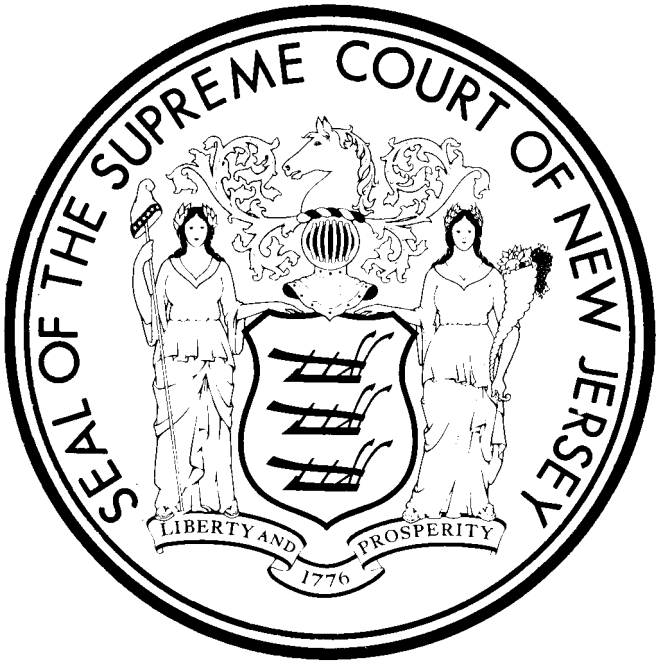
AD HOC COMMITTEE ON THE ARBITRATION OF FAMILY MATTERS



February 9, 2015

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I. Introduction

The Supreme Court Ad Hoc Committee on the Arbitration of Family Matters ("Ad Hoc Committee") was established to formulate rules, forms, and procedures to address arbitration in family matters. The Ad Hoc Committee recommends that the Supreme Court adopt the proposed rule amendment and new rules contained in this report. Also in this report, the Ad Hoc Committee proposes form documents associated with arbitration in family law matters. The Ad Hoc Committee developed the proposed rules and enclosed forms with input from experts on family law and on arbitration and alternative dispute resolution.

Where rule changes are proposed, deleted text is bracketed **[as such]**, and added text is underlined **as such**. No change to a paragraph of the rule is indicated by "**. . . no change**."

II. Background of the Ad Hoc Committee

As directed in Fawzy v. Fawzy, 199 N.J. 456, 482 (2009), the Supreme Court Family Practice Committee (Committee) was charged with developing forms and procedures for arbitration in family law matters pursuant to the Uniform Arbitration Act (UAA), N.J.S.A. 2A:23B-1 to 32. Johnson v. Johnson, 204 N.J. 529 (2010) addressed the application of the Alternative Procedure for Dispute Resolution Act (APDRA), N.J.S.A. 2A:23A-1 to 19, in family law matters as well as required record keeping when addressing custody and parenting time issues. In furtherance of the Court's charge in Fawzy, with additional considerations under Johnson, the Committee developed forms and a script in its 2009-2011 cycle, and again in its 2011-2013 cycle. Proposed rules, forms, and procedures were developed by the Committee and presented to the Court. Each attempt resulted in a submission that was rejected by the Court due to differences in opinion from the public on the intent of the applicable case law and statutes.

Members of the public argued that the proposed forms were confusing, complicated and lengthy, made the arbitration process too similar to litigation, did not provide procedures for the review and enforcement of awards, and were inconsistent and unclear.

This Ad Hoc Committee was selected to address the concerns of the public and develop a procedure that is acceptable to all parties. The Ad Hoc Committee is comprised of representatives from the Judiciary, the Family Bar, and the Civil Bar, including experts on arbitration. The Ad Hoc Committee drafted rules, a questionnaire, a disclosure, and two form agreements to formalize the procedures and to address the concerns that were previously raised through the public comments.

