

**FAMILY LAW SECTION  
OF THE  
HAWAII STATE BAR ASSOCIATION**

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January 31, 2017

TO: Senator Gilbert S.C. Keith-Agaran, Chair  
Senator Karl Rhoads, Vice Chair  
Senate Committee on Judiciary and Labor

FROM: LYNNAE LEE, Chair  
TOM TANIMOTO, Vice-Chair  
Family Law Section of the Hawaii State Bar Association

HEARING DATE: February 1, 2017 at 9 a.m.

RE: Testimony in Support of SB335 Relating to the  
Uniform Family Law Arbitration Act With Amendments

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Dear Chair Keith-Agaran, Vice Chair Rhoads, and fellow committee members:

We are writing to support SB335 with amendments for application to custody and visitation matters. This testimony is written on behalf of the Family Law Section of the Hawaii State Bar Association which is comprised of approximately 140 members statewide all practicing and/or expressing an interest in Family Law.

Alternative Dispute Resolution (ADR), is simply put, anything which helps settle or resolve a case out of court. ADR is often touted by practitioners as a viable and cost-effective alternative to litigation in any field of law, but family law is unique, where the often enflamed personalized passions of the litigants could especially benefit from a process where conflict and the adversarial nature of litigation is minimized.

There are many opportunities for Family Court litigants to seek a settlement prior to engaging in a nasty trial. Before any party can file a motion asking the Court to set a trial date, mediation is invariably required pursuant to Rule 94 of the Hawaii Family Court Rules. The Court also has a built-in process for a settlement conference. Trial dates can be months out and trials requiring longer than a day or two can take months to schedule, to say nothing of the additional time often required by the Court to review the evidence and ultimately issue a decision. It should be noted that the Court has very limited resources to schedule consecutive trial days, hence trials can often take months to conclude. Mediation and Settlement Conferences though, lack any decision making impetus.

Arbitration as one type of ADR, can provide a resource to litigants and their attorneys to present their case and have matters fully decided. Family Court litigants should be provided with as many options as possible to avoid a costly and often times emotionally draining trial.

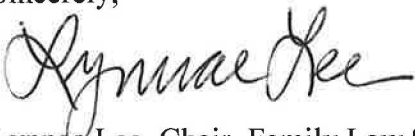
However, arbitration has its shortcomings, in that litigants who do not prevail may be very dissatisfied by the process because an actual sitting judge did not decide the matter, regardless of the arbitrator's experience and high qualifications. This mindset can result in triggering a proceeding in Family Court to determine the status of the arbitration award. Consequently, arbitration could have the benefit of eliminating some trials and easing the Family Court's caseload, while at the same time increasing the Family Court's caseload with proceedings to confirm or set aside arbitration awards.

SB355 starts everything on the right track, but then unfortunately, it excludes custody matters from arbitration and it is for this reason that the Family Law Section supports SB355 subject to amendment which would allow custody matters to be arbitrated. SB355 is fine as is with respect to cases that do not involve children or are contested only as to matters not concerning children. However, some of the most contested cases in Family Court involve both money and children, and it is for this reason that the Family Law Section strongly opposes the afore-said exclusionary provision. Divorces have several parts, namely, the divorce, custody, property and support issues. Arbitrating all aspects of a contested divorce *except* custody matters, will likely lead to a Family Court bench trial on custody in any event, thereby resulting in piecemeal litigation which is what everybody seeks to avoid. Such litigants would then end up paying for two trials, one trial that gets arbitrated and one trial for anything that cannot be arbitrated. It also goes without saying that property awards are often tailored in accordance with custody/visitation awards – it therefore makes sense for everything to be heard together instead of being bifurcated which in and of itself is a rare occurrence subject to a showing of good cause. *See HRS 580-47(a)*.

For the reasons stated above, the Family Law Section supports SB355 provided it includes application to custody and visitation matters.

Thank you for the opportunity to provide testimony on this bill and for your careful consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Lynnae Lee". The signature is fluid and cursive, with a large initial "L".

