Family law arbitration is also well-regarded by the financial experts who assist parties in these cases. The authors polled several financial professionals who reported participating in this process more frequently over the past ten years. One expert listed several reasons she prefers arbitration over litigation:

> The case is presented in a more organized fashion, with parties exchanging comprehensive pre-hearing submissions.
> The hearing is less formal, with the arbitrator having the discretion to follow the rules of evidence.[35]
> Parties often stipulate as to specific assumptions in valuations, such as unreported income, perquisites, etc.
> The process is more conversational, and the atmosphere is less intense.
> The process is more consistent, as evidence is presented in one or two days rather than over days or weeks at a time.
> Retired judges or experienced family lawyers typically hear the cases.
> The matter usually proceeds more quickly from start to finish, with a final award and judgment often entered within one year.
> The environment is more relaxed and friendlier, with a comfortable space, food, drink, and breakout spaces.
> Arbitrators can intervene more quickly on discovery issues and requests for temporary relief, such as attorney fees.[36]

Another expert noted that the parties can choose an arbitrator experienced with complex financial issues, and they can achieve closure without endless litigation and appeals.[37] Further, arbitration allows for flexibility in that arbitrators can hire their own financial expert in complex cases, and the parties may choose a mediation-arbitration model if they want to resolve their issues directly.[38]

Other experts observed that the arbitration process is typically more expedient because the arbitrator controls the proceedings with deadlines and procedures and schedules hearings over consecutive days, and, depending on the case, the proceedings can be more efficient and less costly for the parties than would be a lengthy trial.[39]

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35 The parties can also agree to follow the rules of evidence; it is not totally up to the arbitrator.

36 Telephone Interview with Carleen J. Gaskin, CPA, ABV, CFF, Withum (Dec. 12, 2023).

37 Email from Catherine Stoddard, CPA, ABV, CVA, CFE, MAFF, Forvis Mazars (Nov. 28, 2023).

38 *Id.*

39 Email from Karolina Calhoun, CPA, ABV, CFF, Mercer Capital (Nov. 28, 2023); email from Justin Cherfoli, CPA, ABV, CFF, Stout (Nov. 28, 2023).

B. *Laws Applicable to Family Law Arbitration*

Despite the growing interest in family law arbitration, most states do not have legislation or rules in place to govern the process. North Carolina adopted family law arbitration legislation in 1999,[40] and since then, several other states have enacted family law-specific arbitration legislation, including Connecticut, Florida, Georgia, Indiana, Michigan, New Hampshire, New Mexico, Texas, Utah, and Wisconsin, or rules, including Delaware, New Jersey, New York, and Ohio.[41]

The Uniform Law Commission Executive Committee appointed the Family Law Arbitration Study Committee in April 2012. After careful consideration, the Study Committee unanimously recommended developing an act on family law arbitration that would include terms essential for family law arbitration that are not typically contained in commercial arbitration statutes to supplement, rather than replace, the state's existing commercial arbitration statutes.[42] The Uniform Family Law Arbitration Act ("UFLAA") was recommended by the Uniform Law Commission for enactment in all the states at its meeting in July 2016; the American Bar Association Section of Family Law Council voted to support the UFLAA on October 19, 2016, and the ABA House of Delegates approved it on February 6, 2017.[43]

The "UFLAA provides needed guidelines to ensure that the process is fair and efficient for the participants in family law disputes and protects the interests of vulnerable family members."[44] The UFLAA also incorporates by reference a state's existing arbitration law—whether it is the RUAA or the UAA—for many

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40 N.C. GEN. STAT. ANN. §§ 50-41 to -62; N.C. GEN. STAT. ANN. §§ 1-569.1 to -569.31.

41 *See* Carolyn Moran Zack, *State Laws Applicable to Family Law Arbitration*, 46 FAM. ADVOC. 21 (Fall 2023). District of Columbia, Washington, and Pennsylvania have since adopted the UFLAA. *See* D.C. CODE § 16-5601 (effective Mar. 10, 2023); WASH. REV. CODE § 26.14 (effective Jan. 1, 2024); and 42 PA. CONS. STAT. §§ 7371-7398 (effective July 8, 2024).

42 UNIF. FAMILY LAW ARBITRATION ACT, *supra* note 8, prefatory note.

43 *See id.*; ABA FLS Council Minutes from the Oct. 19, 2016; House of Delegates Approves Policies on Array of Issues Important to the Rule of Law, Am. Bar Ass'n (Feb. 28, 2017), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/february2017/midyear2017/?login.

44 UNIF. FAMILY LAW ARBITRATION ACT, *supra* note 8, prefatory note .

steps in the arbitration process,[45] and can incorporate the state's pre-existing family law arbitration procedures and any policies. It has been enacted in six states, including Arizona and Hawaii, Montana, North Dakota, Pennsylvania, Washington, and in the District of Columbia. It was introduced as of February 2024 in Kansas.[46] These states are not clustered in one geographic area and reflect a widespread interest in uniform legislation with needed guidelines.

All other states, except for West Virginia, allow family law arbitration under their commercial arbitration statutes and case law.[47] In the absence of family law-specific legislation or rules, family lawyers must know the law and options available for family law arbitration in their jurisdiction,[48] and to the extent that the law does not address their family-specific issues, address those issues in their agreement to arbitrate, as discussed in more detail below.

C. *Cases or Issues That Are Appropriate for Arbitration*

When deciding which cases to submit to arbitration, the family lawyer should identify the issues for adjudication. The UFLAA would prohibit an arbitrator from making a status determination, such as an award of legal separation, divorce, or annulment.[49] Instead, the arbitrator can issue awards on the economic claims of the parties related to the divorce or separation, including distribution of property, support, alimony, counsel fees, and expert fees. Depending on the jurisdiction, the parties then request the entry of the decree or submit the award for confirmation by the court and an entry of judgment on the

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45 *Id.*

46 *Legislative Bill Tracking*, UNIF. LAW COMM'N, https://www.uniformlaws.org/committees/community-home?communitykey=ddf1c9b6-65c0-4d55-bfd7-15c2d1e6d4ed#LegBillTrackingAnchor (last accessed Aug. 8, 2024).

47 Carolyn Moran Zack, *Family Law Arbitration: An Underutilized ADR Option*, 46 FAM. ADVOC. 18, 21-25 (Fall 2023).

48 For example, several states expressly provide for parties to choose binding or non-binding family law arbitration, some states permit arbitration of child-related matters, while others expressly prohibit it, and some states permit substantive review of family law arbitration awards by agreement, while most do not. *See id.* at 18-20.

49 *See* CAROLYN MORAN ZACK, FAMILY LAW ARBITRATION PRACTICE, PROCEDURE, AND FORMS 9 (A.B.A. 2020) (citing UNIF. FAMILY LAW ARBITRATION ACT § 3 (UNIF. LAW COMM'N 2016)).

award.[50] If the client seeks a valuation determination, interpretation of a prenuptial or postnuptial agreement, or resolution of discovery issues, the client may agree to arbitrate these issues to help move the case forward to resolution.[51] The arbitrator can issue sanctions, such as a fine or attorney's fees, for a party's misconduct during the arbitration proceeding, including failing to comply with the arbitrator's directives, but cannot hold a party in contempt.[52] Instead, a party seeking this status determination would request the court to enforce the arbitrator's directive, if necessary.

In a jurisdiction where the arbitrator may issue an award on child-related issues, such as child support or child custody, the family lawyer should consider whether the client will want to preserve the right to appellate review of the issues, which would only be available if the case were litigated in court unless the state law expressly provides for substantive review of the arbitrator's award.[53] The client may want to preserve this right of appeal in situations where there are competing claims for primary custody, a request for relocation, or serious mental health or abuse issues. Preserving the right to appellate review is also a consideration if a case presents a novel financial issue that is not well addressed by a state's appellate case law. In addition, the attorney should not recommend that a party participate in the arbitration if the party cannot participate in the arbitration safely and effectively or when a child who is the subject of the arbitration is being abused or neglected.[54] If a party is covered by a protective order, the attorney may recommend arbitration but should first seek confirmation from the court that the party's consent is informed and voluntary, the arbitration process is not in violation of the protective order, and that there are procedures in place to protect the party from harm, harassment, or intimidation.[55]

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50 *Id.*

51 *Id.* at 189-90.

