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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of **PETITION TO AMEND ARIZONA RULES OF FAMILY LAW PROCEDURE**	**Supreme Court No. R-_____** **Petition to Amend Arizona Rules of Family Law Procedure**

Pursuant to Rule 28, Rules of the Supreme Court, Barbara Atwood and Timothy Berg, Commissioners with the Uniform Law Commission, respectfully petition this Court to adopt amendments to the Arizona Rules of Family Law Procedure (ARFLP) to implement the Uniform Family Law Arbitration Act (UFLAA), as set out in Appendix A. Petitioners recommend that Rule 67(C) be deleted and that the proposed rule be inserted in the ARFLP as a new Rule 67.2.

I. BACKGROUND

The use of consensual family law arbitration is on the increase nationwide. The American Academy of Matrimonial Lawyers (AAML) promulgated a Model Family Law Arbitration Act in 2005, and the AAML regularly offers training and certification for family law arbitrators. In recent years, family law arbitration statutes and rules have been adopted in several states. *See, e.g.,* Mich. Comp. Laws. Ann. §§ 5071 – 82; N. Car. Gen. Stat. §§ 50-41—62.

With the growing interest in this mode of alternative dispute resolution and the inadequacy of commercial arbitration law, the Uniform Law Commission in 2013 began the project of drafting a family law arbitration act. In July of 2016 the Uniform Family Law Arbitration Act (UFLAA) received final approval.

For those couples who are not realistic candidates for mediation or settlement, voluntary arbitration offers an attractive alternative to court. When arbitration works well, the advantages are significant. Unlike court proceedings, arbitration hearings are not public, and parties can agree to their own terms of confidentiality. The arbitration process is flexible. The parties identify the precise disputes to be arbitrated and, in conjunction with the arbitrator, can structure the rules to be followed, the schedule, and fees. Sometimes arbitration by agreement is used in combination with mediation in a "med-arb" structure. For couples who

have experienced unpleasant and protracted litigation, arbitration also may be preferred as a method of resolving post-decree issues.

The parties' ability to select the decision-maker is a key attraction of arbitration over litigation. The choice of arbitrator is often shaped by the type of dispute. For example, a lawyer with experience in real estate appraisals might be an optimal decision-maker for couples disputing lands held as marital property. In contrast, a custody dispute over an autistic child might best be arbitrated by an individual with expertise in child psychology.

Because arbitration can move forward without regard to judicial calendars, it usually reaches finality more quickly than litigation. For that reason, it also is touted as being less expensive than litigation, even taking into account the responsibility of the parties to pay the arbitrator's fee. As the United States Supreme Court has recognized, "[i]n bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp*., 559 U.S. 662, 685 (2010).

The trade-off with arbitration is the limited nature of judicial review. The agreement to arbitrate is a waiver of the right to go to court in the first instance, and the opportunity to challenge an award in court is limited. In commercial

arbitration, awards typically are vacated only for arbitrator misconduct or grounds going to the fairness of the arbitration process and not for errors of law. In family law arbitration, likewise, parties who agree to arbitrate relinquish judicial oversight to a significant degree. As discussed below, however, judicial review of awards determining child custody or child support must be more rigorous. Notwithstanding limited judicial review, voluntary arbitration may be an appealing alternative for many people in light of drawbacks, limitations and restrictions associated with litigation.

II. NEED FOR UNIFORM FAMILY LAW ARBITRATION RULE IN ARIZONA

Family law arbitration is not new to Arizona, but Arizona law does not provide comprehensive guidelines for arbitration in the context of family dissolution. Rule 67(C) of the ARFLP states that "parties may agree to arbitrate any and all issues in accordance with the Arizona Arbitration Act, A.R.S. §§ 12-1501 to 1518 or any other law permitting arbitration." The statutory reference in Rule 67(C) is to the Uniform Arbitration Act. In 2010, several years after the promulgation of Rule 67(C), Arizona enacted the Revised Uniform Arbitration Act (RUAA), A.R.S. §§ 12-3001—29, applicable to arbitration agreements made on or after January 1, 2011. *See* A.R.S. § 12-3003(A). The legislature did not repeal the original Uniform Arbitration Act, apparently because the RUAA excludes four

categories of disputes covered under the original Act. *See* A.R.S. § 12-3003(B); Bruce E. Meyerson, *Arizona Adopts the Revised Uniform Arbitration Act*, 43 Ariz. St. L.J. 481, 486 (2011). The RUAA exclusions do not relate to family law disputes. Thus, going forward, the RUAA is presumably the governing statutory law for family law arbitration in Arizona. Although it is a more complete arbitration framework than the original Uniform Arbitration Act, the RUAA does not provide an adequate framework for family law arbitration.