III. Discussion and Recommendation

The proposed agreements address arbitration under the UAA and alternate dispute resolution under the APDRA. The form agreements include language that is required to adhere to the Court's holdings in Fawzy and Johnson, and suggested clauses to assist parties in resolving potential issues at the outset of the proceedings.

The form agreements contain Explanatory Notes as guides for attorneys and parties who are less familiar with arbitration/alternate dispute resolution processes. For the same reason, the form agreements contain optional sections that incorporate important language from the UAA and the APDRA. Attorneys and parties may decide to include those provisions in their agreements for ready reference to the implications of agreeing to an arbitration/alternate dispute resolution process.

Importantly, the form agreements allow the parties to agree on standards of review, except those that cannot be waived by statute, and offer options for parties to consider including: reconsideration (Attachment C and D at paragraph 34); expansion of the scope of judicial review

under the UAA (Attachment C at paragraph 38); and an appeal to an appellate arbitrator/umpire (Attachment C at paragraph 38 and Attachment D at paragraph 39).

The form agreements also contain provisions about enforcing *pendente lite* awards of the arbitrator/umpire (Attachments C and D at paragraphs 27 to 29). These optional provisions dovetail with proposed new Rule 5:3-8 about enforcing awards. The prior proposed agreements and rules did not address this important matter.

During this term of the Ad Hoc Committee, the Appellate Division decided Minkowitz v. Israeli, 433 N.J. Super. 111 (App. Div. 2013) regarding the dual role of arbitrator and mediator. Based upon its importance, the Ad Hoc Committee also considered that issue. The proposed agreements include an acknowledgment by the parties that the law does not favor an arbitrator/umpire also serving in the dual role of mediator in the same proceeding. The proposed agreements do, however, contain waiver language for use if the parties, after having been advised of the Minkowitz issue, still decide to consent for the arbitrator/umpire to also serve as mediator (Attachments C and D at paragraphs 12(D) and 13).

The Ad Hoc Committee recommends that both of these agreements, along with a questionnaire and disclosure form, be appended to the Rules of Court for use in the arbitration of family law matters.

IV. Proposed Rule Amendments

A. Proposed Amendments to R. 5:1-4 - Differentiated Case Management in Civil Family Actions - Arbitration Track

Differentiated Case Management in Civil Family Actions to Provide for a New Arbitration Track

The Ad Hoc Committee proposes amendments to R. 5:1-4, which defines the standards for assignment to various case management tracks. This proposed amendment creates a new arbitration track assignment in the event parties enter into an agreement to arbitrate issues presented in actions pending before the Family Part. Since the parties are agreeing to arbitrate, the court will not be able to reassign the track for good cause as set forth in the proposed amendments to paragraphs (b) and (c). In the event the parties agree to arbitrate, the arbitration would proceed in accordance with the procedure set forth in new proposed R. 5:1-5, below, which defines the scope, prerequisites and conduct of pending litigation.

Rule 5:1-4. – Differentiated Case Management in Civil Family Actions

(a) Case Management Tracks; Standards for Assignment. Except for summary actions, every civil family action shall be assigned, subject to reassignment as provided by paragraph (c) of this rule, to one of the following tracks:

(1) Priority Track . . . no change

(2) Complex Track . . . no change

(3) Expedited Track . . . no change

(4) Standard Track. Any action not qualifying for assignment to the Priority Track, Complex Track, [or] Expedited Track, or Arbitration Track shall be assigned to the Standard Track.

(5) Arbitration Track. At any point in a proceeding, the parties may agree to execute a Consent Order or Agreement to arbitrate or resolve the issues pending before the court pursuant to the Uniform Arbitration Act, N.J.S.A. 2A: 23B-1 *et seq.*, the New Jersey Alternative Procedure for Dispute Resolution Act, N.J.S.A. 2A:23A-1, et. seq., or any other agreed upon framework for arbitration of disputes between and among parties to any proceeding arising from a family or family-type relationship except as provided in R. 5:1-5(a)(1). If the parties elect to arbitrate, the litigation shall be assigned to the Arbitration Track, and the arbitration shall proceed pursuant to R. 5:1-5.