52 *Id.* at 197-98.

53 *Id.* at 241.

54 ZACK, *supra* note 49, at 10 (citing UNIF. FAMILY LAW ARBITRATION ACT § 12 (UNIF. LAW COMM'N 2016)).

55 *Id.* at 187-88.

D. *Discussing Arbitration with Clients*

The family lawyer will want to review the advantages and disadvantages of the proposed arbitration with the client in writing. One scholar noted that perhaps the most significant benefit is that arbitration tends to be far less formal than traditional litigation, with relaxed rules of evidence and procedures.[56] The parties have greater rights of self-determination in choosing limited rights of review and appeal.[57] They may also choose an arbitrator who is an expert in the field with experience in controlling conduct that antagonizes the parties.[58] The parties' lawyers may advocate for them effectively using their same litigation skills.[59] Thus, the result may be more predictable or reasonable with family lawyers presenting their cases to an experienced family lawyer or retired family court judge, rather than to a randomly assigned or inexperienced judge or hearing officer.

Other advantages include that the adjudication will be faster since the parties determine the scope of the arbitration, and the arbitrator can schedule the hearing on consecutive dates when the parties and their experts are available.[60] While the parties have to pay for the arbitrator's time, the arbitration will be more cost-efficient since they will not have to pay their attorneys and experts to attend fragmented proceedings (e.g., support and property distribution), pursue different steps in the court process (i.e., conferences, hearings, and arguments), or prepare for multiple dates over weeks or months when the court is available.[61] The arbitration will take place in an office or other private setting.[62] The arbitration provides closure since the award cannot be challenged, except in rare cases due to fraud or misconduct, unless otherwise provided by applicable law.[63] Finally, the decision is expedient, since the decision often will be rendered within thirty days of the hearing.[64]

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56 Kessler et al., *supra* note 25, at 337.

57 *Id.* at 337-38.

58 *Id.* at 338.

59 *Id.*

60 *See* ZACK, *supra* note 49, at 165-67.

61 *Id.*

62 *Id.*

63 *Id.*

64 *See, e.g.*, 42 PA. CONS. STAT. § 7321.20 (providing that an award must be made within the time specified by the agreement to arbitrate or, if not specified in the agreement, within the time ordered by the court).

Some of these advantages can also be perceived as disadvantages. For example, while most arbitrators will follow the substantive law of their jurisdiction, in the absence of a specific statute or rule or the parties' agreement to the contrary, the arbitrator is not obligated to follow formal rules of evidence or state the reasons for their award in writing.[65] Arbitrators may tend to "split the difference" between the parties to preserve the parties' relationship, encourage repeat business from the parties, or enhance the arbitrator's reputation as a moderate decision-maker.[66] The parties waive their right to appeal except for due process violations or misconduct of the arbitrator, unless they have agreed to an expansive review of the arbitrator's decision, in a jurisdiction where such expansive review is permitted.[67] On the other hand, there is also a risk of achieving a compromise outcome in court, and appealing a trial court award is an expensive and often uphill battle. The risks of arbitration are balanced by the arbitrator's desire to achieve the correct result to protect their reputation as a reliable, neutral decision-maker. Choosing the neutrals for their experience and reputation for excellence is, therefore, a vital part of the process.

E. *Proposing Arbitration to the Other Side*

Once a lawyer has decided that the case is appropriate for arbitration and the client has agreed to arbitrate the case, the next step is to confer with counsel for the opposing party. While there is no prohibition against arbitrating a case with an unrepresented party, there are special considerations in that situation. For example, the lawyer-arbitrator has a duty to inform unrepresented parties that the arbitrator is not representing them, and when the arbitrator knows or reasonably should know that a party does not understand the arbitrator's role in the matter, the arbitrator must explain the difference between a lawyer's role as a third-party neutral and as one who represents a client.[68]

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65 Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 439 (1988).

66 *Id.* at 450.

67 *See, e.g.*, 42 PA. CONS. STAT. § 7321.24 (specifying the limited bases for vacating an award).

68 *See, e.g.*, PA. RULES PRO. CONDUCT 2.4(b); MODEL RULES OF PRO. CONDUCT r. 2.4(b) (AM. BAR ASS'N 1983).

Depending on the dynamics between the parties, the public courtroom setting, with its security, formalities, and rules, may also be preferable to the less formal arbitration setting in this instance.

The discussion with opposing counsel should begin with the concept of arbitration before getting to the arbitrator's selection. If the parties can agree on the concept of arbitration, they will likely be able to agree on an arbitrator or a method for selecting the arbitrator. The parties can select anyone they choose to arbitrate, but in most instances, they will want to choose a family lawyer, a retired judge, or hearing officer. There are specific attributes a party should consider when selecting an arbitrator. Parties may choose an arbitrator with specialized training by the American Arbitration Association or the AAML.[69] Arbitrators must be smart, understand the nature of the dispute, be fair and considerate to both sides and all witnesses, be able to manage the process and the players from the initial preliminary hearing to the award, and be willing to listen and dig deep into the case to decide it correctly and expediently.[70] In addition, in those jurisdictions where the UFLAA has been enacted, the arbitrator should be trained in identifying domestic violence and child abuse.[71] Further, the arbitrator should be experienced in the subject area and be able to act with diligence and promptness in arbitrating the matter.[72]

In the absence of state law to the contrary, the parties may also choose a non-lawyer to be their arbitrator.[73] This selection may be appropriate when the arbitrator has expertise in the subject matter of the arbitration, such as the value of real estate or the tracing of financial contributions to the marital estate. An alternative to this

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69 The AAML conducts regular trainings to certify attorneys as experienced arbitrators. *See, e.g.*, *2023 and 2024 Arbitration Training Seminar*, AM. ACAD. MATRIM. LAW., https://aaml.org/event/arbitration-training-seminar/ (last visited Aug. 8, 2024).

70 David W. Ichel, *Arbitrator Selection Is a Key Component of the Arbitration Process*, N.Y. LAW J., Aug. 17, 2023, https://www.fedarb.com/wp-content/uploads/2023/08/NY_Law_Journal_Arbitrator_selection.pdf.

71 UNIF. FAMILY LAW ARBITRATION ACT, *supra* note 8, § 8(a)(2).

72 *See* CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, Canon I (AM. ARBITRATION ASS'N 2004) (an arbitrator should accept an appointment only if fully satisfied that he or she is competent to serve and is available to devote the time and attention reasonably expected).

73 *See* UNIF. FAMILY LAW ARBITRATION ACT, *supra* note 8, § 8 cmt.

approach is for the lawyer-arbitrator to hire an expert to advise about these issues at the parties' expense.[74] Before selecting an arbitrator, the attorneys should jointly contact the candidates they have identified, confirm their ability to serve promptly and competently for the specified issues, and exchange information about potential conflicts between participants and witnesses to ensure the integrity of the process.

II. Essential Components of an Arbitration Agreement

Arbitration requires a written agreement between the parties. A court cannot compel parties to arbitrate without an agreement.[75] The first meeting of counsel and any unrepresented party with the arbitrator should be to discuss the essential terms of the proposed agreement to arbitrate. Before the meeting, counsel should review the law applicable to family law arbitration in their jurisdiction, including the mandatory and optional terms for an agreement to arbitrate, and decide which of the optional terms they want to include in their draft agreement. Most agreements to arbitrate will include the following essential terms:

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74 *Id.* § 13(c)(6). The retention of a religious leader to apply religious law in the arbitration may also be permitted, but the considerations to be applied in that situation are outside the scope of this article. *See, e.g.*, Lang v. Levi, 16 A.3d 980 (Md. Ct. Spec. App. 2011) (affirming the circuit court's refusal to vacate an award by a Jewish arbitration panel, the Beth Din, and holding that this panel appropriately exercised its authority, as agreed to by the parties, in accordance with Jewish law (Halakhah) and/or general principles of arbitration and equity (Pesharah) customarily employed by rabbinical tribunals); *but see* Kovacs v. Kovacs, 633 A.2d 425 (Md. Ct. Spec. App. 1993) (finding that the chancellor erred in not exercising independent judgment to ensure custody and child support award by the Beth Din was in the best interest of the children; however, alimony and property award of Beth Din was upheld as parties expressly waived application of Maryland law and the procedural aspects of the Maryland Arbitration Act when they agreed to arbitration under Jewish substantive and procedural law).