Lynnae Lee, Chair, Family Law Section  
Tom Tanimoto, Vice-Chair, Family Law Section

**NOTE: *The comments and recommendations submitted reflect the position/viewpoint of the Family Law Section of the HSBA. The position/viewpoint has not been reviewed or approved by the HSBA Board of Directors, and is not being endorsed by the Hawaii State Bar Association.***

**TESTIMONY OF THE  
COMMISSION TO PROMOTE UNIFORM LEGISLATION**

**ON S.B. No. 335**

**RELATING TO THE UNIFORM FAMILY LAW ARBITRATION ACT.**

**BEFORE THE SENATE COMMITTEE ON JUDICIARY AND LABOR**

**DATE:** Wednesday, February 1, 2017 at 9:00 a.m.  
Conference Room 016, State Capitol

**PERSON(S) TESTIFYING:** ELIZABETH KENT or KEN TAKAYAMA  
Commission to Promote Uniform Legislation

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Chair Keith-Agaran and Members of the Committee:

Thank you for the opportunity to submit testimony in support of S.B. No. 335, which enacts the Uniform Family Law Arbitration Act (UFLAA). My name is Elizabeth Kent and I am one of Hawaii's Uniform Law Commissioners. I was on the committee that drafted the UFLAA.

States' laws vary when it comes to arbitrating family law matters and the purpose of the UFLAA is to lay a foundation for arbitration of family law issues and to standardize the arbitration of family law. Significantly, the UFLAA provides protections for victims of domestic violence and addresses issues that are specific to family law cases. Such important issues as the voluntariness of submission to arbitration, temporary awards, definition of the arbitrator's powers, and necessary qualifications for the arbitrator are addressed.

I have worked in the field of Alternative Dispute Resolution for over 20 years and I believe that people are looking for solutions and options. Currently people who have a family law dispute may go to the Family Court for resolution

(litigation), or they may mediate their case (Chapter 658H, Hawaii Revised Statutes), or they may choose to resolve it through Collaborative Law (Chapter 658G, Hawaii Revised Statutes). Family Law Arbitration provides the people of Hawaii with another option to use when they have problems and under this bill they may select an arbitrator, present evidence to the arbitrator, and receive a decision from the arbitrator. Materials from the Uniform Law Commission about the UFLAA are attached to this testimony.

Thank you for the opportunity to present testimony in support of Family Law Arbitration and this bill. I hope it is enacted.

