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Arbitration. A Promising Avenue for Resolving Family Law Cases?

Audrey J. Beeson, Esq.

211

I. INTRODUCTION

It is no secret that the cost of litigation has steadily increased over the last century and the area of family law disputes is no exception. Alternative dispute resolution (ADR) has slowly expanded into the area of family law with numerous states adopting some form of mandatory mediation for either child custody disputes and/or financial disputes. While mediation has proven to be successful in reducing the caseloads for many family law judges, the current court dockets are still overloaded and behind on their calendars, leaving litigants in a legal limbo for sometimes as much as a year before their cases can be finalized.

Family law is unique because the majority of litigants are unable to set aside their emotions in order to make rational decisions in their case. Some litigants are simply too hurt or angry to think clearly, while others act out of spite or in an effort to exact some form of revenge on the other party. Emotions do not discriminate against race, class, sex, or religion. Emotions have the ability to coerce even the most intelligent and educated people into acting illogically.

Our current culture involves multiple family structures: single parent homes, two-parent homes, parents that have children with multiple partners, children adopted into both opposite-sex and same-sex homes, and children conceived as a result of artificial reproduction in both opposite-sex and same-sex homes. The blended family has become the norm and no longer the exception. Family is more than just DNA and biological ties. Any step-parent or adoptive parent can attest to that fact. With such a wide scope of possibilities that define what “family” means in the twenty-first century, there is also a need to expand how the judicial system can help these families when the family structure dissolves.

This paper will examine the path of arbitration in the area of family law, when it began, and how it has grown since 1990. It will discuss the division between the states that currently utilize arbitration for family law issues as well as the scope of judicial review. The paper will then discuss the history leading to, and the enactment of, the Uniform Family Law Arbitration Act (the Act). Next, it addresses Nevada’s legislative history, when arbitration of family law matters was considered, and consequently what a Nevada Family Law Arbitration Act would potentially look like. Finally, it will include a view from the family court judges in the Eighth Judicial District

Court and an analysis of the likelihood that arbitration will become a reality in Nevada.

II. THE PATH OF ARBITRATION IN FAMILY LAW

The American Academy of Matrimonial Lawyers (AAML) was founded in 1962 in Chicago, Illinois by family law attorneys that were highly regarded in their field.¹ In 1990, the AAML decided to endorse the idea of arbitration in family law matters.² In 2005, the AAML published a Model Family Law Arbitration Act, which it based on the Revised Uniform Arbitration Act (RUAA).³ The AAML currently has 264 certified arbitrators listed on their website.⁴

North Carolina was the first state to enact specific legislation dealing with family law arbitration.⁵ The Family Law Arbitration Act was first codified in 1999, with subsequent amendments made in 2003 and 2005.⁶ Other states have codified family law arbitration statutes as well.⁷

¹ *About AAML*, AM. ACAD. OF MATRIMONIAL LAWYERS, <http://www.aaml.org/about-aaml> (last visited May 25, 2017), *Cited in*: Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

² JOAN F. KESSLER ET AL., *Why Arbitrate Family Law Matters?*, 14 J. AM. ACAD. MATRIM. LAW, 333, 333 (1997). Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

³ GEORGE K. WALKER, *Family Law Arbitration: Legislation and Trends*, 21 J. AM. ACAD. MATRIM. LAW, 521, 521 (2008). Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

⁴ *AAML Certified Arbitrators*, AM. ACAD. OF MATRIMONIAL LAWYERS, <http://www.aaml.org/fellows/certified-arbitrators-mediators/aaml-certified-arbitrators> (last visited May 25, 2017). Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

⁵ TELEICIA J. ROSE, *For Better or Worse: Surviving Divorce Through Alternative Dispute Resolution*, 4 Y.B. ON ARB. & MEDIATION 291, 294 (2012). The legislation is contained in ART. 3, *supra* note 9. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

⁶ N.C. GEN. STAT. §§ 50-41 - 50-69 (1999). Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

⁷ ROSE, *supra* note 5, at 294.

Arizona adopted the Uniform Arbitration Act of 2000 (RUAA) without repealing the Uniform Arbitration Act of 1956 (UAA).⁸ While Arizona does not have family law arbitration statutes, within its Rules of Family Law Procedure, Arizona sets forth the option of arbitration in accordance with the Arizona Arbitration Act,⁹ or any other law permitting arbitration.¹⁰ California's Family Law Code provides for arbitration of property division when parties fail to voluntarily agree on the division.¹¹ Colorado adopted the RUAA without repealing the UAA.¹² Additionally, Colorado codified a family law specific statute in 1997 within their Domestic Matters Title.¹³ Subsequent amendments were made in 2004, 2005, and 2012.

Connecticut codified general arbitration proceedings within Title 52, Chapter 909 of the Connecticut General Statutes Annotated. Additionally, Connecticut set forth specific provisions within its family law statute allowing for arbitration in an action for the dissolution of marriage under certain circumstances.¹⁴ Delaware adopted the RUAA without repealing the UAA.¹⁵ Delaware's Family Court Rules of Civil Procedure provide for the different methods of ADR that can be used within the realm of family law cases, that may include non-binding, or if agreed to by the parties, binding arbitration.¹⁶ The District of Columbia adopted the RUAA without repealing the UAA and

⁸ Bruce E. Meyerson, *Arizona Adopts the Revised Uniform Arbitration Act*, 43 ARIZ. ST. L.J. 481, 482.

⁹ Ariz. R. of Fam. Law Proc. 66 Alternative Dispute Resolution: Purpose, Definitions, Initiation, and Duty (2007). Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

¹⁰ Fam. Law Proc. 67 (C), *supra* note 9, sets forth the procedure for arbitration. Arizona will abrogate rule 67(C) on January 1, 2018 and adopt the Uniform Arbitration Act. *In re* Rules 67(C) and 67.2, No. R-17-0017, at *1 (Ariz. Aug. 31, 2017). Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

¹¹ CAL. FAMILY CODE § 2554 (West 1992).

¹² ROBERT E. BENSON, THE PRACTITIONER'S GUIDE TO COLORADO CONSTRUCTION LAW 21-5-21-6 (Robert E. Benson et al. eds., 2nd ed. 2015). The Colorado RUAA applies to arbitration agreements agreed to after August 4, 2004, and the Colorado UAA applies to arbitration agreements agreed to between July 14, 1975 and August 4, 2004. *Id.*

¹³ COLO. REV. STAT. § 14-10-128.5 (2004). Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

¹⁴ CONN. GEN. STAT. § 46b-66 (2001).

¹⁵ DEL. CODE ANN. TIT. 10, §§ 5701 – 5725 (1972).

¹⁶ DEL. FAMILY CT. CIV. R. 16.1 (2007).

has a very general statute allowing for the use of ADR “in accordance with such rules as the Superior Court may promulgate.”¹⁷

Georgia’s Arbitration Code is set forth in Georgia’s Code Annotated, Title 9 Civil Practice, Chapter 9 Arbitration. Georgia also codified the permissibility of arbitration in child custody proceedings within its Domestic Relations Statutes.¹⁸ This law is relatively new, taking effect as recently as January 1, 2008.¹⁹ Indiana enacted a Family Law Arbitration Act on July 1, 2005, with the support of family law practitioners and the Indiana General Assembly.²⁰ The Act is set forth in Title 34 Civil Law and Procedure, Article 57 Arbitration and Alternative Dispute Resolution, Chapter 5 Family Law Arbitration.²¹ Maine does not have family law arbitration statutes; however, they do allow for the appointment of a referee.²² Maine Revised Statutes Annotated, Title 19-a Domestic Relations, Part 1 General Provisions, § 252 allows the court to appoint a referee in “any proceeding for paternity, divorce, judicial separation or modification of existing judgments” brought under Title 19-a.