75 Linda D. Elrod, *The Need for Confidentiality in Evaluative Processes: Arbitration and Med/Arb in Family Law Cases,* 58(1) FAM. CT. REV. 26, 28 (2020).

A. *Disclosures by the Arbitrator*

One of the most essential qualities of an arbitrator is neutrality. The UFLAA requires that the arbitrator make specific disclosures before agreeing to serve: the individual shall,

> after making reasonable inquiry, disclose to all parties any known fact a reasonable person would believe is likely to affect the impartiality of the arbitrator in the arbitration, including 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 a witness; or the arbitrator's ability to make a timely award.[76]

This disclosure requirement is echoed in the International Institute for Conflict Prevention and Resolution's ("CPR") proposed Model Rule for the Lawyer as Third-Party Neutral ("Proposed Model Rule") published in 2002.[77] The proposed model rules require that the lawyer-arbitrator disclose to the parties all circumstances reasonably known to the lawyer why he or she may not be perceived as impartial. Such circumstances include:

> (a) any financial or personal interest in the outcome; (b) any existing or past financial, business, professional, family, or social relationship with any of the parties, including, but not limited to, any prior representation of any of the parties, their counsel and witnesses, or service as an ADR neutral for any of the parties; (c) any other source of bias or prejudice concerning a person or institution which is likely to affect impartiality, or which might reasonably create an appearance of partiality or bias; and (d) any other disclosures required by law or contract.[78]

These disclosures extend to the interests or relationships of lawyer-arbitrators, their immediate family members, current employers, partners, or business associates.[79]

Arbitrators should, therefore, disclose in writing any potential conflicts, and they should also confirm that these disclosures have been made in the proposed agreement to arbitrate. Some states, including New Jersey, may also have specific forms to be

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76 UNIF. FAMILY LAW ARBITRATION ACT § 9(a)(1)-(2), *supra* note 8. This disclosure requirement is ongoing throughout the duration of the arbitration process. *Id.* at § 9 cmt.

77 *Model Rule for the Lawyer as Third-Party Neutral*, CPR-GEORGETOWN COMMISSION ON ETHICS AND STANDARDS IN ADR (2002), https://static.cpradr.org/docs/Third-Party-netural-create-new-cover-page-2012.pdf.

78 *Id., citing* Proposed Model Rule 4.5.3(b)(1).

79 *Id., citing* Proposed Model Rule 4.5.3(c).

completed by the arbitrator and the parties, which help to confirm full disclosure has been made, and this disclosure may not be waived.[80]

B. *Provisions of the Arbitration Agreement*

1. *Venue and mode of conference or hearing*

The proposed agreement should state whether the hearing and any pre-arbitration conferences will be in person or virtual and, if in person, where the proceedings will occur. In the absence of an agreement or applicable law to the contrary, arbitrators have the discretion to hold hearings in a manner they consider appropriate for a fair and expeditious disposition of disputes, including whether to record hearings.[81] If child-related issues are being arbitrated, the arbitrator will have an obligation to make a record, which may be a verbatim recording of the hearing, to permit judicial review of the award under the UFLAA.[82] The proposed agreement should also specify whether a recording of the arbitration hearing will be made and, if so, how that recording will be made (e.g., by video or audio or both).

2. *Scope of arbitration*

The proposed agreement should specify the issues being submitted to the arbitrator, as this will define the scope of the arbitrator's authority. The proposed agreement may refer to specific claims raised by the parties or refer to pleadings they have filed raising these claims. In jurisdictions allowing for the arbitration of child-related awards, the proposed agreement should also provide that these awards are not binding until confirmed by a court. The proposed agreement should provide that the court will review these awards to ensure they are consistent with the child's best interest, unless the state directs a higher or different standard for review of such awards, and that such awards are modifiable under applicable law.[83]

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80 *See* N.J. Ct. R. 5:1-5(a).

81 Unif. Family Law Arbitration Act, *supra* note 8, §14.

82 *Id.* § 14. The parties may wish to preserve de novo review of child-related arbitration awards by agreeing to non-binding arbitration of these issues.

83 *Id.* § 16; *see* Fawzy v. Fawzy, 973 A.2d 347, 361 (N.J. 2009) (holding that review of the arbitration award must take place within the confines of the arbitration statute, unless there is a claim of adverse impact on the child).

3. *Substantive law and rules applicable to proceeding*

Unless the state has family law-specific legislation or a rule expressly providing that the jurisdiction's substantive law and rules of evidence or procedure shall be applied, the arbitrator has discretion about how and whether to apply this law and these rules to the proceeding.[84] Therefore, the proposed agreement to arbitrate may require that the jurisdiction's substantive law and procedural rules be applied and incorporate any other policies the arbitrator must follow, including whether the arbitrator must issue a reasoned award. These rules may include the rules of civil procedure (such as the provisions requiring financial disclosure and sanctions that may be imposed for failure to do so) and the rules of evidence, or may allow for more flexibility, depending on the needs of the parties and particularities of the case.

4. *Process for reconsideration*

The proposed agreement should provide a procedure for reconsideration by the arbitrator of any portion of the award. For example, the reconsideration provision may permit either party to submit such a request in writing (with a copy to the other party) within twenty days of the award. The responding party may submit a written response (with a copy to the other party) within the next twenty days, after which the arbitrator may, in his or her sole discretion, determine whether to conduct further hearing or argument by telephone conference call or otherwise, to decide the reconsideration request. This reconsideration provision (i.e., allowing for reconsideration for any reason) would supplement the provisions of most arbitration statutes, allowing the arbitrator to correct or modify an award on request of a party for specified reasons only.[85]

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84 The UFLAA would require that the arbitrator follow the law of the state, including its choice of law rules. UNIF. FAMILY LAW ARBITRATION ACT, *supra* note 8, § 4.

85 *See, e.g.*, 42 PA. CONS. STAT. § 7321.21 (the arbitrator may modify or correct an award for an evident mistake, if the award is imperfect in form not affecting the merits, they made an award on a claim not submitted, have not made a final and definite award on a claim submitted, or to clarify the award).

5. *Privacy of the proceeding*

The proposed agreement may confirm that the parties desire to maintain the privacy of the arbitration proceeding and may provide for the protection of sensitive information to be exchanged or discussed in the process. For example, the parties may agree to execute a confidentiality agreement to be signed by the parties, their counsel, the arbitrator, and any experts or other third-party witnesses.

6. *Fees and costs*

The agreement to arbitrate must set forth the basis for the arbitrator's fee (which is generally based on an hourly rate), the services and costs to be charged to the parties, the amount of any retainer, and the up-front allocation of these fees. The agreement to arbitrate should also confirm that the fees may be reallocated in the arbitration award at the arbitrator's discretion.[86]

7. *Non-waivable terms*

Most commercial statutes provide that the agreement to arbitrate may waive or vary the requirements of the law, except as expressly provided in the statute.[87] In jurisdictions that have adopted the UFLAA, the arbitration agreement must be in a "record signed by the parties, identify the arbitrator, an arbitration organization, or the method of selecting an arbitrator, and identify the family law dispute the parties intend to arbitrate."[88] Further, the UFLAA provides that, except for child-related disputes, the parties may agree to arbitrate a dispute that arises "after the agreement is made, and the agreement is valid and enforceable as any other

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86 *See, e.g.*, 42 PA. CONS. STAT. § 7321.22(b) ("An arbitrator may award reasonable attorney fees and other reasonable expenses of arbitration if the award is authorized by law in a civil action involving the same claim, by the agreement of the parties to the arbitration proceeding or by the terms of an agreement subject to arbitration."); UNIF. FAMILY LAW ARBITRATION ACT, *supra* note 8, § 13(c)(14) (unless the parties agree otherwise in writing, the arbitrator may allocate arbitration fees, attorney's fees, expert witness fees, and costs to the parties).

