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Written Testimony in Support of HB 2017 before the Senate Judiciary Committee
Sen. Kellie Warren, Chair
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Chair Warren and Members of the Senate 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. I specialize in family law, including child advocacy and high conflict custody cases. I served as the first chair of the Family Law Section of the Kansas Bar Association and was on the committee that recommended mediation as a way for parents to 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 when I was the chair of the American Bar Association Family Law Section, 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 was the Editor-in-Chief of the *Family Law Quarterly* for the American Bar Association for 24 years.

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. I believe that arbitration should be an option for parents to choose in family law cases.

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. The court process, even in the best of times, is often 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 participate in a 10 o'clock a.m. hearing, a parent may have to take a half day off of work. There may be additional hearings. Family law proceedings can be expensive if there is extensive discovery that requires hearings and proceedings to be stretched over months, or if numerous experts are being used. In some judicial districts, judges only give parties and their lawyers a couple of hours to put on evidence.

Another problem may be a judicial lack of expertise on particular subjects. Few judges sitting in family court, especially those recently appointed or assigned, are aware of the complexity of family law that has become more codified, more uniform and more specialized. Family law cases involve not only the basic procedural filing rules and statutes for divorce but also complex jurisdictional rules like the Uniform Child Custody Jurisdiction and Enforcement Act and the Uniform Interstate Family Support Act. In addition, there are federal laws, like the Parental Kidnapping Prevention Act; Indian Child Welfare Act; federal laws which provide for dividing a qualified pension on divorce with a Qualified Domestic Relations Order; and the Servicemembers Civil Relief Act and Uniformed Former Spouses Protection Act for military spouses. Judges who hear child custody cases need to have knowledge not only about the eighteen statutory factors used to determine the best interest of the child factors, but also about child development, family systems and dynamics, the prevalence of domestic violence and the harm to children from witnessing domestic violence. Judges dividing property need to know about the valuation of real estate, family farms, closely held corporations, and whether a business has a goodwill value.

Parties select arbitration for 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. The Uniform Family Law Arbitration Act has been enacted in six states and is pending in others. Family law arbitration has become popular enough that in 2020, the American Bar Association Family Law Section published a book on FAMILY LAW ARBITRATION: PRACTICE PROCEDURE AND FORMS by Carolyn M. Zack.

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 RUAA which provides more safeguards and due process provisions for parties. 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* to protect the child. Child-related issues 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. The arbitrator cannot divorce the parties, terminate parental rights, grant an adoption or guardianship, adjudicate a child in need of care or a juvenile offender.

A family law dispute, for example, would include the

a. interpretation and enforcement of premarital, post marital and nonmarital agreements

b. the characterization, valuation and division of property
c. the allocation of debt
d. awards of maintenance
e. pet "custody"
f. parenting time
g. child support
h. award of attorney's fees
i. disputes between cohabitants.

2. AGREEMENT TO ARBITRATE

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

a. In writing.
b. Identify the dispute(s) to be arbitrated.
c. 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 there is sufficient information for a meaningful judicial review of the awards. 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 VICTIMS PROTECTED

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.