Michigan enacted their own Domestic Relations Arbitration Act on March 28, 2001 in Chapter 50B.²³ Minnesota does not have specific family law arbitration statutes, however, under their ADR program statute, arbitration is included. Arbitration cannot be required in guardianship,

¹⁷ D.C. CODE §11-1102 (2002).

¹⁸ GA. CODE ANN. §19-9-1 (2008). Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

¹⁹ §19-9-1, *supra* note 18. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

²⁰ Hon. Richard T. Payne (ret.), *All Things ADR Considered*, 50-DEC Res Gestae 29, 29 (2006). Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

²¹ IND. CODE ANN. §§ 34-57-5-1-34-57-5-13 (2005). Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

²² ME. STAT. tit. 19-A, § 252(1) (1995). Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

²³ MICH. COMP. LAWS SERV. § 600 Act 236 Ch. 50B (2001). Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

conservatorship, civil commitment, or domestic abuse cases.²⁴ Missouri adopted the RUAA without repealing the UAA.²⁵ While Missouri has not carved out specific statutes relating to their domestic relations chapter, they have referenced said chapter within their RUAA under the statute pertaining to vacatur.²⁶

New Mexico adopted the RUAA on July 1, 2001,²⁷ without repealing the UAA.²⁸ New Mexico also codified binding arbitration options within their Domestic Affairs Chapter.²⁹ Chapter 40, Article 4, Dissolution of Marriage, § 40-4-7.2 sets forth the issues and procedures subject to binding arbitration based on the stipulation of the parties. New Hampshire enacted specific legislation for arbitration of domestic relations cases that they codified as N.H. Rev. Stat. § 542.11.

Utah's statute relating to parenting plans requires the parenting plan to contain ADR provisions, one of which may be arbitration.³⁰ Washington enacted specific legislation under their domestic relations statutes that allow for stipulated arbitration for issues involving child support modification and resolving disputes arising from parenting plans.³¹ Wisconsin's ADR statute provides for arbitration in actions affecting the family under Chapter 767 of the Wisconsin Statutes Annotated.³²

²⁴ MINN. STAT. ANN. § 484.76 (2017). Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

²⁵ MO. REV. STAT. § 435.350 (2016). Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

²⁶ § 435.405, *supra* note 25.

²⁷ N.M. STAT. ANN. § 44-7A-1 (2011).

²⁸ *Id.*

²⁹ *Id.* Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

³⁰ UTAH CODE ANN. § 30-3-10.9 (2017). Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

³¹ WASH. REV. CODE. ANN. § 26.09.175(4), (6) (2010). Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

³² WIS. STAT. ANN. § 802.12 (2016). Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

III. DIVIDE IN THE SCOPE OF FAMILY LAW ISSUES

Jurisdictions have divided on the scope of issues within the domestic relations arena that are subject to arbitration.³³ The division, for the most part, are states that allow arbitration of child-related issues such as custody, visitation, and child support, and those states that do not.³⁴ Three states, Utah, Vermont, and Washington, limit arbitration to disputes that arise from a parenting plan already in place.³⁵

A. Extending Arbitration to Child-Related Issues

North Carolina, being the model for states to follow, allows for arbitration of all issues arising from marriage with the exception of the divorce itself,³⁶ and includes modification of post separation issues.³⁷ Colorado allows for the court to appoint an arbitrator with the consent of all parties to resolve disputes that include “parenting time, nonrecurring adjustments to child support, and disputed parental decisions.”³⁸ The statute further requires that all awards issued by the arbitrator be reduced to writing.³⁹ The District of Columbia allows for arbitration over child custody and related issues.⁴⁰

Georgia allows parents to agree to binding arbitration on issues of child custody, visitation, parenting time, and parenting plans.⁴¹ Indiana allows parties to arbitrate child support, custody, or parenting time.⁴² However, both parents must either be pro se or both must be represented by counsel in order to participate in arbitration.⁴³ Michigan allows parties to stipulate to binding

³³ Linda Elrod & Linda Ravdin, *Lead, Follow, or Get Out of the Way: Family Law Arbitration is Coming 'Round the Mountain*, ABA 1, 4-5 (2014), https://www.americanbar.org/content/dam/aba/events/family_law/2014/10/lead.authcheckdam.pdf.

³⁴ Elrod & Ravdin, *supra* note 33, at 4-5. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

³⁵ § 30-3-10.9(3), *supra* note 30; VT. STAT. ANN. tit. 15, § 666(7) (2017); § 26.09.175, *supra* note 31(6). Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

³⁶ § 50-41, *supra* note 6.

³⁷ *Id.* Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

³⁸ § 14-10-128.5, *supra* note 13.

³⁹ *Id.*

⁴⁰ *Spencer v. Spencer*, 494 A.2d 1279, 1285 (D.C. 1985).

⁴¹ § 19-9-1, *supra* note 18.

⁴² § 34-57-5-2, *supra* note 21.

⁴³ § 34-57-1, *supra* note 21.

arbitration regarding any of the following issues: property, child custody, child support, parenting time, spousal support, attorney's fees and costs, enforceability of prenuptial and postnuptial agreements, allocation of debt, and other contested domestic relations matters.⁴⁴ Arbitration may be heard by a single arbitrator or a panel of three arbitrators.⁴⁵

Missouri's RUAA references arbitration awards in domestic relations proceedings that determine an issue related to the child of a marriage in MO. REV. STAT. § 435.405(5) (2011).⁴⁶ New Hampshire's statute is all-encompassing stating that "parties to any contested issues in a domestic relations case" may stipulate to arbitration.⁴⁷ New Jersey adopted the RUAA without repealing the UAA.⁴⁸ New Jersey does not have any family law specific arbitration statutes. However, the Supreme Court of New Jersey has affirmed that parents have the right to choose their method of resolving issues pertaining to their own children, including arbitration, and any such arbitration award will be reviewed within the confines of New Jersey's version of the RUAA.⁴⁹

New Mexico allows parties to arbitrate child support, custody, time-sharing, and visitation.⁵⁰ The arbitrator is required to record the portion(s) of the hearing that concerns child custody, time-sharing or visitation issues, unless the parties waive the same.⁵¹ Utah's parenting plan statute allows arbitration as one method of ADR for resolving disputes arising from parenting plans and requires the award to be in writing.⁵² Vermont's domestic relations statute involving agreements between parents allows for binding arbitration as one type of ADR to resolve any disputes arising from the agreement.⁵³ Vermont's Arbitration Act⁵⁴ applies to domestic relations

⁴⁴ § 600.5071, *supra* note 23.

⁴⁵ § 600.5073, *supra* note 23.

⁴⁶ Audrey Beeson, *Understanding the Benefits of Arbitration in the Family Law Arena*, NEV. FAM. L. REP. (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

⁴⁷ N.H. REV. STAT. ANN. § 542:11(I) (2016).

⁴⁸ N.J. STAT. § 2A:23B-6 (2009).

⁴⁹ *Fawzy v. Fawzy*, 973 A.2d 347, 349-50 (N.J. 2009).

⁵⁰ § 40-4-7.2(A)(2), *supra* note 27.

