

SESSION OF 2020

SUPPLEMENTAL NOTE ON HOUSE BILL NO. 2533

As Recommended by House Committee on
Judiciary

Brief*

HB 2533 would enact the Uniform Family Law Arbitration Act (UFLAA).

Definitions [Section 2]

The bill would define various terms used throughout the UFLAA, including:

- “Arbitration agreement” would mean an agreement that subjects a family law dispute to arbitration;
- “Child-related dispute” would mean a family law dispute regarding legal custody, residency, parenting time, visitation, or financial support regarding a child; and
- “Family law dispute” would mean a contested issue arising under the Kansas Family Law Code.

Applicability [Sections 3, 4]

The bill would state the UFLAA governs arbitration of a family law dispute but would not authorize an arbitrator to make an award that:

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

- Grants a decree of divorce, annulment, or separate maintenance;
- Terminates parental rights;
- Grants an adoption or a guardianship of a child or incapacitated individual;
- Determines the status of a child in need of care; or
- Determines the existence or nonexistence of the parent and child relationship.

The bill would state except as otherwise provided by the UFLAA, the Revised Uniform Arbitration Act (RUAA) applies to arbitration, and in determining the merits of a family law dispute, an arbitrator would be required to apply the law of this state, including its choice of law rules.

Agreement and Enforceability [Section 5]

The UFLAA would require an arbitration agreement:

- Be in a record signed by the parties;
- Identify the arbitrator, an arbitration organization, or a method of selecting an arbitrator; and
- Identify the family law dispute that the parties intend to arbitrate.

Except in the case of a child-related dispute, an agreement to submit to arbitration for an existing or subsequent family law dispute arising between the parties would be valid, enforceable, and irrevocable, except upon a ground that exists at law or in equity for the revocation of a contract. An agreement to arbitrate a child-related dispute that arises between the parties after the agreement is made would be unenforceable unless the parties affirm the agreement in a record after the dispute arises or the

agreement was entered during a family law proceeding and the court approved or incorporated the agreement in an order issued in the proceeding.

If a party objects to arbitration on the ground that the agreement is unenforceable or does not include a family law dispute, the court would decide.

Initiation of Arbitration [Section 6]

The bill would state a party may initiate arbitration by giving notice to the other party as specified in the arbitration agreement, or if unspecified, pursuant to the RUAA.

Motions for Judicial Relief [Section 7]

A motion for judicial relief under the UFLAA would be required to be made to the court in which a proceeding is pending involving a family law dispute subject to arbitration, if such exists. Otherwise, the motion may be made in a court with jurisdiction over the parties and the subject matter.

Motion to Compel

On motion of a party, the court may compel arbitration if the parties have entered into a valid agreement pursuant to the UFLAA, unless the court determines that the arbitration should not proceed for reasons related to a party's safety or ability to effectively participate.

Motion to Terminate

On motion of a party, the court would be required to terminate arbitration if it determines that the:

- Agreement is unenforceable;
- Family law dispute is not subject to arbitration; or

- Arbitration should not proceed for reasons related to a party's safety or ability to effectively participate.

Motion to Consolidate

Unless the agreement prohibits consolidation, and if necessary for the fair and expeditious resolution of the family law dispute, a court could order consolidation of separate arbitrations involving the same parties and common issue of law or fact, upon motion of a party.

Requirements of Arbitrator [Section 8]

Unless waived by the parties, or if the arbitrator is otherwise identified in the agreement, an arbitrator would be required to be trained in identifying domestic violence and child abuse and be:

- An attorney in good standing admitted to practice law;
- An attorney in good standing on inactive status; or
- A judge on retired status.

Upon motion of a party, the court would select an arbitrator if an arbitrator is unable or unwilling to act or if the method of selecting an arbitrator fails.

Disclosures of Arbitrator; Disqualification of Arbitrator [Section 9]

The UFLAA would require an individual, after making reasonable inquiry and before agreeing to serve as arbitrator, to disclose any known facts that a reasonable person would consider likely to affect impartiality, including financial or personal interest in the arbitration outcome or existing or past

relationships with certain persons involved in the arbitration, or the arbitrator's ability to make a timely award. An arbitrator, party, or party attorney would have a continuing obligation to disclose such facts, and the UFLAA would include procedures for suspending arbitration or vacating of awards based on the failure to disclose such facts.

Any objection to the selection or continued service of an arbitrator, a motion for stay of arbitration, and disqualification of the arbitrator would be required to be made pursuant to the law and procedure of the state, in addition to the UFLAA.

If an arbitrator is disqualified or the parties agree to discharge an arbitrator, the parties could select a new arbitrator or request the court select another qualified arbitrator pursuant to applicable law and procedure.

Rights of Parties [Section 10]

The UFLAA would provide that a party may be represented by an attorney, be accompanied by an individual who will not be called as a witness or act as advocate, and participate in the arbitration to the full extent permitted by Kansas law governing contractual arbitration. *Ex parte* communication would not be allowed by a party or party's representative, except to the extent such communications are allowed in a family law proceeding.