The shortcomings of commercial arbitration law in the family law context derive, in part, from the State's non-waivable *parens patriae* duty to protect children and vulnerable family members. *See Hays v. Gama,* 205 Ariz. 99, 102 ¶ 18, 67 P.3d 695, 698 (2003) ("[w]e have repeatedly stressed that the child's best interest is paramount in custody determinations") (citing cases); *Nold v. Nold*, 232 Ariz. 270, 304 P.3d 1093 (Ariz. App. 2013) (best interests of child are for court alone to decide, and court cannot delegate or abdicate its responsibility to exercise independent judgment). In light of the State's *parens patriae* responsibility, any family law arbitration framework must provide for close judicial review of arbitration awards determining child custody or child support. Family law arbitration procedure also needs to address the possibility of domestic violence or child abuse and to provide a mechanism for engaging court processes to protect the safety of individuals involved. In addition, family law arbitration law should make

available the remedies that are uniquely necessary for families in dissolution, such as temporary orders and post-decree modifications.

Recent case law from Arizona reveals the need for greater legal clarity governing family law arbitration. In *Chang v. Siu*, 234 Ariz. 442, 323 P.3d 725 (Ariz. Ct. App. 2014), a divorcing couple had agreed to arbitrate their property dispute before a retired judge, but they provided in the agreement that judicial review of the arbitrator's award would go directly to the court of appeals. After the award was issued, the wife obtained confirmation in the superior court, and the husband appealed. The court of appeals affirmed the superior court's order and held that the parties could not expand the appellate court's jurisdiction by agreement. The court also noted the uncertainty in the law regarding the parties' ability to contractually expand the scope of judicial review of arbitration awards. *See also In re Marriage of Yeatts*, 2014 WL 3731350 (Ariz. Ct. App. 2014) (unpublished decision) (dismissing for lack of jurisdiction and noting confusion among parties as to the roles of settlement judge and arbitrator in marital dissolution case).

The reviewing authority of Arizona's superior and appellate courts is clearly set forth in the proposed Rule. See Paragraphs O through W of proposed Rule 67.2. In addition, parties and arbitrators in Arizona would likely benefit by having

a more detailed framework for family law arbitrations, including where the best interests of children are involved.

III. OVERVIEW OF PROPOSED UNIFORM FAMILY LAW ARBITRATION RULE

Since 2006, Arizona has provided detailed procedural guidelines for resolving family law cases arising under Title 25 of the Arizona Revised Statutes, both through judicial processes and alternative dispute resolution methods. *See* Rules 1 & 67, ARFLP. Similar to Rule 67.1, implementing the Uniform Collaborative Law Act by rule, proposed Rule 67.2 would implement the Uniform Family Law Arbitration Act by rule to provide a procedural framework for voluntary family law arbitration. It includes guidelines for parties, arbitrators, and courts both during an arbitration and after an award has been issued. Proposed Rule 67.2 incorporates by reference Arizona's RUAA but supplements that statutory framework to meet the needs of family law dispute resolution. See Paragraph C. Given certain limitations in rule-making, proposed Rule 67.2 does diverge from the UFLAA in some respects. For example, proposed Rule 67.2 does not include the immunity provision of the UFLAA (Section 25) because a grant of immunity may be beyond the scope of rule-making. Importantly, however, Arizona's RUAA contains a substantially similar immunity provision for arbitrators that would apply to family law arbitrators. See A.R.S. § 12-3014.

Consistent with the directive in ARFLP Rule 67(C) that "[t]he parties may agree to arbitrate any and all issues," proposed Rule 67.2 allows the parties to agree to arbitrate any family law dispute, *see* Paragraph B(1), extending the Rule to any "contested issue arising under" Title 25 of the Arizona Revised Statutes and within the scope of the Arizona Rules of Family Law Procedure, see Paragraph (A)(6). Typical issues could include property division, allocation of debt, spousal maintenance, legal decision-making, parenting time, child support, and attorneys' fees. Proposed Rule 67.2, however, does exclude certain status determinations, such as adoption and termination of parental rights, from arbitration. *See* Paragraph B(2).