⁵¹ § 40-4-7.2(M), *supra* note 27.

⁵² §§ 30-3-10.9(3)(b), 30-3-10.9(4)(d), *supra* note 30.

⁵³ tit. 15, § 666, *supra* note 35. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

⁵⁴ tit. 12, § 5651, *supra* note 35. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

arbitration.⁵⁵ Washington also allows parties to use arbitration in order to resolve any disputes that arise from the parties' permanent parenting plan and requires any award to be in writing.⁵⁶ Wisconsin's ADR Statute allows parties to agree to binding arbitration to resolve custody, visitation, child support, or modification of any of the foregoing.⁵⁷

B. Limiting Arbitration to the Division of Assets and Debts

Prior to January 2018, Arizona's family law rules permitted arbitration in accordance with the Arizona Arbitration Act, which only allowed arbitration of issues pertaining to the division of assets and debts. While the rules do state that parties may agree to arbitrate "some or all of the issues before the court,"⁵⁸ the fact that child custody was not expressly set forth as other states have done leads me to believe that child custody was not an arbitral issue until January 2018 as addressed herein below.

California's law seems to contradict itself. The first subsection of § 2554 states that the court may submit the issue of "the character, the value, and the division of the community estate" to arbitration if the total value of the property does not exceed \$50,000.⁵⁹ While the second subsection states that the court "may submit the matter to arbitration at any time it believes the parties are unable to agree upon a division of property."⁶⁰ Therefore, it appears that the court may submit any property division to arbitration no matter the value of said property. California case law expressly prohibits arbitration of child support wherein the arbitration "purport[s] to restrict the court's jurisdiction over child support."⁶¹

⁵⁵ See generally *Brinckerhoff v. Brinckerhoff*, 889 A.2d 701 (Vt. 2005). Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

⁵⁶ WASH. REV. CODE ANN. § 26.09.184(4)(c) (2017). Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

⁵⁷ § 802.12(3)(d), *supra* note 32. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

⁵⁸ Fam. Law Proc. 67(C), *supra* note 9. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

⁵⁹ § 2554, *supra* note 11.

⁶⁰ *Id.*

⁶¹ *In re Marriage of Berezna and Heminger*, 110 Cal.App.4th 1062, 1069 (2003). "Such [arbitration] agreements, to the extent that they purport to restrict the court's jurisdiction over child support, are void as against public policy. Children have the right to have the court hear and determine all matters

Connecticut's statute authorizes the use of arbitration in the dissolution of marriages when parties enter into a voluntary agreement to arbitrate.⁶² Parties may not, however, arbitrate the issues of child custody, visitation, or child support.⁶³

New York case law allows arbitration of issues in domestic relations cases pertaining to separation agreements, marital property, alimony, and child support.⁶⁴ However, case law, as recent as 2015, held that issues involving child custody and visitation are not subject to review and any agreement by parties to arbitrate such issues are void.⁶⁵

IV. JUDICIAL REVIEW

A. Review of Arbitration Awards Related to Child Issues

North Carolina's Family Law Arbitration Act contains provisions for modification, confirmation, or vacatur of awards in §§ 50-53 through 50-56.⁶⁶

Colorado's statute allows for de novo review of an arbitration award.⁶⁷ A party can seek to have an arbitration award vacated, modified, or corrected pursuant to the same procedures which are set forth in the statutes codifying the RUAA.⁶⁸ Furthermore, if a party wishes to have the court modify the award pursuant to a de novo hearing, a party can file a motion with the court requesting said hearing.⁶⁹ Any motion must be filed within thirty-five days after the date that the award is issued.⁷⁰

that concern their welfare and they cannot be deprived of this right by any agreement of their parents." *Id.* (quotations omitted).

⁶² § 46b-66(c), *supra* note 14.

⁶³ *Id.* Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

⁶⁴ N.Y. DOM. REL. LAW § 236 (McKinney 2017) (effective January 23, 2016).

⁶⁵ *Goldberg v. Goldberg*, 124 A.D.3d 779, 780 (N.Y. App. Div. 2015) (finding that although the parties consented to arbitration of custody and visitation matters, they had no power to do so: "Disputes concerning child custody and visitation are not subject to arbitration as the court's role as parents patriae must not be usurped") (citation omitted).

⁶⁶ §§ 50-53 through 56, *supra* note 6.

⁶⁷ § 14-10-128.5(2), *supra* note 13. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

⁶⁸ "Any party may apply to have the arbitrator's award vacated, modified, or corrected pursuant to part 2 of article 22 of title 13, C.R.S., or may move the court to modify the arbitrator's award pursuant to a de novo hearing." § 14-10-128.5(2), *supra* note 13.

⁶⁹ § 14-10-128.5(2), *supra* note 13.

⁷⁰ *Id.*

Georgia's statute allows for review by the judge in a final child custody decree.⁷¹ The judge has the authority to do any of the following: (1) incorporate the arbitrator's decision into the final decree, (2) supplement the decision on issues not covered in arbitration, or (3) make specific written findings of fact wherein the court determines that the child's best interests are not met by the decision.⁷²

Indiana's standard of review pertaining to an award under the Family Law Arbitration Act is the same appellate standard applied to trial court decisions in marriage dissolution cases, the "clearly erroneous" standard.⁷³

Michigan allows for court review as provided by court rules and statutes to determine whether the award is adverse to the child's best interests.⁷⁴ Missouri's standard of review for arbitration awards in any domestic relations proceedings that involve issues pertaining to the custody of a child is de novo review.⁷⁵ New Hampshire requires that arbitrators submit their decisions and findings to the superior court, and the superior court has the authority to review the same to ensure compliance with domestic relations laws of the state.⁷⁶

New Jersey's Supreme Court held that arbitration pertaining to child-related issues should be conducted within the purview of the Arbitration Act and further mandated that "a record of all documentary evidence adduced during the arbitration proceedings be kept; that testimony be recorded; and that the arbitrator issue findings of fact and conclusions of law in respect to

⁷¹ § 19-9-1.1, *supra* note 18. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

⁷² § 19-9-1.1, *supra* note 18. As recently as June 10, 2016, the Court of Appeals of Georgia enforced the intent behind § 19-9-1.1 when it upheld the superior court's confirmation order incorporating the arbitrator's custody determination. *Brazell v. Brazell*, 337 Ga.App. 758, 766 (2016)

⁷³ *Masters v. Masters*, 43 N.E.3d 570, 571 (2015). Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

⁷⁴ § 600.5080, *supra* note 23. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

⁷⁵ § 435.405(5), *supra* note 25. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

⁷⁶ § 542:11, *supra* note 47. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

the award of custody and parenting time,” so that the courts can evaluate the same if the award is challenged.⁷⁷

New Mexico allows for court review upon application by a party, at which time the court may vacate an award if the court finds “circumstances have changed since the issuance of the award that are adverse to the best interests of the child [or] upon a finding that the award will cause harm or be detrimental to a child.”⁷⁸

Utah’s parenting plan statute gives the district court the right to review any arbitration award resolving disputes arising from the parenting plan.⁷⁹ Vermont’s courts recognize a limited review power and follow their Arbitration Act when determining whether an award should be modified or vacated.⁸⁰ Washington courts have the right to review arbitration awards de novo pursuant to statute,⁸¹ and the trial court’s interpretation of said statute is a question of law which will be reviewed de novo on appeal.⁸²