87 *See, e.g.*, 42 PA. CONS. STAT. § 7321.5 (differentiating between grounds waivable after the controversy arises and grounds not waivable under any circumstances).

88 UNIF. FAMILY LAW ARBITRATION ACT, *supra* note 8, § 5(a).

contract."[89] The exception to this rule is an agreement to arbitrate a future child related dispute, which is not enforceable unless the parties affirm the agreement in writing after the dispute arises, or the agreement was entered during a family law proceeding and the court approved and incorporated the agreement in an order.[90]

C. *Following the Arbitration*

1. *Post-award confirmation*

Unless otherwise provided by law, an arbitrator's award is not enforceable as a judgment until the court confirms it.[91] Thus, the proposed agreement should provide for the submission of the award to the court following the reconsideration period and entry of judgment on the award. In the absence of family law-specific legislation providing for the confidentiality of the award, the parties may also agree that the court may order that a document or part of the arbitration record be sealed or redacted to prevent public disclosure of all or part of the record or award, to the extent permitted under the law of the state.[92]

If the arbitration includes the resolution of a child-related dispute, the proposed agreement should reiterate the standard of review to be employed by the court before confirming the award.[93] In most states where arbitration of child-related issues is permitted, the court may not confirm the award unless it finds that the award complies with state law and is in the child's best interest.[94] The court's duty to ensure the child's best interest rests on the state's *parens patriae* responsibility, and subjects the arbitrator's award to a standard of review similar to that given to a parenting agreement achieved through negotiation or mediation.[95] In some states, the law requires a judge to make findings about best interest

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89 *Id.* § 5(b).

90 *Id.* § 5(c).

91 *See, e.g.*, 42 PA. CONS. STAT § 7321.23; UNIF. FAMILY LAW ARBITRATION ACT, *supra* note 8, § 21.

92 UNIF. FAMILY LAW ARBITRATION ACT, *supra* note 8, § 21.

93 *Id.* § 15.

94 *See* Miller v. Miller, 620 A.2d 1161 (Pa. Super. Ct. 1993) (arbitration of custody disputes is permitted, but subject to close scrutiny by the court); Knorr v. Knorr, 588 A.2d 503 (Pa. 1991) (parties may also arbitrate child support but may not agree to less child support than is required for the best interests of the child).

95 UNIF. FAMILY LAW ARBITRATION ACT, *supra* note 8, § 16 cmt.

factors specified in a state statute; if no factors are listed, the judge cannot confirm the award.[96] In addition, federal law mandates that all states use child support guidelines. If there is no child support worksheet as required by state law and the amount of child support is not the guideline amount of support, the judge may not confirm the award.[97] On confirmation, the award is enforceable as a judgment.[98]

2. *Right of appeal or judicial review*

Most commercial arbitration statutes permit appeals from an order confirming an award or from a final judgment entered on confirmation of an arbitration award; however, the scope of review of the award is limited.[99] Because arbitrators are the final judges of both law and fact, an arbitration award is not subject to reversal for a mistake of either.[100] Courts may vacate an award for reasons relating to due process or the fairness of the proceedings, including that: the award was procured by corruption, fraud, or other undue means; there was evident partiality or corruption by the arbitrator, or misconduct by the arbitrator prejudicing the rights of a party to the proceeding; the arbitrator failed to give notice of a hearing, postpone a hearing, or refused to consider evidence material to the controversy; the arbitrator exceeded his or her powers; or there was no agreement to arbitrate.[101] The appellate court will reverse a trial court's decision on whether to vacate an arbitration award only for an abuse of discretion or error of law.[102]

A few states, including California, North Carolina, and New Jersey, allow the parties expressly to agree to substantive judicial

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96 *Id.* (citing Zupan v. Zupan, 230 P.3d 329 (Wyo. 2010)).

97 *Id.*

98 *Id.* § 16(d).

99 *See, e.g.*, 42 PA. CONS. STAT. § 7321.29 (permitting an appeal to be taken from an order confirming or denying confirmation of an award and from a final judgment entered on an arbitration award issued under the Revised Uniform Arbitration Act).

100 *See* PennEnergy Res., LLC v. Winfield Res., LLC, 301 A.3d 439 (Pa. Super. Ct. 2023) (stating that judicial review of arbitration awards is extremely deferential and, in light of a strong public policy in favor of commercial arbitration, courts begin with the presumption that the award is enforceable).

101 *See, e.g.*, 42 PA. CONS. STAT. § 7321.24.

102 *PennEnergy Res., LLC*, 301 A.3d at 452 n.17.

review of the arbitration award itself.[103] If the state's law permits such an expansive review of the arbitration award, this right to review should be confirmed in the proposed agreement to arbitrate. The agreement to arbitrate should specify whether the court may review the award for errors of law, substantial evidence, abuse of discretion, or such other standard to which the parties agree, and state whether a court or a new arbitrator or panel of arbitrators will make that review in the first instance.[104] Where this expansive review is available, the parties may waive their right of appeal in their arbitration agreement, so long as the intention and agreement to waive this right is clear.[105]

In those states where the UFLAA has been enacted and child-related issues are arbitrable, the court will vacate an unconfirmed award for child support or child custody if the moving party establishes that the arbitrator did not provide reasons for the award according to the family law of the state, the award is contrary to the best interests of the child, or the record of the hearing or the statement of reasons in the award is inadequate for the court to review the award.[106] A party may take an appeal from an order vacating the award.[107]

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103 N.C. GEN. STAT. § 50-60(b) ("Unless the parties contract in an arbitration agreement for judicial review of errors of law. . . a party may not appeal on the basis that the arbitrator failed to apply correctly the law"); N.J. STAT. ANN. § 2A:23B-4(c) ("nothing in this act shall preclude the parties from expanding the scope of judicial review of an award by expressly providing for such expansion in a record."); *see also* Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586 (Cal. 2008) (holding that the parties may expressly agree to accept a broader scope of review in their agreement to arbitrate and should provide for any judicial review on the merits explicitly and unambiguously).

104 *See* Hous. Auth. of City of Calexico v. Multi-Housing Tax Credit Partners XXIX, L.P., 312 Cal. Rptr. 3d 792 (Cal. Ct. App. 2023) (where parties agree to expansive judicial review of an arbitration award, this review must be made by the state trial court in the first instance); Appendix XXIX-B-Agreement to Arbitrate Pursuant to the Unif. Arbitration Act, N.J. STAT. ANN. §23B-1 (stating that the parties may agree to appeal a final award to a panel of one or more private appellate arbitrators).

105 Van Duran v. Rzasa-Ormes, 926 A.2d 372, 377-78 (N.J. Super. Ct. App. Div. 2007). *But see* South, Inc. v. Reel Precision Mfg. Corp., 331 Fed. Apps. 925, 2009 U.S. App. LEXIS 12762.

106 UNIF. FAMILY LAW ARBITRATION ACT, *supra* note 8, § 16(d).

107 *Id.* § 24(a)(5).

III. The Arbitration Process

A. *Overview*

A party may initiate arbitration by giving notice to the other party as provided in the arbitration agreement or, in the absence of a specified manner, under the law and procedural rules of the state governing contractual arbitration.[108] If the parties have recently agreed to arbitrate, they typically begin the process without providing a formal notice since they have already agreed to proceed with the arbitration. Notice would be needed, for example, if the parties had included an agreement to arbitrate in a premarital agreement, and one of them desired to move forward with that agreement. The notice would ensure that a party actually informed, and should be served to the person's place of residence, place of business, or other place the person has held out as a place of delivery for such communications.[109] Under most commercial arbitration statutes, unless a party objects to lack or insufficiency of notice not later than at the beginning of the arbitration hearing, the person waives any objection to lack or insufficiency of notice by appearing at the hearing.[110]

The arbitrator has broad discretion about how to conduct the arbitration process, except as limited in the agreement to arbitrate or as proscribed by law. The arbitrator's duty is to conduct the arbitration in a manner appropriate for a fair and expeditious disposition of the proceeding.[111] The authority conferred upon the arbitrator includes the power to hold conferences with the parties before the hearing and, among other matters, determine the admissibility, relevance, materiality, and weight of any evidence.[112] The arbitrator must give the parties notice of any hearing, and allow a party the right to be heard, present evidence material to the

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108 *See, e.g.*, 42 PA. CONS. STAT. § 7321.10 (stating that, unless the parties otherwise agree, notice of the arbitration is made by original process as in a civil action).