Under the proposed Rule, an arbitration agreement must be in writing and must identify the dispute to be arbitrated as well as the arbitrator or a way of selecting the arbitrator. See Paragraph D. The agreement to arbitrate should be a voluntary and informed choice of each party, not an alternative that is the product of coercion or ordered by the court absent full agreement of the party. In light of the likely preemptive effect of the Federal Arbitration Act, 9 U.S.C. § 2, the proposed Rule adopts the FAA's requirements for arbitration agreements and, as a general matter, accepts the enforceability of pre-dispute arbitration agreements, such as arbitration clauses in pre-marital agreements. Of course, traditional contract defenses (lack of voluntariness, fraud, duress, unconscionability, and the

like) remain available as a basis to challenge the validity of any arbitration agreement. The proposed Rule contains procedural guidelines for challenging the enforceability of an arbitration agreement in court. See Paragraph F.

While pre-dispute arbitration agreements are generally enforceable under the proposed Rule, pre-dispute arbitration agreements for child-related disputes are not enforceable. See Paragraph D(3). A parent's choice to arbitrate is likely to be better informed and based on a fuller understanding of the child's interests after the dispute has materialized. In light of the State's *parens patriae* duty to protect children, the proposed Rule generally requires that an agreement to arbitrate child-related issues must be entered into or reaffirmed *after* the dispute has arisen. See Paragraph D(3). The one exception under the proposed Rule is when an arbitration agreement involving child-related disputes has been incorporated in an earlier court decree—such as a marital settlement agreement or separation agreement. *Id.*

As in commercial arbitration, the proposed Rule gives maximum flexibility to the parties in choosing an arbitrator. While default requirements are that the arbitrator be an active or retired attorney or a retired judge and be trained in identifying domestic violence and child abuse, those requirements can be waived by agreement of the parties. See Paragraph K. If the parties cannot agree on an arbitrator, it is up to the court to appoint a qualified individual.

The proposed Rule recognizes the state's *parens patriae* responsibility for children and vulnerable family members in several non-waivable provisions. The Rule requires that arbitration proceedings involving child-related issues must be recorded, Paragraph M, and any award regarding children must spell out the underlying reasons, Paragraph N(3). In contrast to the limited judicial review that typifies commercial arbitration, the proposed Rule requires robust judicial scrutiny of child-related awards, a subset of awards authorized by the proposed Rule. In particular, under Paragraphs O and R, a court cannot confirm an award determining legal decision-making, parenting time, or other child-related dispute unless it finds that the award complies with applicable substantive law and is in the child's best interests. Under Paragraph R(4), a court in its discretion may exercise de novo review of a child-related award. At the same time, in order to preserve the efficiency of arbitration, the proposed Rule provides for limited judicial review of purely financial issues between the parties. See Paragraph R(1).

The proposed Rule also includes special protections for children and family members if the arbitrator learns that abuse or family violence is occurring. If an arbitrator has a reasonable basis to believe that a child is the subject of abuse or neglect, the proposed Rule requires the arbitrator to terminate the arbitration of any child-related disputes and report the findings to the Arizona Department of Child Safety. See Paragraph K. In addition, if the arbitrator believes domestic violence

is present, the arbitrator must stay the arbitration and refer the parties to court. In order for arbitration to proceed, the party at risk of harm must reaffirm the agreement to arbitrate, and the court must find that adequate procedures are in place to protect the party from risk of harm or intimidation. See Paragraph K(2).

Under the proposed Rule, arbitrators have authority to enter temporary awards as needed under Arizona law governing temporary orders, A.R.S. § 25-404; Rules 47, 48, ARFLP. See Paragraph J. Parties seeking modification of confirmed awards based on changed circumstances can seek relief in court under Rule 91 or agree to further arbitration. See Paragraph U.

In addition, the proposed Rule provides a non-exclusive list of arbitrator powers, including the authority to interview children and appoint a representative for a child consistent with Arizona law. See Paragraph L.

IV. CONCLUSION

Petitioners respectfully request that the Court consider this petition and proposed Rule at its earliest convenience. Petitioners additionally request that the petition be circulated for public comment until May 20, 2017, and that the Court adopt the proposed Rule as attached in Appendix A, or as modified in light of comments received from the public, with an effective date of January 1, 2018.

Respectfully submitted January 9, 2017.

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