Wisconsin courts cannot confirm arbitration awards affecting custody, visitation, or support unless all five of the following apply: (1) the award sets forth detailed findings of fact, (2) the arbitrator certifies that all statutory requirements have been met, (3) the court finds that custody has been determined under the applicable statutes, (4) the court finds that visitation has been determined under the applicable statutes, and (5) the court finds that

⁷⁷ 973 A.2d 347, *supra* note 49, at 350. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

⁷⁸ § 40-4-7.2(T), *supra* note 27. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

⁷⁹ § 30-3-10.9 (4)(f), *supra* note 30. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

⁸⁰ Brinckerhoff, 889 A.2d 701, *supra* note 55, at 705. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

⁸¹ § 26.09.184(4)(e), *supra* note 55. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

⁸² *In re Smith-Bartlett*, 95 Wash. App. 633, 976 P.2d 173 (1999). Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

child support has been determined pursuant to statute.⁸³ The court is required to review the decision under the best interest standard.⁸⁴

B. Review of Financial Arbitration Awards

Connecticut's statute allows for confirmation, modification, or vacatur under their general arbitration proceedings.⁸⁵ Delaware reviews arbitration awards under their Arbitration Act.⁸⁶

In the District of Columbia, the court retains jurisdiction over certain aspects of family law disputes no matter the parties' agreement, therefore not all facets of a valid arbitration award are binding or prevent the court from modifying part or all of the arbitration decision.⁸⁷ "While a property right can be released by contract, *Alves v. Alves*, 262 A.2d 111, 118 (D.C.1970), and arbitration of alimony could be binding and non-modifiable, *Crutchley v. Crutchley*, *supra*, 306 N.C. at 523, 293 S.E.2d at 797, provisions concerning custody and child support would continue to be within the court's jurisdiction despite pre[-]litigation or mid-litigation arbitration or agreement."⁸⁸

The Supreme Court of Georgia determined that it is "the ultimate duty of the trial court, not an arbitrator, to determine the propriety of a settlement agreement. Even if a settlement agreement is reached with the assistance of an arbitrator and made part of an arbitrator's award, a trial court still must properly review the award prior to its incorporation into a final decree."⁸⁹

New York, like most other jurisdictions, favors enforcement of arbitration awards therefore they review arbitration awards in conjunction with the arbitration statutes.⁹⁰

⁸³ § 802.12(3)(e), *supra* note 32. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

⁸⁴ *Miller v. Miller*, 620 A.2d 1161, 1166 (Pa. Super. Ct. 1993). Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

⁸⁵ § 46b-66(c), *supra* note 14.

⁸⁶ TIT.10, § 5713, *supra* note 15.

⁸⁷ *Spencer*, 494 A.2d 1279, *supra* note 40, at 1285.

⁸⁸ *Id.*

⁸⁹ *Page v. Page*, 281 Ga. 155, 156, 635 S.E.2d 762, 763 (2006).

⁹⁰ "The only basis upon which an award can be vacated at the behest of a party who participated in the arbitration or was served with notice of intention to arbitrate is that the rights of that party were prejudiced by corruption, fraud or misconduct in procuring the award, partiality of an arbitrator, that the arbitrator exceeded his power or failed to make a final and definite award, or a procedural failure

V. HISTORY OF THE UNIFORM FAMILY LAW ARBITRATION ACT

The Uniform Law Commission Executive Committee (“Commission”) selected a family law arbitration study committee (“committee”) in April 2012.⁹¹ In 2013, the Commission approved a committee to draft a Family Law Arbitration Act.⁹² Prior to the committee’s first meeting, several key questions were sent to the committee members for consideration with the intention that the members would have a fruitful discussion pertaining to the questions posed.⁹³ Notably, the areas of concern included topics such as: how to address pre-dispute agreements to arbitrate, subjects to exclude from the Act, the standard of judicial review for custodial and child-related issues, and safeguards pertaining to domestic violence.⁹⁴

Key focuses of the committee included the following: the desire to create a free-standing act, as opposed to a partial act that referenced other arbitration law; the desire to ensure that a choice to enter into arbitration would be voluntary; the desire to include the ability of the act to include child custody issues with a standard of judicial review; giving arbitrators powers specific to the realm of family law practice; and arbitrator qualifications.⁹⁵ As discussions progressed, the committee expressed the aspiration not to make the arbitrator qualifications so strict that they would preclude individuals with

that was not waived.” *Silverman v. Benmor Coats, Inc.*, 61 N.Y.2d 299, 307 (1984); CPLR 7511(b)(1); *see also MR v. AR*, 48 Misc. 3d 1201(A), 18 N.Y.S.3d 580 (Sup. Ct. 2015).

⁹¹ NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, PREFATORY NOTE, UNIFORM FAMILY LAW ARBITRATION ACT (2016). Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

⁹² NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *supra* note 90. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

⁹³ Barbara Atwood & Linda Elrod, *October 2013 Meeting Issues Memo*, UNIFORM LAW COMMISSION (Oct. 22, 2013), http://www.uniformlaws.org/shared/docs/Family%20law%20arbitration/2013oct22_FLAA_IssuesMemo.pdf. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

⁹⁴ Atwood & Elrod, *supra* note 93.

⁹⁵ Barbara Atwood, *October 2013 Post Committee Meeting Memo*, UNIFORM LAW COMMISSION (Nov. 1, 2013), http://www.uniformlaws.org/shared/docs/Family%20law%20arbitration/2013oct_FLAA_Meeting%20Summary%20for%20Committee.pdf.

224

special knowledge or experience.⁹⁶ The committee also wanted to provide parties the most flexibility when choosing an arbitrator by allowing parties to waive certain requirements.⁹⁷

A final draft for approval was issued on May 23, 2016.⁹⁸ The Act was approved and recommended for enactment in all the states at the National Conference of Commissioners on Uniform State Laws, which took place between July 8 and July 14, 2016.⁹⁹ The Act is comprised of twenty-nine sections and if adopted, integrates a state's current arbitration law, either the UAA or the RUAA, for steps in the arbitration process.¹⁰⁰ The Act gives a state the ability to "opt-out" of child-related issues and contains exclusions to make status determinations.¹⁰¹

If a state does choose to include the child-related provisions, the Act includes several provisions to protect children and the oversight power of the court.¹⁰² For example, arbitration proceedings that involve child-related issues must be recorded and must include the reasons why the arbitrator made

⁹⁶ Barbara Atwood, *February 2014 Committee Meeting – Chair Memo*, UNIFORM LAW COMMISSION (Feb. 10, 2014), http://www.uniformlaws.org/shared/docs/Family%20law%20arbitration/2014feb_FLAA_Chair%20Memo.pdf.

⁹⁷ Barbara Atwood & Linda Elrod, *2014 Annual Issues Meeting Memo*, UNIFORM LAW COMMISSION (May 20, 2014), http://www.uniformlaws.org/shared/docs/Family%20law%20arbitration/2014am_flaa_issues%20memo.pdf.