109 UNIF. FAMILY LAW ARBITRATION ACT, *supra* note 8, § 6 cmt.

110 *See, e.g.*, 42 PA. CONS. STAT. § 7321.10(b).

111 *See, e.g.*, *id.* § 7321.16(a).

112 *Id.*

controversy, and cross-examine witnesses appearing at the hearing.[113] An attorney may represent a party.[114]

In jurisdictions where the UFLAA has been enacted, a party or representative of a party may not communicate *ex parte* with the arbitrator except to the extent allowed in a family law proceeding for communication with a judge.[115] In addition, under the UFLAA, a party has an absolute right to be accompanied by an individual who will neither be called as a witness nor act as an advocate, to ensure that a support person may accompany a victim of domestic violence during the arbitration.[116]

The arbitrator has the authority to issue temporary awards (or "directives"), like a judge in a civil proceeding. For example, under most commercial arbitration statutes, the arbitrator may:

> Issue subpoenas for the attendance of a witness and for production of records and other evidence at a hearing and may administer oaths.
> Permit a deposition of a witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or cannot attend a hearing, and determine the conditions under which the deposition is taken.
> Permit discovery as the arbitrator deems appropriate.
> Order a party to comply with the arbitrator's discovery-related orders and sanction a noncomplying party to the extent a court could in a civil action.
> Issue protective orders to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could in a civil action.[117]

The arbitrator has the authority to compel a person under subpoena to testify and to allocate fees related to discovery as though the matter were litigated in court.[118] If necessary, a party may seek enforcement of a subpoena or discovery-related order by the court.[119] The arbitrator also has the authority to issue interim awards as necessary to protect the effectiveness of the

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113 *See, e.g.*, 42 PA. CONS. STAT. § 7321.16(d); UNIF. FAMILY LAW ARBITRATION ACT, *supra* note 8, § 13(b).

114 *See, e.g.*, 42 PA. CONS. STAT. § 7321.17; UNIF. FAMILY LAW ARBITRATION ACT, *supra* note 8, § 10(a)(1).

115 UNIF. FAMILY LAW ARBITRATION ACT, *supra* note 8, § 10(b).

116 *Id.* § 10(a)(2).

117 *See, e.g.*, 42 PA. CONS. STAT. § 7321.18.

118 *Id.*

119 *Id.*

arbitration proceeding and promote a fair and expeditious resolution.[120] Therefore, the arbitrator's power to control the process is broad and is buttressed by a party's ability to seek enforcement of any interim directive by the court.[121]

Following the arbitration hearing, the arbitrator must make a record of the award, which is signed or otherwise authenticated by the arbitrator, and give notice of the award to each party to the proceeding.[122] The award must be made within the time specified by the agreement to arbitrate or, if not specified in the agreement, within the time ordered by the court.[123] A party waives an objection that an award was not timely made unless the party gives notice of the objection to the arbitrator before receiving notice of the award.[124] Except for awards determining a child-related dispute, where detailed findings and reasoned awards are typically required, the parties can agree that the award is not a reasoned award.[125] A party must make a motion to the court for an order confirming the award, and the court will issue a confirming order unless the award is modified, corrected, or vacated as provided by applicable law.[126]

B. *Special Considerations for Awards on Child-Related Issues*

An increasing number of states permit arbitration of child-related disputes, so long as courts retain their essential role in overseeing awards affecting children.[127] Further, the New Jersey Supreme Court has held that parents have a constitutional right to resolve their custody disputes by arbitration.[128] There are,

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120 *Id.* § 7321.9(b)

121 *Id.* § 7321.19.

122 *See, e.g., id.* § 7321.20(a).

123 *See, e.g., id.* § 7321.20(b).

124 *Id.*

125 *See, e.g., id.* § 7321.16(b).

126 *See, e.g., id.* § 7321.23.

127 UNIF. FAMILY LAW ARBITRATION ACT, *supra* note 8, § 3 cmt. (citing Vanderborgh v. Krauth, 370 P.3d 661 (Colo. App. 2016); Brazzel v. Brazzel, 789 S.E.2d 626 (Ga. Ct. App. 2016); *In re* Marriage of Golden and Friedman, 974 N.E.2d 927 (Ill. App. Ct. 2012); Harvey v. Harvey, 680 N.W.2d 835 (Mich. 2004); Vanderheiden v. Marandola, 994 A.2d 74 (R.I. 2010)).

128 *Fawzy*, 973 A.2d 347 ; *see also* GA. CODE ANN. § 19-9-1.1 (Georgia law expressly permits the parties to agree to binding arbitration of custody decisions, unless the judge makes specific findings that the award is not in the best interest of the children).

however, a minority of states that exclude child-related disputes from arbitration altogether.[129] In jurisdictions where child-related issues are arbitrable, the family lawyer should know any additional or special requirements for such awards.

In states where the UFLAA is enacted, an arbitrator must request that a verbatim recording be made of any part of an arbitration hearing concerning a child-related dispute.[130] This recording could be done by video (e.g., by Zoom, Webex, or other virtual platform) or audio (e.g., by a cell phone, tablet, or other digital recording device), at significantly less expense than the parties would pay for a transcript in a court trial. The award determining a child-related dispute must state the reasons on which it is based as required by the state's substantive law.[131] After reviewing the record, if necessary, the court may confirm that the award complies with state substantive law and is in the child's best interest.[132]

The family lawyer should know the law and any procedures applicable to child custody or could support arbitrations in their state. For example, Pennsylvania has adopted a best-interest test for judicial review of an arbitrated custody award, allowing the court to substitute its judgment for the arbitrator's.[133] New Jersey has adopted a higher standard, which prevents the court from infringing on the parent's choice to be bound by the arbitrator's decision if no harm to the child is threatened.[134] To permit this judicial review, the family lawyer should ensure that an appropriate record is made of any arbitration proceedings involving child custody issues.[135] The family lawyer should also ensure that the arbitrator makes findings as required by law to substantiate a child support decision if the court permits judicial review of child

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129 UNIF. FAMILY LAW ARBITRATION ACT, *supra* note 8, § 3 cmt. (citing Goldberg v. Goldberg, 1 N.Y.S.3d 360 (N.Y. App. Div. 2015), and CONN. GEN. STAT. ANN. § 46b-66(c)).

130 UNIF. FAMILY LAW ARBITRATION ACT, *supra* note 8, § 14(b).

131 *Id.* § 15(c).

132 *Id.* § 16(c).

133 *See Miller*, 620 A.2d at 1165 (arbitration of custody disputes is permitted but it is subject to close scrutiny by the court).

134 *Fawzy*, 973 A.2d at 361.

135 *Id.* (requiring that in child custody and parenting time decisions, a verbatim record and documentary evidence must be retained).

support awards in the child's best interest.[136] For example, if the state statute requires a finding on each factor, then the arbitrator's award should include such a finding.

