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Written Testimony in Support of HB 2496
Before the House Judiciary Committee
Rep. Fred Patton, Chair
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Chair Patton, Vice Chair Ralph, and Members of the House Committee on Judiciary,

I would like to thank the Chair and Members of the Committee for the opportunity to testify today. As background, I have been a law professor at Washburn Law School since 1974. My specialization is in family law, including high conflict custody cases. I started and was the first chair of the Family Law Section of the Kansas Bar Association and was part of the committee recommending mediation as a way to help parents resolve their custody disputes. I have created and taught numerous courses on family law topics, including child advocacy. I have also written three books, including a family law textbook that has been used in 35 law schools, a national treatise on child custody, and a two volume treatise on Kansas Family Law. In 2000 I put together an international, interdisciplinary think tank - Wingspread Conference on High Conflict Custody: Reforming the System for Children. The white paper from that conference has been used in many states to help improve the legal system's response to high conflict. I am currently the Reporter for the Joint Editorial Board on Uniform Family Laws for the Uniform Law Commission which proposes topics on which a more uniform approach could be helpful. In 2006, I was the Reporter for the Uniform Child Abduction Prevention, which Kansas has enacted. In 2016 I was the Reporter for the Uniform Family Law Arbitration Act which is our topic today. My career has been dedicated to trying to give parents options to help them resolve their child custody disputes amicably and make these disputes less adversarial. I am unabashedly a child advocate.

I believe that arbitration should be an option for parents to choose in family law cases. Many trials were delayed for months as the COVID-19 pandemic forced courts to move hearings to Zoom platforms. There continue to be an increasing volume of contested family law cases, especially in the child custody area. State court budgets are strained. The legislature, lawyers, judges and parties need to be thinking about alternative ways to resolve disputes.

Why arbitration?

Arbitration can be an important new tool for parents for whom the court process may be perceived as too slow, too cumbersome, too public, or too expensive. Additionally, some may feel the judge will not allow them adequate time to make their case in court. The court process, even in the best of times, is often too slow because of continuances, delays, and crowded court

dockets. Hearings, motions and trials have traditionally been only at the courthouse during normal business hours at the court's convenience, not the parties. To get to a 10 o'clock hearing, a parent may have to take a half day off of work. Family law proceedings can be expensive if there is extensive court discovery, if court hearings and proceedings are stretched over months, or if numerous experts are being used. In some courts, the judges will only give parties and their lawyers a couple of hours to put on evidence. Too often the judges in family court, especially those recently appointed or assigned, have had no knowledge of what a specialty area family law is. In addition to the basic divorce law and complex jurisdictional rules like the Uniform Child Custody Jurisdiction and Enforcement Act and the Uniform Interstate Family Support Act, the judge needs to have some knowledge about child development, family systems and dynamics, the prevalence of domestic violence, and valuations of closely held corporations, family farms and the like.

Parties who select arbitration want a simpler, faster, more convenient process with a seasoned "expert" decision-maker of their own choosing, often, but not always, at a lower cost. Arbitration is similar to court proceedings because the parties submit their dispute to a decision-maker. The difference is that the parties jointly select the decision-maker and the process. Arbitration is a matter of contract. The parties can choose arbitration for all or part of the case. If the only issue is child custody, the parties might want a clinical psychologist who deals with children's issues to resolve the parenting plan issues. If the main conflict is valuation, the parties can hire a lawyer or CPA or other valuation professional with knowledge of the specific item. The parties choose their own procedure, usually more informal and not subject to the rules of evidence. Parties agree on the location and times of hearings at the convenience of the arbitrator and the parties. The parties may meet after work or in the evening, or on a Saturday morning or Sunday afternoon in a conference room at the local library or at someone's office. The parties may choose how to conduct their discovery of finances and other issues. The proceedings are private. In most cases, arbitration awards are appealable on very narrow grounds. An arbitrator's award can be enforced or affirmed by the court as part of its judgment.

Family Law Arbitration and the Uniform Family Law Arbitration Act

Arbitration in the family law area is a relatively recent development. The United States Supreme Court rejected the judicially-created public policy exception for family law cases 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. New Jersey has court

rules on arbitration and has found that 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). In New York and South Carolina, child custody and visitation disputes have not been arbitrable because there is no statute allowing it.

Kansas courts have recognized and approved of the use of arbitration in family law cases under the former bare bones Uniform Arbitration Act (UAA). In 2018 Kansas enacted the Revised Uniform Arbitration Act which provides more safeguards for parties and more process provisions. Neither the UAA nor the RUAA, however, adequately cover the concerns for family law arbitration. Neither provides protection for children or for 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 Family Law Arbitration Act drafting committee included judges, lawyers, arbitrators, mediators, and domestic violence advocates. Professor Barbara Atwood chaired the three year process that resulted in the UFLAA in July 2016. The UFLAA was endorsed by the American Bar Association. The UFLAA contains the additional features to protect those in family law disputes.

1. FAMILY LAW DISPUTES CAN BE ARBITRATED

UFLAA Section 2(f) 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 divorce the parties, grant an adoption, 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.

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 UFLAA requires the agreement 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

Most states now permit arbitration of child custody and child support as long as meaningful judicial review of the awards is preserved. Only five states appear to exclude some or all child-related issues from contractual arbitration, either by statute or by case law. The UFLAA presumptively extends to child-related disputes. The UFLAA recognizes the state's *parens patriae* responsibility for children and vulnerable family members in several non-waivable provisions. In contrast to the limited judicial review in commercial arbitration, the Act requires robust judicial scrutiny of child-related awards. 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. Section 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.

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

6. POWERS OF THE ARBITRATOR

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, including 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.

Conclusion

The UFLAA provides needed standards to ensure that this method of dispute resolution retains the advantages of efficiency for the parties as well as protections for children and victims of domestic violence. The UFLAA can give Kansans another dispute resolution tool that might fit their needs better than existing ones.