(b) Procedure for Track Assignment. The Family Presiding Judge or a judge designated by the Family Presiding Judge shall make the track assignment as soon as practicable after all parties have filed Family Case Information Statements required by R. 5:5-2 or after the case management conference required by R. 5:5-7, whichever is earlier. The track assignment, however, shall not precede the filing of the first responsive pleading in the action. In making the track assignment, due consideration shall be given to an attorney's request for track assignment. If all the attorneys agree on a track assignment, the case shall not be assigned to a different track except for good cause shown and after giving all attorneys the opportunity to be heard, in writing or orally. The good cause exception shall not apply to a case assigned to the Arbitration Track. If it is not clear from an examination of the information provided by the parties which track assignment is most appropriate, the case shall be assigned to a track other than the Arbitration

Track that affords the greatest degree of management. The parties shall be advised promptly by the court of the track assignment.

(c) Track Reassignment. Except with respect to assignment to the Arbitration Track, an action may be reassigned to a track other than that specified in the original notice to the parties either on the court's own motion or on application of a party. Unless the court otherwise directs, such application may be made informally to the Family Presiding Judge or to a judge designated by the Family Presiding Judge and shall state with specificity the reasons therefor. An action assigned to the Arbitration Track may be reassigned to the track assignment most appropriate if the parties mutually elect to opt out of the Arbitration Track by Consent Order or Agreement.

Note: Adopted January 21, 1999 to be effective April 5, 1999; paragraph (b) amended August 1, 2006 to be effective September 1, 2006; subparagraph (a)(3) amended July 21, 2011 to be effective September 1, 2011; subparagraph (a)(4) amended; subparagraph (a)(5) adopted, and paragraphs (b) and (c) amended _____to be effective _____.

V. Proposed New Rules

A. Proposed New R. 5:1-5 - Arbitration

Proposed Scope, Prerequisites and Conduct of Pending Litigation in Arbitrated Cases

The Ad Hoc Committee proposes new R. 5:1-5, which sets out the procedure and forms to be used in family matters where the parties agree to arbitrate as referenced in the new arbitration track set forth in the proposed amendment to R. 5:1-4, above. Notable policy recommendations include:

- Subparagraph (a)(1) – This subparagraph states that the rule governs an Agreement or Consent Order under the UAA, APDRA, or any other agreed upon framework and lists case types where arbitration is inappropriate.
- Subparagraph (a)(2) - Prior to the execution of an Agreement or Consent Order, each party will be required to execute the proposed Arbitration Questionnaire, recommended for inclusion in the Appendix to the Rules.[1]
- Subparagraph (a)(3), (4), and (5) – These subparagraphs set forth the requirements of the agreement to arbitrate.
- Subparagraph (a)(6) - An arbitration should be pending for "no more than one year following arbitration track assignment, which term may be modified by the court for good cause shown."

[1] A previous version of this Arbitration Questionnaire was appended to the Committee's 2009-2011 Rules Cycle Report as well as the 2011-2013 Rules Cycle Report. See 2009-2011 Family Practice Committee Report at 102-05 and 2011-2013 Family Practice Committee Report at 71.

- Subparagraph (a)(7) - Cases assigned to the arbitration track should be given scheduling consideration by the court when fixing trial dates in other matters.
- Subsection (a)(8) – This subparagraph requires the parties to file a certification under R. 4:5-1(b)(2) when entering into an agreement to arbitrate.
- Paragraph (e) - Examples of forms to arbitrate pursuant to N.J.S.A. 2A:23A-1 and N.J.S.A. 2A:23B-1 are referenced and proposed for inclusion in the Appendix to the Rules.