C. *Private Judging Distinguished*

In some jurisdictions, parties can agree to appoint a private judicial officer and to pay for their services.[137] The private judicial officer has the same rights and responsibilities as a judge, and the parties follow the procedural and evidentiary rules applicable to court proceedings.[138] The private judge holds a record hearing, and the decision is appealable as is any judicial ruling.[139] Thus, the parties select their decision-maker and have more privacy for their proceeding, which may be held outside the public forum.[140] As with arbitration, it is essential for the family lawyer to obtain full disclosure of the private judge's potential conflicts with the parties, counsel, and any witnesses, and to choose an individual with a reputation for fairness and integrity.[141]

IV. Techniques in Family Law Arbitration

Even if attorneys understand arbitration, they may wonder why change using litigation as the go-to practice? The answer is in this baseball analogy: the team is in the middle of the season, and its performance is lackluster. The manager has been using a veteran pitcher throwing his standard array of predictable pitches and giving up too many runs. The manager decides to try the rookie pitcher, who displays a variety of new pitches, and she helps to turn the season around.

The prior sections already discussed the drawbacks of litigation in court. There are limitations to mediation or collaborative law as well. Clients who fail to resolve their case through mediation or the collaborative law process may settle for less than

136 *See, e.g.*, Knorr v. Knorr, 588 A.2d 503 (Pa. 1991) (parties may also arbitrate child support but may not agree to less child support than is required for the best interests of the child).

137 Jennifer R. Morra, *Going Private: Appointing a Judge Pro Tem*, 46 FAM. ADVOC. 26, 27 (Oct. 2023).

138 *Id.*

139 *Id.*

140 *Id.*

141 *Id.* at 29.

is reasonable to avoid litigation or because they have run out of money to fund further efforts at resolution. They may prefer an ADR process that is streamlined, offers privacy, flexibility in scheduling, savings in time and money, and closure for the litigation.[142] Family law arbitration may be the answer, but lawyers and clients need to be open and willing to adapt—to call up that rookie pitcher to turn the game around. After all, it is often said that "intelligence is the ability to adapt to change."[143]

This section discusses how the legal community can take small steps to shift toward a mindset oriented toward arbitrating family law disputes by engaging in techniques including: (1) "final offer" arbitration (FOA); (2) mediation-arbitration; (3) single issue arbitration; or (4) a panel of arbitrators. These approaches to resolving issues related to divorce or separation may provide the closure clients need when other ADR processes fail, while still maintaining the privacy, flexibility, and control clients want.

A. *Final Offer Arbitration (FOA)*

"Final Offer Arbitration" is a dispute resolution method in which both parties submit a "final offer," and an arbitrator or panel of arbitrators chooses *one* of the offers, instead of finding a compromise between the two.[144] "The theory is that FOA will encourage good faith bargaining between parties and that each side's fear of losing to a more reasonable offer will facilitate settlements or, at the very least, induce reasonableness."[145] This approach incentivizes the parties at the beginning of negotiations to exchange reasonable offers, saving time and money.[146] In mediation, the parties engage in a "dance," usually starting at opposite extremes. One party moves a few steps. The other moves a few steps. The mediator wants to speed up the "music." Yet, there may

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142 *See* Mary Kay Kisthardt, *The Use of Mediation and Arbitration for Resolving Family Conflicts: What Lawyers Think About Them,* 14 J. AM. ACAD. MATRIM. LAW. 353, 377-78 (1997) (examining attorneys' perceptions about mediation and arbitration, including disadvantages and advantages).

143 *See, e.g.,* THOMAS W. FARANDA, UNCOMMON SENSE: LEADERSHIP PRINCIPLES TO GROW YOUR BUSINESS PROFITABLY 41 (1991).

144 Rachel Schwartzman, Student Article, *Utilizing Final-Offer Arbitration to Settle Divorces: A Proposal and Analysis*, 53 FAM. L.Q. 3, 4 (Spring 2019).

145 *Id.*

146 *Id.* at 14.

be little incentive to compromise, perhaps because of the unreasonableness of one party or a power differential where one spouse has more bargaining power and endurance, thereby placing the other spouse at a disadvantage with no recourse but to return to mediation several times to try to resolve the case, to settle for less than a reasonable amount, or to prosecute the case.[147]

Litigants may choose from two approaches to FOA, depending on the type and number of disputed issues. One type of FOA is where the arbitrator decides independently of the parties' offers and then selects as the final award whichever offer is more like the arbitrator's decision.[148] Usually, this format lends itself to quantifiable disputes, such as the owner's income or the value of an asset. The second type of FOA is typically used when multiple disputed issues fall into economic and non-economic categories. Both parties submit to the arbitrator their final offers, either issue-by-issue or as a total package, and the arbitrator chooses the more reasonable offer.[149] This approach gives the arbitrator a choice between two offers on each disputed issue or total package. It alleviates the litigants' concern that "the arbitrator will impose a resolution neither party is happy with" or that the arbitrator may "split the difference" between the parties' offers.[150]

Major League Baseball arbitrates the players' salaries using the FOA technique.[151] Under the Collective Bargaining Agreement, there are no appeals by either side, and the arbitrator's decision is final.[152] Given the players' continued relationships with the owners, the need to cooperate, and the speed at which the decision needs to be made, the FOA works best for professional baseball.

Family law cases could benefit from the FOA approach. The divorcing parties would voluntarily agree to submit their disputed financial issues to the arbitrator for a binding decision. They could submit the entire case, including the values of and distribution of the assets, amount, and term of alimony, etc., or they could submit specific issues, including the value and distribution of the marital home, the family business, or the personal property. The parties

147 *Id.* at 7-8.
148 *Id.* at 11.
149 *Id.*
150 Schwartzman, *supra* note 144, at 8.
151 *Id.* at 14.
152 *Id.* at 16.

might also agree they have a "grace period" to exchange and adjust their offers until the arbitration hearing. Once the parties submit their final offer to the arbitrator before the arbitrator's decision, they may continue negotiating and settling the issues.[153] If the parties do not resolve the issues, the arbitrator must choose from one of the offers submitted. Thus, the FOA promotes good faith negotiations, better working relationships, and quick, cost -effective resolution by eliminating the mediation "dance," avoiding the animosity between the parties and wasting resources used in litigation.

B. *Mediation/Arbitration (Med-Arb or Arb-Med)*

Med-Arb is short for a two-step alternate dispute resolution process involving mediation and arbitration.[154] The notion of submitting family law issues to mediation is not novel.[155] Still, when only one or two disputed issues remain, presenting them to an arbitrator may benefit the client instead of preparing for a courtroom battle that might be long, expensive, and emotionally taxing. Clients who want privacy and closure may agree, either before engaging in mediation or during mediation, to submit their disputed issues to the same neutral or change the neutral after mediation and before the arbitration hearing.[156] If the former, the clients may save money and time by not having to identify, appoint, and educate another neutral. There are significant risks, however, in using the same neutral approach, including that the neutral may use confidential information learned in the mediation to decide the arbitration case.[157]

Options to avoid the risk of actual or inadvertent misuse of confidential information include excluding individual caucuses

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153 *Id.* at 25.

154 Ned I. Price, *Binding Arbitration, Voluntary Trial Resolution, and Med-Arb Proceedings in Family Law,* 86 FLA. B. J. 48, 50 (Nov. 2012).

155 Kisthardt, *supra* note 142 (analyzing the results of 123 surveys from members of the American Academy of Matrimonial Lawyers in the Fall of 1996, to ascertain attorneys' perceptions of the advantages and disadvantages of mediation and arbitration, and identifying the similarities and differences among mediation programs or services as well as the advantages and disadvantages of mediation).

156 Elrod, *supra* note 75, at 34.

157 *Id.* at 35.

during the mediation phase, requiring the mediator-arbitrator to disregard information learned during the mediation, and allowing the parties to decide whether to change the neutral after the mediation fails.[158] To lessen the risk of the arbitrator's award being challenged, lawyers should require written consent by the clients acknowledging the waiver of their rights and acceptance of the risks associated with the same neutral engaged in both the mediation and arbitration process.[159] The consent should also include a clear definition of the mediation and arbitration processes; whether the arbitrator can rely on communication received during mediation; and, if so, whether the neutral is required to disclose the information learned in confidence during the mediation process; and finally, include language to allow the parties the ability to change the neutral should the mediation fail.[160] Even with written consent, some states' ethical rules and codes for mediators and arbitrators disapprove of a single neutral serving as both mediator and arbitrator in the same case.[161]

Another concern of the med-arb approach is the question of judicial review.[162] A court may vacate the arbitration award based on statutes or rules.[163] Since courts use contract law to evaluate the enforceability of a mediated settlement, the mediated settlement does not have statutory constraints and is usually enforced despite challenges based on common law defenses.[164] Thus, it is essential when combining the mediation and arbitration processes to ensure the parties' voluntary written consent and acknowledgment of the risks and waivers of their rights and clearly define each process and standard of review, especially if the parties desire to use the same neutral as mediator and arbitrator.[165]

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158 *Id.* at 36.