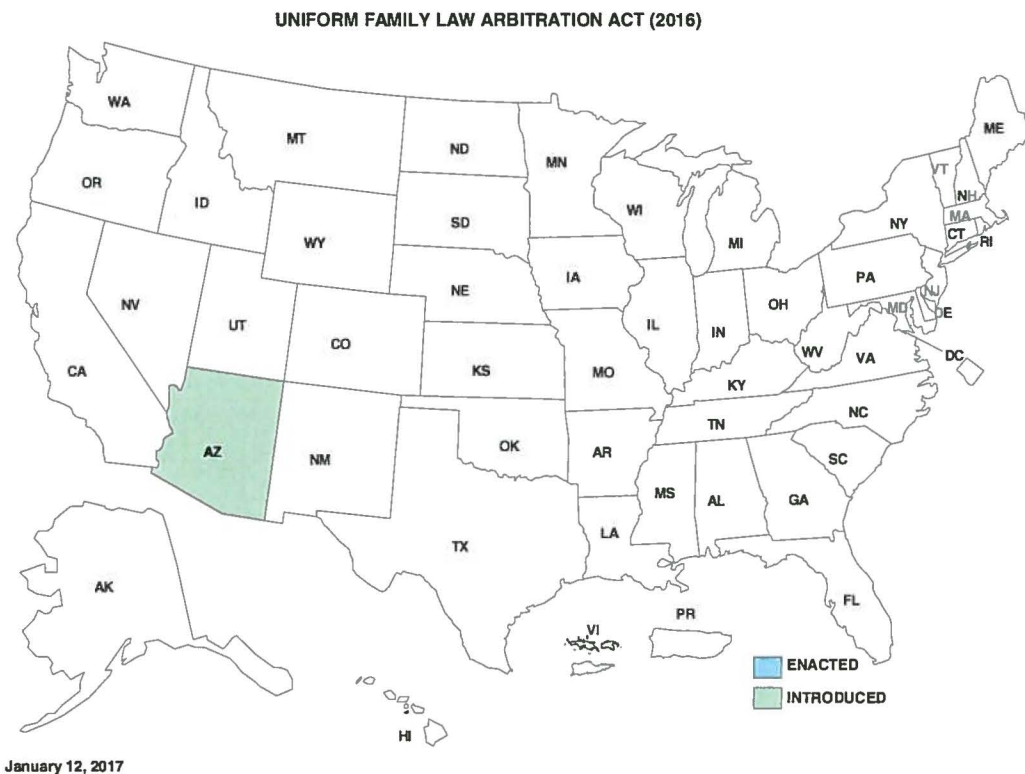


A Few Facts about  
**THE UNIFORM FAMILY LAW ARBITRATION ACT (2016)**

**PURPOSE:** Arbitration is a method of alternative dispute resolution in which the parties choose a neutral third party to resolve their disputed issue. 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. Current state statutes vary widely in this area. 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.

**ORIGIN:** Completed by the Uniform Law Commission in 2016.

**ENACTMENTS:** Not yet enacted.



For further information about UFLAA, please contact ULC Legislative Counsel Kaitlin Dohse at (312) 450-6615 or [kdohse@uniformlaws.org](mailto:kdohse@uniformlaws.org).



## THE UNIFORM FAMILY LAW ARBITRATION ACT

### - A Summary -

The Uniform Family Law Arbitration Act (UFLAA) creates a statutory scheme for the arbitration of family law disputes. Arbitration is a private process that parties may use to resolve a dispute rather than going to court. During an arbitration, a neutral third party, the arbitrator, hears arguments from the parties, evaluates evidence, and makes a decision on their dispute. Although arbitration has long been used in the commercial context, it has recently begun to gain popularity in the family law sphere.

Under the UFLAA, a “family law dispute” is a contested issue arising under the state’s family or domestic relations law. Family law disputes typically include disagreements about marital property, spousal support, child custody, and child support.

Under the Act, an arbitrator may not:

- grant a divorce;
- terminate parental rights;
- grant an adoption or guardianship of a child or incapacitated person; or
- determine the status of a child in need of protection.

The Act sets out arbitration procedures chronologically, from defining an arbitration agreement to providing standards for vacating a confirmed award. Many of the provisions of the UFLAA will be familiar to arbitrators and practitioners in the dispute resolution field. This is because the UFLAA is based in part on the Uniform Arbitration Act (1955) and Revised Uniform Arbitration Act (2000). The UFLAA’s provisions for arbitrator disclosure, award, appeals, and arbitrator immunity, among others, are drawn substantially from these earlier uniform acts.

Since family law disputes are different from traditional commercial disputes, however, the UFLAA contains some key provisions that do not appear in the Uniform Arbitration Act or Revised Uniform Arbitration Act. Many of these differences have to do with protecting vulnerable individuals during the arbitration process, such as children and victims of domestic violence. For instance, unless waived by the parties, the UFLAA requires arbitrators to be trained in detecting domestic violence and child abuse before arbitrating a family law dispute. If the arbitrator detects abuse, the arbitrator must stay the arbitration and refer the dispute to court. Likewise, if a party is subject to a protection order, the dispute will be referred to court for resolution.

Importantly, the UFLAA requires close judicial review of arbitration awards determining child-related issues. While an award regarding property or spousal support is subject to limited judicial review, a child-related award may not be confirmed by a court unless the court finds that the award complies with applicable law and is in the best interests of the child. Also, *de novo* review of child-related awards is a bracketed alternative that a state can choose to enact. In

addition, some states may want to exclude child-related disputes from arbitration altogether, and the Act provides an opt-out alternative for that purpose.

Another unique provision of the UFLAA relates to agreements to arbitrate a dispute that may arise in the future (often referred to as “pre-dispute agreements”). Pre-dispute agreements are generally permissible under the UFLAA, in accordance with the UAA and the RUAA. If parties agree to arbitrate a future child-related dispute, however, then the parties must affirm the agreement to arbitrate at the time of the dispute before proceeding to arbitration.

After the court confirms an award, a party may request a modification under state law governing post-decree modifications. If the parties agree, modification actions can be resolved by arbitration.

The UFLAA is an overlay statute meant to work together with the state’s existing choice-of-law rules and contractual arbitration law. It provides a comprehensive, clear framework for the arbitration of family law disputes, and should be enacted in every state.

For more information about the UFLAA, please contact ULC Legislative Counsel Kaitlin Dohse at (312) 450-6615 or [kdohse@uniformlaws.org](mailto:kdohse@uniformlaws.org).