[New] R. 5:1-5. Arbitration

[New] R. 5:1-5. Arbitration

(a) Scope of Rule, Prerequisites, and Conduct of Pending Litigation.

(1) This Rule shall govern all Agreements to Arbitrate ("Agreements") and all Consent Orders to Arbitrate ("Consent Orders"), including but not limited to those entered into pursuant to the Uniform Arbitration Act, N.J.S.A. 2A: 23B-1, *et seq*., the New Jersey Alternative Procedure for Dispute Resolution Act, N.J.S.A. 2A:23A-1, et. seq., or any other agreed upon framework for arbitration or resolution of disputes between and among parties to any proceeding heard in the family part, except: (A) the annulment or dissolution of the relationship; (B) actions involving the Division of Child Protection and Permanency; (C) domestic violence actions; (D) juvenile delinquency actions; (E) family crisis actions; and (F) adoption actions.

(2) Prior to the execution of any Agreement or entry of a Consent Order, each party shall review and execute the Arbitration Questionnaire, which is set forth in Appendix __[proposed as Attachment A in this report], and each party's questionnaire shall be attached to the Agreement or Consent Order.

(3) Insofar as an Agreement or Consent Order relates to a pending family proceeding, the Agreement or Consent Order shall state:

(A) the parties understand their entitlement to a judicial adjudication of their dispute and are willing to waive that right;

(B) the parties are aware of the limited circumstances under which a challenge to the award may be advanced and agree to those limitations;

(C) the parties have had sufficient time to consider the implications of their decision to arbitrate; and

(D) the parties have entered into the Agreement or Consent Order freely and voluntarily, after due consideration of the consequences of doing so.

(4) In addition, in all family proceedings involving child-custody and parenting-time, issues, the Agreement or Consent Order shall provide that:

(A) a record of all documentary evidence shall be kept;

(B) all testimony shall be recorded verbatim; and

(C) the award shall state, in writing, findings of fact and conclusions of law with a focus on the best-interests of the child standard.

(5) Further, in all family proceedings involving child support issues, the Agreement or Consent Order shall provide that the award shall state, in writing, findings of fact and conclusions of law with a focus on the best-interests standard.

(6) Any action pending at the time that an Agreement or Consent Order to arbitrate is reached shall be placed on the Arbitration Track referenced in R. 5:1-4 for no more than one year following Arbitration Track assignment, which term may be modified by the court for good cause shown.

(7) Cases assigned to the Arbitration Track should be given scheduling consideration when fixing court appearances in other matters.

(8) If the parties have entered into an Agreement or Consent Order to arbitrate or an arbitration award has issued, the certification filed pursuant to R. 4:5-1(b)(2) shall so state.

(b) Appendix _ [proposed as Attachment D in this report] is an example of a form of agreement to arbitrate pursuant to N.J.S.A. 2A: 23B-1 *et seq*.

(c) Appendix _ [proposed as Attachment C in this report] is an example of a form of agreement to arbitrate pursuant to N.J.S.A. 2A: 23A-1 *et seq*.

Note: Adopted _____, to be effective _____.

B. Proposed New R. 5:3-8 – Review and Enforcement of Arbitration Awards

Review and Confirmation Under Applicable Statutes, Requirements of Case Law

The Ad Hoc Committee proposes new R. 5:3-8, which sets out the procedure for review and enforcement of arbitration awards in family matters where the parties agree to arbitrate as referenced in the new arbitration track set forth in the proposed amendment to R. 5:1-4, above. Notable policy recommendations include:

- Subparagraph (a) – This subparagraph outlines the procedure for confirming a final or interim economic award.
- Subparagraph (b) – This subparagraph outlines the procedure for confirming a final or interim custody and parenting time award and identifies the record keeping requirements.
- Subparagraph (c) – This subparagraph outlines the procedure for confirming a final or interim child support award and the requirement that the court conduct a hearing if there is evidential support of harm to a child.