159 Ellen E. Deason, *Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Review*, 5 Y.B. ARB. & MEDIATION 219, 247-48 (2013).

160 *Id.*

161 *Id.* at 227-28.

162 *Id.* at 225.

163 *Id.* at 230-31.

164 Deason, *supra* note 159, at 231-32 (citing Paul F. Kirgis, *Judicial Review and the Limits of Arbitral Authority: Lessons from the Law of Contract,* 81 ST. JOHN'S L. REV. 99, 104 (2007) ("The bottom line is that awards are rarely vacated by courts on any grounds.")).

165 *Id.* at 247-49.

Some clients prefer the arbitration-mediation approach, where the parties present their case to the arbitrator, the arbitrator's award is sealed in an envelope, and the parties mediate the case. If the parties settle in mediation, the sealed award is not opened. If the parties do not settle, the arbitrator's award is unsealed and becomes binding.[166]

C. *One Issue Arbitration*

"Arbitration is very effective for limited issues, time-sensitive issues, or post-judgment (after the divorce) matters that linger because courts don't have the time to hear these matters."[167] The parties have agreed in theory that the house will be sold, or they will equitably divide the personal property in the home. To obtain a final divorce decree, they state in their property settlement agreement that if there is a future dispute over the sale of the home or division of the personal property, the parties shall submit those issues to a named arbitrator who will decide and whose award will be binding on the parties, subject to the grounds enumerated in the state's arbitration law. Another option is for the parties to submit the Gordian knot—the value of the real estate or the business—to arbitration, and then mediate the balance of the dispute. This arbitration process to resolve one or two issues is practical and efficient. The clients get divorced and have already agreed upon a streamlined process should they be unable to resolve those issues.

D. *Streamlined Three Panel Arbitration*

A streamlined approach with a three-panel arbitrator may be appropriate when a high-dollar divorce involves complex issues. Both parties select a neutral, and the two neutrals select a third arbitrator as the Chief. The Chief Arbitrator presides over the preliminary hearing, discovery disputes, and dispositive motions while the other two arbitrators wait in the wings for the evidentiary hearing. This streamlined approach saves the parties time and money but allows them to request the full panel to hear disputed issues at

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166 Elrod, *supra* note 75, at 37.

167 Carolyn Daly, *Getting Divorced Despite the System: How to Move Your Case Forward While the Courts Are Backlogged,* LEGAL INTELLIGENCER, July 9, 2023, at 2.

any time.[168] Some divorces involve highly technical industries, and parties need an expert in that industry to listen to the evidence, along with experienced, trained family law arbitrators. The panel of arbitrators could be helpful, for example, when the case involves a business valuation, such as a car dealership, and the panel would include an experienced attorney and a business valuator or a car dealership owner.[169]

Joan Kessler and co-authors have observed that "confidence in the trier of facts can go a long way towards reducing anger and frustration of the participants, as well as fostering a certain respect for a decision ultimately made to resolve the matter."[170] If the parties knew that one of the three-panel arbitrators is an expert within the industry for the asset that is being valued and distributed, they will likely have more confidence in the process, while being able to minimize public exposure and maintain the confidentiality of sensitive or proprietary information.

V. Moving Forward: Ways to Improve Family Law Arbitration

A. *The Need for Family Law-Specific Arbitration Legislation*

The recent Utah case of *Taylor v. Taylor*[171] illustrates the benefits of having a family law-specific arbitration statute and rules. In that case, after litigating their divorce for a year, David Taylor asked his estranged wife, Jill Taylor, to arbitrate their economic issues. After considering the parties' positions and submissions, the arbitrator issued an award calculating alimony, setting the amount of child support, and dividing the parties' assets. David then asked the district court to invalidate the award, arguing that his proposed arbitration agreement was invalid because it was contrary

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168 *Streamlined Three Arbitrator Panel Option for Large Complex Cases,* AM. ARBITRATION ASS'N, https://go.adr.org/Streamlined_Panel_Option.html (last visited Jan. 26, 2024).

169 Audrey J. Beeson, *Arbitration. A Promising Avenue for Resolving Family Law Cases?*, 18 PEPP. DISP. RESOL. L.J. 211, 237 (2018).

170 Kessler et al., *supra* note 25, at 337.

171 Taylor v. Taylor, 517 P.3d 380 (Utah 2022).

to public policy to arbitrate divorce actions or, alternatively, that the arbitrator had manifestly disregarded the law.[172]

The district court denied David's motion, and the Utah Supreme Court affirmed. In so ruling, the court rejected David's argument that the agreement to arbitrate the parties' divorce claims was not eligible for arbitration and that the agreement was invalid under the Utah Uniform Arbitration Act ("UUAA").[173] The court also found that David's disagreement with the award did not equate to the arbitrator's manifest disregard of the law.[174]

David claimed that Utah's family law imposed a nondelegable duty on the district courts to make and modify final decisions regarding alimony, property division, child support, and custody, and this nondelegable duty was not compatible with the UUAA, which renders arbitrated decisions on these issues final and nonmodifiable.[175] The court held that the UUAA does not expressly exempt any action or issue, including those related to divorce, and, thus, under the express provisions of the UUAA, the parties could enter a binding agreement to arbitrate these issues.[176] On the other hand, the court recognized that neither Utah case law nor the family code specifically addressed the arbitrability of divorce issues. Utah family law seemed to conflict with the provisions of the UUAA providing for vacatur and modification.[177]

The court recognized the strong state policies underlying arbitration law and family law, and determined that, in the absence of an express statutory prohibition, the strong policies allowing the parties to choose to arbitrate their disputes trumped the policies favoring more robust judicial review.[178] The court also concluded that the Utah family code does not prevent parties from agreeing to arbitrate their property and alimony disputes under the UUAA,

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172 *Id.*

173 UTAH CODE ANN. § 78B-11-107(1) (stating that an agreement to arbitrate is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract).

174 *Taylor*, 517 P.3d at 398.

175 *Id.* at 388.

176 *Id.*

177 *Id.* at 389.

178 *Id.* at 390 (distinguishing the court's obligation to maintain independent authority over issues involving children).

nor does it conflict with the parties' agreement to limit judicial review of these awards to those grounds under the UUAA.[179]

The court noted that even though the family code and arbitration code do "not talk directly to each other," the state legislature could fill the gap by enacting legislation such as the UFLAA.[180] The UFLAA specifically defines the family law disputes that may be submitted to binding arbitration, confirms the grounds on which the awards may be modified or vacated, and allows an award to be modified after it is confirmed as provided in the arbitration agreement or under state law.[181] With such family law-specific arbitration legislation, specific guidelines are in place to address concerns about arbitrating unique family law issues.

The nonbinding memorandum decision of the Indiana Court of Appeals in *Ashley v. Ashley*,[182] highlights the effectiveness of family law-specific arbitration legislation. Indiana has enacted a unique Family Law Arbitration Act, which requires the arbitrator to follow statutory guidelines for property division and comply with substantive law.[183] In the *Ashley* case, the parties separated in 2016 after thirty years of marriage and resolved their financial issues in a marital settlement agreement, including provisions for the deferred sale of properties and distribution of proceeds. The parties agreed to be bound by the Family Law Arbitration Act and to submit any disputes to the arbitrator.[184] Disagreements arose regarding the sharing of expenses and distribution of proceeds from the sale of the properties, and the wife moved to arbitrate the dispute. The arbitrator ultimately entered an award for the distribution of the sale proceeds after the hearing, and the wife appealed.