Temporary Orders and Awards; Disposition of Arbitration [Section 11]

Temporary orders related to parentage, divorce, support orders, or custody could be entered by a court upon motion of a party before an arbitrator is selected and able to act and a temporary award for such matters could be made after an arbitrator is selected. In addition, the court could enter a temporary order when the matter is urgent and an arbitrator would not be able to act in a timely manner or provide an

adequate remedy. Temporary awards made could be confirmed, corrected, vacated, or amended before the court confirms a final award, upon motion of a party.

The UFLAA would grant the court discretion to enforce a subpoena or interim award issued by an arbitrator for the fair and expeditious disposition of the arbitration, upon motion of a party.

Protection Orders; Stay of Arbitration [Section 12]

The UFLAA would require the arbitrator to stay the arbitration and refer the parties to court if a party is subject to a protection order, as defined by the bill, or if the arbitrator has a reasonable belief a party's safety or ability to participate effectively is at risk. The arbitration would not proceed unless the party at risk affirms, and the court determines such affirmation is informed and voluntary, the arbitration agreement in a record. The court also would have to determine the arbitration is not inconsistent with the protection order and reasonable procedures are in place to protect the party from risk, harm, harassment, or intimidation.

The arbitrator would be required to terminate the arbitration and report to the Department for Children and Families if the arbitrator has a reasonable belief a child subject of a child-related dispute is abused or neglected.

An arbitrator would be allowed to make a temporary award to protect a party or child from harm, harassment, or intimidation; on motion of a party, the court could stay arbitration and review the determination of the temporary award.

The provisions of this section of the UFLAA would supplement other remedies available to victims of domestic violence, family violence, stalking, harassment, or other similar abuse under Kansas law.

Authority of Arbitrator [Section 13]

The arbitrator would be required to conduct arbitration as the arbitrator considers appropriate for a fair and expeditious disposition and to provide each party a right to be heard, to present evidence material to the family law dispute, and to cross-examine witnesses. Unless the parties otherwise agree in a record, the arbitrator's authority would include the power to:

- Select the rules for conducting the arbitration;
- Hold conferences with the parties before a hearing;
- Determine the date, time, and place of a hearing;
- Require a party to provide a copy of a relevant court order, information required to be disclosed in a family law proceeding, and a proposed award that addresses each issue in arbitration;
- Meet with or interview a child who is subject of a child-related dispute;
- Appoint a private expert at the expense of the parties;
- Administer an oath or affirmation and issue a subpoena for the attendance of a witness or the production of evidence at a hearing;
- Compel discovery and determine the date, time, and place of discovery;
- Determine the admissibility and weight of evidence;
- Permit deposition of a witness;
- For good cause, prohibit a party from disclosing information;

- Appoint an attorney, guardian *ad litem*, or other representative for a child at the expense of the parties;
- Impose a procedure to protect a party or child from risk of harm, harassment, or intimidation;
- Allocate fees and other costs to the parties; and
- Impose a sanction on a party for bad faith or misconduct.

The arbitrator could not allow *ex parte* communication except to the extent allowed in a family law proceeding.

Recording of Arbitration [Section 14]

An arbitration hearing would not need to be recorded unless required by the arbitrator, provided by the arbitration agreement, or requested by a party. In a hearing concerning a child-related dispute, the arbitrator would be required to request a verbatim recording of any part.

Awards [Sections 15-23]

The arbitrator would be required to date, sign, and give reasons on which the award is based unless otherwise agreed by the parties, and give notice of such award to each party by an agreed-upon method, or in the absence of an agreement, under law governing notice in contractual arbitration. An award determining a child-related dispute would have to state the reasons on which it is based pursuant to law governing court orders in a family law proceeding.

The court would be required to enter a judgment in conformity with an order confirming, vacating without directing a rehearing, or amending an award under the UFLAA.

The court could order a document or part of the arbitration record be sealed or redacted to prevent public disclosure of all or part of the record or award, upon motion of a party.

If the meaning or the effect of an award is disputed, the parties could agree to arbitrate the dispute before the original arbitrator or another arbitrator or go to court to clarify the judgment in a family law proceeding.

Confirmation [Section 16]

The UFLAA would state an award is not enforceable until confirmed. A party could move the court for an order confirming the award after the arbitrator gives notice of such award, if the parties agree or the time has expired for making a motion and no motion to correct or vacate is pending.

If the award determines a child-related dispute, the court would be required to confirm the award if it finds the award, on its face, complies with applicable law and is in the best interests of the child.

Correction [Sections 17, 18]

An arbitrator could correct an award, upon motion by a party made within 30 days after the arbitrator gives notice of an award:

- If the award has an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property;
- If the award is imperfect in a matter of form not affecting the merits on the issues submitted; or
- To clarify the award.

A court would be required to correct an award, upon motion by a party made within 90 days after the arbitrator gives notice of an award if:

- The award has an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property;
- If the award is imperfect in a matter of form not affecting the merits on the issues submitted; or
- The arbitrator made an award on a dispute not submitted to the arbitrator and the award may be corrected without affecting the merits of the issues submitted.

A motion to correct could be joined with a motion to vacate or amend the award, and unless a motion to vacate is pending, the court could confirm a corrected award.