⁹⁸ See generally *Executive Committee Conference Call*, UNIFORM LAWS (May 23, 2016), http://www.uniformlaws.org/shared/docs/executive/2016may23_EC_ConfCall_Minutes.pdf. "The Uniform Family Law Arbitration Act (UFLAA) establishes a clear, comprehensive framework for the arbitration of family law matters. Although arbitration has been used for decades to resolve commercial disputes, arbitration of family law issues, such as property, support, and child-related disputes, has recently gained traction. The UFLAA is based in part on the widely enacted Uniform Arbitration Act and Revised Uniform Arbitration Act, but includes special standards for the arbitration of child custody and support, protections for victims of domestic violence, and more." UNIFORM LAW COMMISSION, NEW ACTS 2016: SUMMARIES, UNIFORM FAMILY LAW ARBITRATION ACT (2017); Nat'l Conference of Comm'rs on Unif. State Laws, *Family Law Arbitration Act*, UNIFORM LAW COMMISSION (2017), <http://www.uniformlaws.org/Act.aspx?title=Family%20Law%20Arbitration%20Act>.

⁹⁹ NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM FAMILY LAW ARBITRATION ACT (2016), http://www.uniformlaws.org/shared/docs/family%20law%20arbitration/2016AM_FamilyLawArbitration_Draft.pdf.

¹⁰⁰ See UNIF. FAM. L. ARB. ACT (UFLAA), Prefatory Note (UNIF. LAW COMM'N 2016).

¹⁰¹ UFLAA, *supra* note 99, § 3, at Legislative Note. Status determinations include terminating a parent's rights, granting an adoption, granting a divorce, etc.

¹⁰² UFLAA, *supra* note 99, § 3, at Legislative Note.

[Vol. 18: 211, 2018]

Arbitration
PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

the award (just as a judge would make findings of fact).¹⁰³ Additionally, to be enforceable, the court must confirm the award.¹⁰⁴ Upon a motion to confirm the award, it is subject to judicial review, either on its face or upon review of the record, and the award must be in the best interest of the child.¹⁰⁵

VI. OVERVIEW OF THE UNIFORM FAMILY LAW ARBITRATION ACT

Section 1 of the Act is the title.¹⁰⁶ Section 2 contains the definitions.¹⁰⁷ Section 3 addresses the scope of the Act and contains those exclusions adopted by each state.¹⁰⁸ Section 4 incorporates that particular state's adopted arbitration act as well as delineates that the arbitrator must follow the state laws pertaining to the family law dispute.¹⁰⁹

Section 5 requires that there be an arbitration agreement, that it specify the arbitrator (an organization or method of selecting the arbitrator), and that it identify the precise issues that the parties agree to arbitrate.¹¹⁰ This will allow parties to choose one or two issues on which they cannot agree but that they do not wish to expend monies to litigate.¹¹¹ Section 5 also provides that an agreement to resolve future child-related disputes is not enforceable unless the parties reaffirm their intent to arbitrate the issues after the new dispute arises.¹¹² Section 5 gives the court, not the arbitrator, the power to determine whether an arbitration agreement is enforceable and whether it does include the family dispute at issue.¹¹³

Section 6 sets forth notice requirements that a party must comply with in order to initiate arbitration.¹¹⁴ Section 7 allows for a motion for judicial relief under the Act, including enforceability requirements as set forth in

Id. at § 15.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at § 16.

¹⁰⁶ *Id.* at § 1.

¹⁰⁷ *Id.* at § 2.

¹⁰⁸ *Id.* at § 3.

¹⁰⁹ *Id.* at § 4.

¹¹⁰ *Id.* at § 5.

¹¹¹ *See Id.* at Prefatory Note, § 5, & Comment.

¹¹² *Id.* at § 5.

¹¹³ *Id.*

¹¹⁴ *Id.* at § 6.

Section 5.¹¹⁵ Section 8 includes the requirements an arbitrator must have to qualify under the Act.¹¹⁶ Section 9 addresses the mandatory disclosures an arbitrator must make and when disqualification of an arbitrator is appropriate.¹¹⁷

Section 10 discusses party participation, representation, and the ability of a party to have a non-advocating individual present with the party so long as the individual is not a witness in the case.¹¹⁸ This provision was carefully crafted so that certain persons who are victims of domestic violence can participate in arbitration with the benefit of a support person. Similar to mediation, it is important that each party come to the table on equal footing, without there being a power imbalance.¹¹⁹ It is then up to the arbitrator, as it would be up to the mediator, to determine whether arbitration is inappropriate for a particular case.¹²⁰ Section 10 also delineates that ex parte communications with an arbitrator are subject to the same restrictions as those with a judge.¹²¹

Section 11 addresses temporary orders, whether made by the arbitrator or the court.¹²² Section 12 provides for the protection of a party or a child to address concerns of domestic violence, abuse, or neglect.¹²³ Section 13 sets forth the powers and duties that an arbitrator is given under the Act, absent an agreement by the parties in the record to restrict the same.¹²⁴ Section 14 addresses when an arbitration proceeding shall or shall not be subject to the requirement of a recording.¹²⁵

Section 15 explains the conditions of an award issued by an arbitrator.¹²⁶ Section 16 discusses confirming an award. Section 17 allows for an arbitrator to correct an unconfirmed award.¹²⁷ Section 18 allows for

¹¹⁵ *Id.* at § 7.

¹¹⁶ *Id.* at § 8.

¹¹⁷ *Id.* at § 9.

¹¹⁸ *Id.* at § 10.

¹¹⁹ Terneia Urban Guill, *A Framework for Understanding and Using ADR*, 71 TUL. L. REV. 1313, 1321 (1997).

¹²⁰ See UFLAA, *supra* note 99, at § 12.

¹²¹ *Id.* at § 10.

¹²² *Id.* at § 11.

¹²³ *Id.* at § 12.

¹²⁴ *Id.* at § 13.

¹²⁵ *Id.* at § 14.

¹²⁶ *Id.* at § 15.

¹²⁷ *Id.* at § 17.

[Vol. 18: 211, 2018]

Arbitration
PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

the court to correct an unconfirmed award.¹²⁸ Section 19 provides the procedure to have an unconfirmed award vacated or amended.¹²⁹ Section 20 provides a mechanism to clarify an award that is ambiguous.¹³⁰

Section 21 discusses a judgment on an award as well as the sealing or redacting to prevent disclosure of the same.¹³¹ Section 22 provides a party with the process to request that a confirmed award or judgment be modified.¹³² Section 23 addresses enforcement of confirmed awards, including those issued by another state.¹³³

Section 24 allows for an appeal process.¹³⁴ Section 25 sets forth the immunity that an arbitrator is given.¹³⁵ Section 26 discusses the uniformity of application and construction of the Act. Section 27 deals with the relation to the Electronic Signatures in Global and National Commerce Act.¹³⁶ Section 28 affords a state a transition time period.¹³⁷ Section 29 will set forth the date that the Act becomes effective in the adopting state.¹³⁸

As of March 2018, the Uniform Family Law Arbitration Act has been enacted in the states of Hawaii and Arizona.¹³⁹ The bill, as passed, was transmitted to the Governor of Hawaii on May 3, 2017.¹⁴⁰ The Uniform Family Law Arbitration Act took effect in the state of Hawaii on July 10, 2017.¹⁴¹ Arizona incorporated the Act by way of a Petition to Amend Arizona Rules of Family Law Procedure.¹⁴² The amendments were adopted effective

¹²⁸ *Id.* at § 18.

¹²⁹ *Id.* at § 19.

¹³⁰ *Id.* at § 20.

¹³¹ *Id.* at § 21.

¹³² *Id.* at § 23.

¹³³ *Id.* at § 23.

¹³⁴ *Id.* at § 24.

¹³⁵ *Id.* at § 25.

¹³⁶ *Id.* at § 26.

¹³⁷ *Id.* at § 28.