## WHY YOUR STATE SHOULD ADOPT THE UNIFORM FAMILY LAW ARBITRATION ACT (2016)

The Uniform Family Law Arbitration Act (UFLAA) provides necessary guidelines for the arbitration of family law matters. As popularity grows for this form of alternative dispute resolution, enacting the UFLAA ensures predictability and consistency. Some features of the UFLAA include:

- ***The UFLAA offers an efficient alternative for the resolution of family law disputes.*** The Act gives parties a private, efficient method to solve family law problems. The UFLAA also gives parties control over selection of their arbitrator, and thus, more control over the timing of their dispute resolution process.
- ***The UFLAA seamlessly integrates the state's existing contractual arbitration law.*** The Act looks to the state's existing statutory law and procedural rules for contractual arbitration to fill in gaps not covered by the UFLAA.
- ***The UFLAA guards the role of the courts with respect to children.*** Arbitration awards regarding child custody or child support cannot be confirmed unless the court finds that the award complies with applicable law and is in the best interests of the child. If the parties are arbitrating a child-related dispute under the Act and the arbitrator has a reasonable basis to believe the child is subject to abuse or neglect, then the arbitrator ends the arbitration, and the matter will be sent to the court for resolution.
- ***The UFLAA protects victims of domestic violence.*** The Act provides safeguards to ensure that one party to the arbitration will not intimidate or overpower another. For example, a party to the arbitration process may be accompanied by a friend or supporter who will not be called as a witness or act as an advocate. All arbitrators must also be attorneys with domestic violence training. If the arbitrator detects domestic violence, the arbitrator will stay the arbitration and refer the parties to court.
- ***The UFLAA addresses post-decree modifications.*** The Act allows a party to request to modify an award or judgment after it has been confirmed by the court. The modification must be based on facts occurring after confirmation and may be resolved judicially or, if the parties agree, by arbitration.

For more information about the UFLAA, please contact ULC Legislative Counsel Kaitlin Dohse at (312) 450-6615 or [kdohse@uniformlaws.org](mailto:kdohse@uniformlaws.org).



**TESTIMONY OF THOMAS D. FARRELL**

Regarding Senate Bill 335, Relating to the Uniform Family Law Arbitration Act

Senate Committee on Judiciary and Labor  
Senator Gilbert S. C. Keith-Agaran, Chair

Wednesday, February 1, 2016 9:00 a.m.  
Conference Room 016, State Capitol

Good morning Senator Keith-Agaran and Members of the Committee:

I oppose SB 335 as presently drafted and respectfully submit that, in the form before you today, this bill would actually discourage the arbitration of family law matters.

A bit of background may be in order. Quite frankly, we don't need the UFLAA at all, in my opinion. We have a Uniform Arbitration Act at Chapter 658A, Hawaii Revised Statutes, and it has served us adequately over the years. Not many family law attorneys nor clients care to arbitrate---primarily because it is necessary to pay the arbitrator. I've only been able to get a couple of cases to arbitration over the past ten years. Nonetheless, there are some advantages to arbitration, and I encourage my clients to consider it. Moreover, various family court judges, including Senior Family Court Judge Mark Browning, have said that they are willing to confirm arbitration decisions in family court cases, so long as there is a reasonable basis for the arbitrator's decision. No one has ever refused or said that he or she would refuse to do so.

It was hoped that the adoption of the UFLAA would encourage more arbitration of family law disputes. Maybe; maybe not.

The problem with the draft before you, however, is that it does not track the UFLAA because it explicitly excludes child custody and visitation disputes. I have no idea why anyone thinks that those issue cannot or should not be submitted to arbitration, if the parties agree to do so. The uniform act makes no such exclusion.

Ironically, the two cases that I took to arbitration were both child custody/visitation disputes. If the version of the UFLAA before you in this bill had been law at the time, I wouldn't have been able to take them to arbitration.

Some might say that you can still take your financial issues to arbitration, and submit your child custody issues to court, but that isn't very practical. Who wants to have two tribunals deciding different parts of a case? Moreover, financial issues and custody issues are often intertwined.

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The most obvious example is that whether A will pay child support to B or vice versa is dependent upon who has custody of the child.

So I would strongly urge this committee to amend this bill to return to the text of the UFLAA which includes child custody and visitation, and if that is not palatable, then simply let this bill die in your committee.