[New] R. 5:3-8. Review and Enforcement of Arbitration Awards

[New] R. 5:3-8. Review and Enforcement of Arbitration Awards

(a) Confirmation of Final or Interim Economic Awards. Either party may apply to the court by motion, the return date for which may be shortened by the court pursuant to R. 1:6-3(a), or summarily pursuant to R. 5:4-1 if no other family action is pending, to confirm a final or interim arbitration award. The court shall confirm and enter a judgment in conformity with the final award of the arbitrator, or confirm and enter a *pendente lite* order in conformity with an interim award of the arbitrator, unless the court determines to correct, modify or vacate the final or interim arbitration award pursuant to the procedures and standards set forth in the Uniform Arbitration Act, N.J.S.A. 2A: 23B-23 or 24 (unless the parties have expanded the scope of review under N.J.S.A. 2A:23B-4(c)); the New Jersey Alternative Procedure for Dispute Resolution Act, N.J.S.A. 2A:23A-13 or 14; other applicable statute; or any other agreed upon framework.

(b) Confirmation of Final or Interim Custody and Parenting Time Awards. Either party may apply to the court by motion, the return date for which may be shortened by the court pursuant to R. 1:6-3(a), or summarily pursuant to R. 5:4-1 if no other family action is pending, to confirm a final or interim child custody and parenting time arbitration award. The court shall confirm and enter a judgment in conformity with the final custody and parenting time award of the arbitrator, or confirm and enter a *pendente lite* order in conformity with an interim custody and parenting time award of the arbitrator unless the court finds that:

(1) a record of all documentary evidence has not been kept; or

(2) the award does not contain detailed written findings of fact and conclusions of law; or

(3) that a verbatim record of the proceedings was not made, in which case any interim or final award shall be subject to vacation and review *de novo* by the court; or

(4) there is evidential support establishing a *prima facie* case of harm to a child, in which event the court shall conduct a hearing and if, after that hearing, there is a finding of harm to a child, the parties' choice of arbitration shall be invalidated, the court shall vacate the interim or final award and determine *de novo* the child's best interest. If there is no finding of harm to a child, the court shall confirm and enter a judgment in conformity with the final award of the arbitrator, or confirm and enter a *pendente lite* order in conformity with an interim award of the arbitrator, unless the court determines to correct, modify or vacate the final or interim arbitration award pursuant to the procedures and standards set forth in the Uniform Arbitration Act, N.J.S.A. 2A: 23B-23 or 24 (unless the parties have expanded the scope of review under N.J.S.A. 2A:23B-4(c)); the New Jersey Alternative Procedure for Dispute Resolution Act, N.J.S.A. 2A:23A-13 or 14; other applicable statute; or any other agreed upon framework.

(c) Confirmation of Final or Interim Child Support Awards.

Either party may apply to the court by motion, the return date for which may be shortened by the court pursuant to R. 1:6-3(a), or summarily pursuant to R. 5:4-1 if no other family action is pending, to confirm a final or interim child support arbitration award. The court shall confirm and enter a judgment in conformity with the final child support arbitration award of the arbitrator, or confirm and enter a *pendente lite* order in conformity with an interim child support award of the arbitrator unless the court finds that there is evidential support establishing a *prima facie* case of harm to a child, in which event the court shall conduct a hearing and if, after that hearing, there is a finding of harm to a child, the parties' choice of arbitration shall be invalidated, the court shall vacate the interim or final award and determine *de novo* the child's

best interest. If there is no finding of harm to a child, the court shall confirm and enter a judgment in conformity with the final award of the arbitrator, or confirm and enter a *pendente lite* order in conformity with an interim award of the arbitrator, unless the court determines to correct, modify or vacate the final or interim arbitration award pursuant to the procedures and standards set forth in the Uniform Arbitration Act, N.J.S.A. 2A: 23B-23 or 24 (unless the parties have expanded the scope of review under N.J.S.A. 2A:23B-4(c)); the New Jersey Alternative Procedure for Dispute Resolution Act, N.J.S.A. 2A:23A-13 or 14; other applicable statute; or any other agreed upon framework.