¹³⁸ *Id.* at § 29.

¹³⁹ *Family Law Arbitration Act: Enactment Status Map*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=Family%20Law%20Arbitration%20Act>.

¹⁴⁰ *HB1235 HD1 SD1 CD1*, HAWAII STATE LEGISLATURE, http://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=HB&billnumber=1235&year=2017.

¹⁴¹ *Id.*

¹⁴² *R-17-0017 Rule 67.2 Uniform Family Law Arbitration Rule*, <http://www.azcourts.gov/Rules-Forum/aft/673>.

January 1, 2018 as the new rule 67.2 titled, “Uniform Family Law Arbitration Rule.”¹⁴³

VII. EVALUATING THE UNIFORM FAMILY LAW ARBITRATION ACT

As a family law practitioner, having another option for ADR in my cases, is very appealing. The greatest benefits that I believe the Act has to offer are the expediency of a decision and the ability of parties to choose a particular arbitrator with special knowledge to handle particular issues in their case.

There are many states, including mine, that constantly see backlogged court dockets for family law cases.¹⁴⁴ The ability of parties to have an expedited final decision pertaining to the most precious things in their lives—their children—would give litigants, among other things, (1) the ability to reduce the stress of lengthy litigation, (2) finality, and (3) the ability to begin to move on with their lives.¹⁴⁵ Litigation does not just take a financial toll on the parties.¹⁴⁶ Any experienced family law practitioner can tell you the effect that litigation has on clients over time. The stress affects the client’s ability to function on a day-to-day basis, to perform well at his or her place of employment, his or her overall physical and mental health, and can wear the client down to the point that he or she no longer cares what is fair or what they are entitled to under the law because they simply want closure.¹⁴⁷

Many jurisdictions have family court judges that, as practitioners, did not practice family law or handle complex issues that would provide expertise in those areas.¹⁴⁸ Additionally, there are many experienced family law judges that simply do not have the acumen, patience, or expertise necessary to try a case that deals with complex issues, such as detailed business valuations, high-end asset cases, or retirement and pension plans.¹⁴⁹ Giving parties and

¹⁴³ *In the Matter of Rules 67(C) and 67.2, ARIZONA RULES OF FAMILY LAW PROCEDURE*, Arizona Supreme Court No. R-17-0017, Aug. 31, 2017.

¹⁴⁴ *See, e.g., Lynn Duryee, Improving Efficiency and Service in Family Courts*, CALIFORNIA COURTS 6, <http://www.courts.ca.gov/partners/documents/Improving.pdf> (the court had a backlog that forced cases to remain in the system for 8-10 years before being resolved).

¹⁴⁵ *See Kessler, supra* note 2, at 337; ROSE, *supra* note 5, at 292-93.

¹⁴⁶ *See Kessler, supra* note 2, at 337; ROSE, *supra* note 5, at 292-93.

¹⁴⁷ *See Larry J. Cohen & Joyce H. Vesper, Forensic Stress Disorder*, 25 LAW & PSYCHOL. REV. 1, 4-5 (2001).

¹⁴⁸ Kessler, *supra* note 2, at 336

¹⁴⁹ *See Payne, supra* note 20, at 29.

their counsel the ability to choose an arbitrator with special knowledge and/or experience in a given field is a benefit that a randomly assigned judge cannot offer to litigants.¹⁵⁰ Parties may have to spend more time and money to educate the judge on these complex issues than if they agreed to submit the issue to a qualified arbitrator.¹⁵¹

There are, of course, potential downfalls with the Act, particularly depending on how much a particular state amends or modifies it.¹⁵² For those states that choose to opt-out of the child custody and child-related provisions, the Act may not have as great an impact on reducing the court caseloads.¹⁵³ Furthermore, if a particular state eliminates minimum qualifications or training for arbitrators, then there is nothing to stop any one person from calling themselves an arbitrator and offering their services to litigants.¹⁵⁴ While their decisions would still be subject to limited judicial review, if the program does not start off with competent and successful arbitrators, then it will surely fail.¹⁵⁵ Another downfall is the potential for small legal communities wherein a particular arbitrator may have a previously unknown relationship with one of the attorneys, which, while not rising to the level of actual bias, may impact how that arbitrator treats each of the attorneys.

VIII. NEVADA'S LEGISLATIVE HISTORY

Nevada's mediation and arbitration statutes can be found in Chapter 38 of the Nevada Revised Statutes.¹⁵⁶ Nevada adopted the RUAA in 2000.¹⁵⁷ Nevada excludes actions involving divorce or problems of domestic relations

¹⁵⁰ Kessler, *supra* note 2, at 336.

¹⁵¹ See Payne, *supra* note 20, at 30.

¹⁵² See Walker, *supra* note 3, at 589.

¹⁵³ See ROSE, *supra* note 5, at 295.

¹⁵⁴ See e.g. Walker, *supra* note 3, at 597 (noting that the Model Act does not require specific qualifications for arbitrators).

¹⁵⁵ See Kessler, *supra* note 2, at 335.

¹⁵⁶ Nev. Rev. Stat. § 38 (2001). Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

¹⁵⁷ § 38, *supra* note 156. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

from any program of mandatory arbitration.¹⁵⁸ The Nevada Supreme Court also adopted Rules Governing Alternative Dispute Resolution (Rules) in 2005.¹⁵⁹ The Rules took the already existing Nevada Arbitration Rules enacted in 1992, subsequently amended January 1, 2005, and added General Provisions and Nevada Mediation Rules on March 1, 2005.¹⁶⁰

During the 2007 Legislative Session, Assembly Bill (A.B.) 571 was offered for consideration.¹⁶¹ A.B. 571 was entitled, “An Act relating to domestic relations; establishing certain alternative methods of dispute resolution for matters involving divorce or domestic relations; providing for the arbitration of any controversy, other than divorce, arising out of a marital relationship; providing a penalty; and providing other matters properly relating thereto.”¹⁶² A.B. 571 would have amended provisions of Chapter 38 of NRS to include provisions allowing arbitration of certain domestic relations issues.¹⁶³ The proposed amendments would have also added “domestic relations decision makers” as what appears to be a type of arbitrator that would be agreed upon by the parties and have the authority to issue binding decisions relating to the “implementation or clarification of any court order concerning” a minor child.¹⁶⁴

A.B. 571 included a provision placing an affirmative obligation on attorneys representing parties in divorce or domestic relations actions to

¹⁵⁸ § 38.255(3)(h), *supra* note 156. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

¹⁵⁹ § 38.258, *supra* note 156. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

¹⁶⁰ Nev. Arb. R. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

¹⁶¹ H.R. 571, Comm. on Judiciary, 74th Sess. (Nv. 2007). Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

¹⁶² 74th Sess., *supra* note 161. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

¹⁶³ 74th Sess., *supra* note 161. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

¹⁶⁴ 74th Sess., *supra* note 161. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

inform the party of all methods of ADR available.¹⁶⁵ Additionally, the attorney would be required to file a statement, signed by the attorney and his or her client, confirming that the attorney met this obligation.¹⁶⁶ The bill also provided for the creation of an ADR commissioner that would be responsible for creating, promoting, administering, and monitoring ADR programs for the family court.¹⁶⁷ The ADR commissioner would have the authority to sign orders directing parties that consented to submit to arbitration.¹⁶⁸