Among other things, the wife argued that the arbitrator exceeded the scope of her authority by giving the husband credit for certain expenses and considering other issues related to the properties. The court concluded that the Family Law Arbitration Act allowed a broad range of issues to be submitted to arbitration, and

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179 *Id.* at 388-89.

180 *Id.* at 396.

181 *Id.*

182 Ashley v. Ashley, No. 23A-DR-667, 2023 WL 8462545 (Ind. Ct. App. Dec. 7, 2023).

183 IND. CODE ANN. §§ 34-57-5-1 to 34-57-5-13.

184 *Ashley,* 2023 WL 8462545, at *1.

in their settlement agreement, the parties expressly agreed that the arbitrator would decide these issues.[185] The court did find an error in the arbitrator's distribution of the proceeds and remanded the case to the trial court to correct that error.[186] The court declined to disturb the arbitrator's findings on the balance of the wife's issues.

In *Ashley*, neutral party argued that family law arbitration was against the state's public policy since the legislation explicitly provided for such arbitration. The parties were not relegated to stretching the confines of the commercial arbitration statute to find a basis for appeal since the arbitration statute itself provided for the arbitrator to follow the substantive law in making her award and allowed the judgment on the award to be appealed as though from a civil order.[187] With specific family law arbitration or rules in place, counsel can more effectively advise their clients about the process, and the clients can more reasonably anticipate that the arbitration will bring closure rather than open-ended litigation.

B. *The Uniform Family Law Arbitration Act*

In those states that do not have family law arbitration legislation or rules, family lawyers should consider pressing their legislature to adopt the Uniform Family Arbitration Act ("UFLAA"). The UFLAA fills in the gaps left by the commercial arbitration statutes and addresses the unique needs of family law participants.[188] The UFLAA recognizes that 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."[189] The UFLAA supplements the state's commercial arbitration law to address the unique family law concerns.

To that end, the UFLAA expressly defines the claims that may be submitted for binding arbitration, and requires that, in determining the merits of a family law dispute, an arbitrator must

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185 *Id.* at *4.

186 *Id.* at *8.

187 *See* IND. CODE ANN. § 34-57-5-11 (an appeal from entry of judgment on an arbitration award may be taken as if in a civil action).

188 Barbara A. Atwood, *The New UFLAA: Providing Needed Standards for Efficiency and Fairness*, 39 FAM. ADVOC. 38, 39 (Spring 2017); *see also* Linda D. Elrod, *The Case for Arbitration in Family Cases—and for the Uniform Act*, 23 DISP. RESOL. MAG. 18, 18-19 (Winter 2017).

189 Atwood, *supra* note 188, at 39.

apply the law of the state, including its choice of law rules.[190] The uniform law renders an agreement to arbitrate a child-related dispute unenforceable unless the parties affirm the agreement after the dispute arises or the court approves the agreement.[191] The uniform law protects the confidentiality of the proceedings by allowing the court to order that a document or part of the arbitration record be sealed or redacted to prevent public disclosure of all or part of the record or award.[192] The uniform law expressly provides for the modifiability of an award based on a fact occurring after the award is confirmed.[193]

The UFLAA bolsters a state's ability to protect children and victims of domestic violence. First, if a state opts to allow for the arbitration of child-related issues, an arbitrator must have a record created during the arbitration when child-related disputes are discussed.[194] When an award determines a child-related issue during or as a result of an arbitration, the award must explain the facts that were discussed to lead to the finding of the award.[195] The award can be vacated if the arbitrator does not consider the best interest of the child in making the award.[196] Additionally, arbitrators are allowed to meet with or interview a child who is the subject of a child-related dispute; therefore, children can be exposed to a decision-maker in a more comfortable setting than a courthouse.[197]

Unless the parties otherwise agree, the arbitrator must be trained in identifying domestic violence and child abuse.[198] If the arbitrator suspects that a party's safety or ability to participate effectively in arbitration is at risk, the arbitrator must stay the arbitration and refer the parties to court.[199] If an arbitrator determines that there is a reasonable basis to believe that a child who is the subject of a child-related dispute is abused or neglected, the arbitrator must terminate the arbitration of the child-related dispute and report the abuse or neglect to the state child protection

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190 UNIF. FAMILY LAW ARBITRATION ACT, *supra* note 8, § 4.
191 *Id.* § 5.
192 *Id.* § 21.
193 *Id.* § 22.
194 *Id.* § 14.
195 *Id.* § 15(c).
196 *Id.* § 19(b).
197 *Id.* § 13 cmt.
198 *Id.* § 8.
199 *Id.* § 12.

authority. The arbitrator may make a temporary award to protect a party or child from harm, harassment, or intimidation.[200]

Without the protections of the uniform law in place, courts are divided about whether arbitrators can arbitrate on child -related issues, making the enforceability and reliability of these awards unpredictable.[201] The UFLAA would protect the courts' *parens patriae* authority by expressly providing that the arbitrator must state the reasons on which the award is based as required by the substantive law of the state, and by requiring that the court ensure that the award is in the child's best interest before it confirms the award.[202] The UFLAA provides the added benefit of allowing the parties to receive an expedited award by an experienced and knowledgeable decision-maker that they select, in a cost-efficient manner.[203] The key difference between binding arbitration and litigation in court is that the parties exercise their autonomy to litigate their family law claims privately and efficiently. With the UFLAA in place, the court and the arbitration participants can expect child-related decisions to be made in compliance with due process and pursuant to applicable law.

Conclusion

How family claims are resolved can have important consequences not only for the claimants and their children but also for society at large.[204] Resolutions reached outside the court leading to greater party satisfaction arguably promote the public interest because children grow up happier with parents who are more content with the outcome than they might have been with traditional

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200 *Id.* § 12; *see e.g.*, H.B. 917, 2023 Leg., Reg. Sess. (Pa. 2023).

201 *See, e.g.,* Kosciusko v. Parham, 836 S.E.2d 362 (S.C. Ct. App. 2019) (determining that South Carolina's ADR rules prohibit arbitration of children's issues because Rule 4(d) expressly includes arbitration of property and alimony); Singh v. Singh, 837 S.E.2d 651 (S.C. Ct. App. 2019) (holding based on the *parens patriae* doctrine, child-related issues cannot be subject to binding arbitration with no right of judicial review); Patin v. Patin, 45 Va. Cir. 519, 520 (Va. Cir. Ct. 1998) (noting that an arbitrator's award of child custody without judicial review is helpful and important, yet it cannot fully be used to decide the child's best interest).

202 Elrod, *supra* note 1, at 14, 15.

203 *Id.*

204 Leo Kanowitz, *Alternate Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239, 249 (1987).

litigation.[205] Supreme Court Chief Justice Warren Burger opined more than forty years ago that "arbitration may serve an important place in the area of family law."[206] Change in the form of private litigation of family law disputes is necessary for the health and welfare of litigants and their children. It may also help attorneys in the area to achieve a more successful and rewarding family law practice. To effect this change, family lawyers need to start incorporating arbitration in their practice.

> If counsel for each party does not endorse arbitration, it will not happen (except, perhaps, in the rare case where the client knows about arbitration, has a strong preference for it, and also has the ability to stand up to the lawyer). On the other hand, if counsel supports the concept of arbitration, the client will likely consider and elect that alternative.[207]

The future success of family law arbitration also depends on the consistency, predictability, and reliability of the process. Attorneys can help to build this field of dreams to bring closure to client's family law claims in a more private, expedient, and cost-efficient manner by consciously recommending arbitration to clients and colleagues, by carefully drafting agreements to arbitrate that include essential terms, and by supporting the adoption of family law-specific legislation that promotes best practices and protects the needs of family law participants.

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205 *Id.*

206 Interview with Warren E. Burger, *Unclogging the Courts—Chief Justice Speaks Out*, U.S. NEWS & WORLD REP., Feb. 22, 1982, at 36.

207 Frank L. McGuane, Jr., *Model Marital Arbitration Act: A Proposal*, 14 J. AM. ACAD. MATRIM. LAW 393, 396 (1997).