Arbitration and Procedural Pluralism in Family Law

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Date : November 22, 2017

Barbara A. Atwood, *The New UFLAA: Providing Needed Standards for Efficiency and Fairness*, 39(4) **Family Advocate** 38 (2017), available at SSRN.

In July 2016, the Uniform Law Commission gave final approval to the Uniform Family Law Arbitration Act (UFLAA). Barbara Atwood was the drafting committee's Chair and Linda Elrod was its Reporter. In *The New UFLAA: Providing Needed Standards for Efficiency and Fairness*, Professor Atwood offers an overview of the UFLAA's history, the problems to which it responds, and the hard choices that had to be made in its drafting.

Arbitration has a bad reputation in large segments of the legal profession and legal academy. It is associated with provisions in consumer and employment agreements—mandatory arbitration with class action waivers meant to make challenges to improper behavior both private and impractical, and there are documented instances of the process being run by private arbitration companies with suspiciously one-sided win rates for the business or employer. It is also associated with Supreme Court decisions that have read the Federal Arbitration Act in controversially broad ways, in the process making it very hard to challenge arbitration provisions in court on grounds of unconscionability, lack of consent, or related grounds. Arbitration was also recently in the news when the Republican Congress and the current President combined to overturn a Consumer Financial Protection Bureau rule that would have limited use of such provisions in financial documents. Why would anyone want to have that unpopular mess in family law?

Atwood provides a compelling explanation to the naysayers. As she explains, just as family law agreements are distinct from commercial agreements, arbitration in the family law context is different from arbitration in the commercial context. Unlike commercial arbitration, which typically arises from mass-produced, take-it-or-leave it standardized forms (the boilerplate agreements that are part and parcel of credit card applications, cell phone contracts, and low-level corporate employment), family law arbitration generally emerges out of negotiations preceding separation or divorce, or as a term in a premarital, marital, or separation agreement. There is a hope that in the family law context, arbitration can offer the advantages frequently advertised on its behalf, without the problems that have arisen in (commercial) practice.

As Atwood notes, the non-public nature of arbitration might be especially attractive to disputing couples, and the process is often quicker and cheaper than litigation. At the same time, as Atwood points out, there is at least a tension, and perhaps a distinct misfit, between arbitration and family law. Typically, arbitration is accompanied by the absence of a record and very limited opportunities for judicial review. Understandably, family courts are reluctant to follow these typical arbitration procedures—at least for decisions affecting children (custody, relocation, child support), where the courts claim a strong *parens patriae* power and responsibility. While some might argue that arbitration could simply be modified to suit the particularities of the family law context, this too raises questions. Under the Supreme Court's robust reading of the Federal Arbitration Act, it is unclear whether any modification of arbitration for family law purposes will be allowed.

Nevertheless, the UFLAA is intended to address these concerns in order to reap the benefits of arbitration in the family law context. As the article indicates, under the UFLAA, pre-dispute agreements to arbitrate child-related conflicts would generally need to be reaffirmed after the dispute arises to be valid; an arbitrator is required to request a verbatim recording of the parts of an arbitration hearing concerning child-related disputes; and arbitrators in family law cases would have the power to make temporary orders or awards. For most purposes, though, the UFLAA is meant to incorporate, or at least be consistent with existing state and federal arbitration procedures and standards.

The Article provides a clear description of this emerging development in family law. Also, as Atwood observes, the growing use and recognition of arbitration in family law should be seen alongside other developments in family law processes: including greater use of mediation and new experiments in many states with “collaborative law.” And the growing pluralism in family law procedure is even more evident when one adds in the distinction between secular and religious arbitration, and a seeming increase of the use of choice of law and choice of forum provisions in premarital, marital, and separation agreements. Professor Atwood’s article offers a useful overview of a new uniform law, as well as a good introduction to the alternative dispute resolution methods that are becoming ever more important in family law.

Cite as: Brian Bix, *Arbitration and Procedural Pluralism in Family Law*, JOTWELL (November 22, 2017) (reviewing Barbara A. Atwood, *The New UFLAA: Providing Needed Standards for Efficiency and Fairness*, 39(4) **Family Advocate** 38 (2017), available at SSRN), https://family.jotwell.com/arbitration-and-procedural-pluralism-in-family-law/.