The intent of A.B. 571 was to reduce the amount of cases submitted to actual litigation by giving parties and the court several ADR options including mediation, collaborative divorce, cooperative divorce, arbitration, and the use of parenting coordinators or domestic relations decision makers.¹⁶⁹ A.B. 571 was proffered at a time when the State of Nevada was considering adding six additional judges to the family court system in Clark County, which would have resulted in an expense exceeding \$1.25 million per year.¹⁷⁰ During the testimony of attorney and former family court judge, Robert Lueck, the expediency of ADR was touted as a key reason to pass A.B. 571.¹⁷¹ Lueck stated that many believe the current process is too slow, stressful, and expensive.¹⁷² He also mentioned studies that conclude that the divorce

¹⁶⁵ 74th Sess., *supra* note 161. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

¹⁶⁶ 74th Sess., *supra* note 161. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

¹⁶⁷ 74th Sess., *supra* note 161. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

¹⁶⁸ 74th Sess., *supra* note 161. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

¹⁶⁹ H.R. 571, 74th Sess., Minutes of the Meeting of the Assemb. Comm. on Judiciary, 571 H.R. 74th Sess. 2-3 (Nv. 2007) (statement of Robert Lueck, former Family Court Judge). Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

¹⁷⁰ Minutes of the Meeting of the Assemb. Comm. on Judiciary, *supra* note 169, at 2-3. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

¹⁷¹ Minutes of the Meeting of the Assemb. Comm. on Judiciary, *supra* note 169, at 3.

¹⁷² Minutes of the Meeting of the Assemb. Comm. on Judiciary, *supra* note 169, at 3 (statement of Robert Lueck, former Family Court Judge).

process causes stress-related illnesses, depression, and adjustment problems, with children taking the brunt of the impact.¹⁷³

The arbitration act included within A.B. 571 was based on the Model Domestic Relations Arbitration Act published by the AAML.¹⁷⁴ After the drafting of the bill by the Legislative Counsel Bureau, suggestions were made to eliminate the ability of an arbitrator to award punitive damages in order to eliminate the potential desire of a spouse to engage in arbitration purely for the purpose of punishing the other spouse, which would undermine the intent behind non-adversarial ADR options.¹⁷⁵

Testimony and support for the bill were focused more on the mandatory mediation and collaborative law process provisions as opposed to the parenting coordinator, arbitrator, and domestic relations decision-maker provisions. The use of arbitration in family law was very new in 2007, and therefore most practitioners in Nevada were simply unaware of the benefits and successes of arbitration in other states.

IX. VIEW FROM THE EIGHTH JUDICIAL DISTRICT COURT

A. Family Law Arbitration

As part of the research conducted in order to write this paper, I created a short, six-question survey that was sent to each of the twenty family court judges in the Eighth Judicial District Court. Currently: one judge's caseload consists solely of juvenile cases, three judges' caseloads consist solely of abuse and neglect cases, and two of the judge's caseloads consist of domestic relations and adult guardianship cases, leaving fourteen judges that handle domestic relations cases encompassing issues such as private termination of parental rights, adoptions, name changes, divorces, child custody disputes, paternity cases, child support, and domestic partner cases.¹⁷⁶ Of the twenty family court judges surveyed, thirteen participated and returned

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 5. Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

¹⁷⁵ Comm. on Judiciary, H.R. 571, 74th Sess., Ex. C, at 20 (Nv. 2007). Audrey Beeson, *Understanding The Benefits Of Arbitration In The Family Law Arena*, Nevada Family Law Report (2017), <https://www.nvbar.org/wp-content/uploads/NFLR-Winter-2017.pdf>.

¹⁷⁶ Audrey Beeson, Eighth Judicial Court Family Division Survey (unpublished survey) (on file with author).

[Vol. 18: 211, 2018]

Arbitration
PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

the survey.¹⁷⁷ Twelve of the thirteen currently handle domestic relations cases, and one handles abuse/neglect cases.¹⁷⁸ Of the thirteen responding judges, six included comments to explain or support their survey answers.¹⁷⁹

The survey was drafted to be very general and short in order to incentivize the very busy judges to take the time to complete the survey. My intent was for the survey to take approximately one to two minutes and no more than five for the judges that wanted to give commentary on their answers. The survey contained a footnote wherein I informed the judges that the survey was for the purposes of a research paper and that the judges' answers would remain anonymous.¹⁸⁰ The survey was sent to the judges via e-mail through either their law clerks or judicial executive assistants. The survey consisted of the following yes or no questions: (1) would you support legislation adopting a Family Law Arbitration Act for the State of Nevada; (2) would you support the training of Family Law Attorneys in family law arbitration; (3) do you believe that family law arbitration could help decrease your current caseload; (4) would you support arbitration of financial issues (the division of assets and debts); (5) would you support arbitration of spousal support and alimony?; and (6) would you support arbitration of child custody and child support issues?¹⁸¹

The results of the survey were as follows: (1) seven of the judges would support adopting a Family Law Arbitration Act, three would not, and three had no response; (2) eleven of the judges would support the training of family law attorneys in family law arbitration, one would not, and one had no response; (3) eleven of the judges believed that family law arbitration could help decrease their current caseload and two did not (4) eleven of the judges would support arbitration of financial issues concerning the division of assets and debts, one would support it for marital estates valued at or less than \$50,000, and one would not; (5) ten of the judges would support arbitration of spousal support and alimony and three would not; and (6) six of the judges would support arbitration of child custody and child support issues and seven would not.¹⁸²

It did not surprise me that three of the judges did not respond to the question regarding the adoption of a Family Law Arbitration Act based on the

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

fact that I had no idea such an act existed prior to completing my research. What did surprise me is that one of the judges did not believe that arbitration could help lessen his or her caseload. Because the survey was anonymous, I was unable to explore the reasons for that judge's opinion.

Comments ranged from concerns pertaining to the amount of specialized training attorneys would need to have in order to be effective arbitrators, that arbitration be voluntary not mandatory, and that current Nevada law is not sufficiently defined in areas other than property distribution and child support to consider arbitration in areas such as alimony or child custody.¹⁸³

Based on the results of the survey, it appears that, overall, family law arbitration would have the support of the Eighth Judicial Court, Family Division.¹⁸⁴ Further, it appears that financial issues, as well as child custody-related issues, could be included.¹⁸⁵ I was actually surprised that as many as six judges (46%) would support arbitration of child custody related issues, especially due to the lack of detail in the survey question.¹⁸⁶

B. The Uniform Family Law Arbitration Act

Due to the fact that the UFLAA was adopted by the Uniform Law Commission after the original draft of this paper was written for an L.L.M. course, I wanted to get a sense of how the judges in my community would feel about the adoption of the UFLAA by Nevada. Three judges graciously agreed to review the Act and participate in a discussion regarding the same. The fact that our judges would have to remain neutral if this Act was introduced into the legislature made their input all the more interesting to me. The general consensus of having an additional option for ADR was positive.¹⁸⁷ The idea of having minimal qualifications and appropriate training was also positive.¹⁸⁸ Numerous suggestions and concerns were raised, each of which was legitimate.

Suggestions included: (1) expanding the standards that arbitrators are held to in *Section 9 Disclosure by Arbitrator; Disqualification* to include the

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Interview with Three Anonymous Judges, 8th Jud. Dist. Ct., Fam. Div. (May 25, 2017).