Vacation [Section 19]

A court would be required to vacate an award, upon motion by a party, if:

- The award was procured by corruption, fraud, or other undue means;
- There was evident partiality, corruption, or misconduct substantially prejudicing the rights of a party by an arbitrator;
- The arbitrator refused to postpone the hearing upon sufficient cause, consider material evidence, or otherwise conducted the hearing to substantially prejudice the rights of a party;
- The arbitrator exceeded the arbitrator's powers;

- There was no agreement to arbitrate, unless the moving party participated without making a motion for judicial relief before the first arbitration hearing; and
- The arbitration was conducted without proper notice of initiation and the rights of a party were substantially prejudiced.

A court, using the record of the arbitration hearing and facts occurring after the hearing, would be required to vacate (or amend, if amending is in the best interests of the child), an award for a child-related dispute, if :

- The award does not comply with applicable law or is contrary to the best interests of the child;
- The record of the hearing or the statement of reasons in the award is inadequate; or
- There exists a basis for vacating the award under the section governing family law disputes other than child-related disputes.

A motion to vacate or amend would have to be filed within 90 days after receiving notice of the award unless the movant alleges corruption, fraud, or undue means, in which case the motion would have to be filed within 90 days after the ground is known or would have been known by exercise of reasonable care. Upon vacating an award on grounds other than no agreement, the court could order a rehearing. If the grounds are corruption, fraud, or partiality, corruption, or misconduct by the arbitrator, a rehearing would be required to be conducted before a new arbitrator.

If the court denies a motion to vacate or amend, it would be required to confirm the award unless a motion to correct the award is pending.

Modification [Section 22]

If a party requests a modification of a confirmed award or judgment on an award based on a fact occurring after confirmation, the parties would be required to proceed under the dispute resolution method specified in the award or judgment, if one exists. If no dispute resolution method is specified, the parties could agree to arbitrate the modification before the original or another arbitrator or proceed pursuant to law governing modification of a judgment in a family law proceeding.

Enforcement [Section 23]

The UFLAA would provide the court shall be required to enforce an arbitration award, a temporary award, or award in a family law dispute confirmed by a court in another state in the same manner and extent as any other order or judgment of a court or another state's court.

Appeals [Section 24]

An appeal would be in the same form as from an order or judgment in a civil action, and may be taken from a final judgment or from an order:

- Denying a motion to compel arbitration;
- Granting a motion to stay arbitration;
- Confirming or denying confirmation of an award;
- Correcting an award; or
- Vacating an award without directing a rehearing.

Immunity [Section 25]

The UFLAA would provide the same immunity for an arbitrator or arbitration organization as that of a judge of a Kansas court acting in a judicial capacity. Such immunity would not be lost due an arbitrator's failure to make disclosures required under the UFLAA.

An arbitrator would not be competent to testify and could not be required to produce records in a judicial, administrative, or similar proceeding to the same extent as a Kansas judge, except as necessary to determine the claim of an arbitrator or arbitration organization against a party to the arbitration proceeding, or on a hearing to vacate an award based on corruption, fraud, undue means, or partiality, corruption, or misconduct by the arbitrator if a *prima facie* ground exists.

An arbitrator would be entitled to attorney fees and other reasonable expenses of litigation in a civil action against them, arising from their services, if a person seeks to compel testimony or production of records from them and the court determines they are immune or not competent to testify under the above provisions.

Uniformity [Section 26]

The UFLAA would direct that consideration be given to the uniformity of law among enacting states in applying and construing the act.

Electronic Signatures [Section 27]

The UFLAA would state its provisions modify, limit, or supersede the federal Electronic Signatures In Global and National Commerce Act, but does not modify, limit, or supersede provisions related to consumer disclosures in that act, or authorize electronic delivery of certain types of notice as prescribed by that act.

Date of Applicability [Section 28]

The provisions of the UFLAA would apply to any agreement made on or after the effective date of the UFLAA, or if made before the effective date, upon agreement in a record by the parties.

Background

The Uniform Law Commission promulgated the UFLAA in 2016, and has recently been adopted in Arizona, Hawaii, and North Dakota.

The bill was introduced by the House Committee on Judiciary at the request of the Kansas Bar Association (KBA). In the House Committee hearing, a representative of the KBA testified in support of the bill, stating the need for alternatives to litigation to resolve family law disputes. Written-only proponent testimony was provided by a representative of the KBA's Alternative Dispute Resolution Section. No other testimony was provided.

According to the fiscal note prepared by the Division of the Budget on the bill, the Department for Children and Families (DCF) indicates enactment of the bill could cause an increase in the volume of child abuse and neglect reports, and consequently increase the number of Kansas Protection Report Center employees needed. In addition, DCF indicates additional Child Protection Specialists could be needed, increasing State General Fund expenditures by \$64,000 per year for salaries and operating costs per position.

The Office of Judicial Administration indicates enactment of the bill would have a negligible effect on expenditures and would have no fiscal effect on revenue for the agency. Any fiscal effect associated with enactment of the bill is not reflected in *The FY 2021 Governor's Budget Report*.