¹⁸⁸ *Id.*

Nevada Judicial Canons,¹⁸⁹ (2) require either a court annexed program or that an arbitration program be subject to the oversight of a committee, and (3) incorporating Nevada's best interest statutory language directly within *Section 16 Confirmation of an Award*.¹⁹⁰ Concerns included: (1) the financial inability of many pro per litigants to afford an arbitrator unless the arbitrator's fee is subject to maximum compensation guidelines, (2) the perceived notion that the court is endorsing an appointed arbitrator if the parties cannot mutually agree to one, and (3) whether unrepresented parties would fully understand the rights that they are waiving when agreeing to arbitration.¹⁹¹

The judges also stated that this Act would need to have a lot of support, focus, and backing from members of the family bar.¹⁹² While some support was garnered for collaborative law several years back, there simply was not enough support among family law practitioners.¹⁹³ Attorneys would need to understand the benefits of the Act, spread the word to the other members of the bar, and really champion the Act as a realistic option for practitioners and litigants to save money and time.

X. IS IT TIME FOR NEVADA'S FAMILY LAW ARBITRATION ACT?

It's been ten years since proposed family law arbitration came before the Nevada Legislature, and, since that time, additional states have adopted or created their own statutory language allowing for voluntary arbitration in family law and domestic relations disputes.¹⁹⁴ With the passing of the Uniform Family Law Arbitration Act in 2016,¹⁹⁵ it is very possible that arbitration in family law will become a more familiar and discussed option for ADR within the family law community.

¹⁸⁹ There are four judicial canons: (1) a judge shall uphold and promote the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety; (2) a judge shall perform the duties of judicial office impartially, competently, and diligently; (3) a judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office; and (4) a judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary. NEV. SUP. CT. R. CJC CANON 1-4.

¹⁹⁰ Interview with Three Anonymous Judges, *supra* note 187.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ 74th Sess., *supra* note 161.

¹⁹⁵ See generally UFLAA, *supra* note 99.

In my opinion as a family-law practitioner, the benefits of arbitration cited by professionals outweigh the disadvantages. The largest advantage of choosing arbitration is the ability of the parties to choose their own arbitrator or arbitrator panel.¹⁹⁶ Parties would be able to research the experience and background of certified arbitrators and narrow their choices to an arbitrator with the particular knowledge that the parties want or need. Parties divorcing without children but with large assets and complicated financial matters could choose an arbitrator with extensive experience in that area. Further, if there is a business that has to be evaluated and considered, then those parties may want a panel of arbitrators, which could include the experienced attorney as well as business valuers or professionals known for their expertise in that particular field of business (such as a surgeon or car dealership owner).

In Nevada, as in other states, family-law judges are not required to have a background in family law.¹⁹⁷ A few judges used family court as a stepping stone to eventually move to district court. New judges, whether family, criminal, or civil, will likely be deficient in certain areas of law, and often not know as much as the attorney appearing before them who has focused on that particular issue. However, a lack of a family-law background is not always a downfall if they have a civil-litigation background, and they have the knowledge and experience required for the more complex business and asset cases.

Currently, Nevada only has forty-two certified family law specialists,¹⁹⁸ two of which currently sit on the bench, and at least one of which is retired, leaving only thirty-nine practicing attorneys. Therefore, while other jurisdictions have set forth requirements that arbitrators be family-law specialists,¹⁹⁹ for Nevada it would preclude too many talented and experienced family-law attorneys from qualifying to be an arbitrator. Therefore, I believe that it would be more likely that Nevada would adopt the qualification guidelines set forth in the Act, which requires that any attorney in good standing, or a retired attorney or judge, trained in domestic violence and child abuse could be qualified as an arbitrator.²⁰⁰ Potentially, training based on the program currently provided by the AAML could be offered prior to and in conjunction with the adoption of the Uniform Family Law

¹⁹⁶ See Ben Giaretta & Akshay Kishore, *One Arbitrator or Three?*, ASHURST (Sept. 1, 2015), <https://www.ashurst.com/en/news-and-insights/legal-updates/one-arbitrator-or-three/>.

¹⁹⁷ See § 3.060, *supra* note 156.

¹⁹⁸ *Certified Specialists*, NEVADA STATE BAR, <https://www.nvbar.org/lawyerreferral/certified-specialists/> (last visited Oct. 12, 2017).

¹⁹⁹ See, e.g., § 50-45(d), *supra* note 6.

²⁰⁰ UFLAA, *supra* note 99, at § 8.

Arbitration Act. If attorneys are given the opportunity to remain in Nevada for appropriate training, the amount of qualified family-law arbitrators could meet the potential demand for the same.

I would be remiss if I did not also consider the potential problems and downfalls of adopting the Act in Nevada. Depending on the amount of modifications or amendments that the Nevada Legislature makes to the Act before submitting it for passage, the intent of the Act could be altered. If, for instance, the legislature sees no need for any qualifications or training for arbitrators in family-law, then we potentially run into the same issue that we currently have with lawyers that call themselves mediators when they are in fact not mediators, and instead only offer a settlement conference to litigants. That's not to say that settlement conferences do not have value, because they certainly do. However, litigants should be informed of the difference between a settlement conference and mediation, and then they should make the appropriate choice for their particular circumstances. While there are certainly numerous competent attorneys that could serve as arbitrators, it would better serve litigants to have qualified, trained arbitrators. Domestic violence and child abuse training are especially important in the field of family law. While mediators are trained to look for signs and conduct appropriate screenings, attorneys that offer their "mediation" services for settlement conferences are not. The onus of choosing the arbitrator falls on the parties, unless they cannot agree, however, having minimum qualifications and training listed as part of an arbitrator's credentials would give the option a more structured and regulated framework, which would hopefully give litigants, attorneys, and judges more confidence in the option.

XI. CONCLUSION

While this paper does not include an analysis of all fifty states, it gives a broad view of the current law as it pertains to the availability and support of arbitration in family-law matters throughout the United States. Not having arbitration for family-law issues in the State of Nevada, I must admit that I was surprised by the number of jurisdictions that do allow arbitration for at least some issues in the domestic-relations field. More practitioners in Nevada need to be made aware of the benefits and use of arbitration in family law by other jurisdictions so that the topic becomes as common in discussions pertaining to ADR options for our clients as mediation and judicial settlement conferences are now.

While the William S. Boyd School of Law has vastly increased the scope of its ADR courses, it would be wise to implement an ADR course

specific to the field of domestic relations so that law students understand that arbitration is a valid option. With new practitioners having a strong education and exposure to all areas of ADR, they can bring a new outlook with them as they become part of the legal community. We can restructure the family-law community to be more focused on ADR options instead of the adversarial “winner takes all” approach, which simply does not comport with family law. Attorneys should be more focused on preserving the co-parenting relationship and shielding the children as much as possible when couples decide to divorce. Our current culture sets parents up to fail in their future relationships with the other parent and even with their own children. Too often a client will come to me and ask, “How can I win primary custody of my child?” The mentality surrounding litigation of domestic-relations issues is often “kill or be killed,” with parents slinging as much mud as they can, whether founded in fact or fantasy.

Finally, based on my experience as a family-law practitioner, and seeing the struggles that my clients experience during long, drawn out litigations, I believe that adopting the Act in Nevada would serve as a great benefit to many families in my community. So often, the longer the litigation lasts, the ability of parents to cooperate, communicate, and co-parent more severely declines. If litigants have the option of having an arbitrator make a decision for them much earlier in the process, the new family composition can succeed with less detriment to the children that never asked to be involved in the middle of their parents’ conflict.