Note: Adopted _____, to be effective _____.

VI. Proposed New Appendix

A. Proposed New Appendix - Arbitration Questionnaire (Attachment A)

The Ad Hoc Committee developed a questionnaire, which contains questions to be reviewed by parties in connection with their execution of a Consent Order or Agreement to Arbitrate in family law matters as directed in Fawzy v. Fawzy, 199 N.J. 456, 482 (2009). The questionnaire contains 14 questions and addresses waiver, as well as the rights of the parties that are entering arbitration or alternate dispute resolution. The Ad Hoc Committee recommends appending the proposed arbitration questionnaire (Attachment A) to the Rules of Court.

B. Proposed New Appendix – Arbitrator/Umpire Disclosure Form (Attachment B)

The Ad Hoc Committee developed a disclosure form to be reviewed and signed by the arbitrator/umpire. This form may be used under both N.J.S.A. 2A:23A-1, et seq., and N.J.S.A. 2A:23B-1, et seq.

C. Proposed New Appendix - Agreement to Resolve Disputes Pursuant to the New Jersey Alternative Procedure for Dispute Resolution Act, N.J.S.A. 2A:23A-1, et seq., (Attachment C)

The Ad Hoc Committee developed a form agreement to resolve disputes in family law matters pursuant to N.J.S.A. 2A:23A-1, et seq. This agreement includes all required provisions under the applicable case law and statute, as well as provisions that may assist parties in resolving potential issues once alternate dispute resolution is an agreed upon path. This agreement was designed to provide guidance in creating an enforceable agreement under the APDRA. The agreement form shall have appended to it the above-referenced arbitrator/umpire

disclosure form. The Ad Hoc Committee recommends appending this proposed agreement (Attachment C) to the Rules of Court as a sample to be used to refer matters to an alternative procedure for the resolution of disputes.

D. Proposed New Appendix - Agreement to Arbitrate Pursuant to the Uniform Arbitration Act, N.J.S.A. 2A:23B-1, et seq., (Attachment D)

The Ad Hoc Committee developed a form agreement to arbitrate family law matters pursuant to N.J.S.A. 2A:23B-1, et seq. This agreement includes all required provisions under the applicable case law and statute, as well as provisions that may assist parties in resolving potential issues once arbitration is an agreed-upon path. This agreement was designed to provide guidance in creating an enforceable agreement under the UAA. The agreement form shall have appended to it the above-referenced arbitrator/umpire disclosure form. The Ad Hoc Committee recommends appending this proposed agreement (Attachment D) to the Rules of Court as a sample to be used to refer matters to arbitration.

Committee Members and Staff

Hon. Bonnie J. Mizdol, P.J.F.P.(Chair)
Dale E. Console, Esq.
Laurence J. Cutler, Esq.
Jhanice V. Domingo, Esq.
Judge Catherine I. Enright, P.J.F.P.
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Judge Eugene J. McCaffrey, Jr., P.J.Civ.
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Respectfully submitted,

Hon. Bonnie J. Mizdol, P.J.F.P., Chair

Dated: February 9, 2015

List of Attachments

A. New Rules Appendix - Arbitration Questionnaire

B. New Rules Appendix - Arbitrator Disclosure Statement

C. New Rules Appendix - Agreement to Resolve Disputes Pursuant to the New Jersey Alternative Procedure for Dispute Resolution Act, N.J.S.A. 2A:23A-1, et seq.

D. New Rules Appendix - Agreement to Arbitrate Pursuant to the Uniform Arbitration Act, N.J.S.A. 2A:23B-1, et seq.,

ATTACHMENT A

The following questionnaire shall be reviewed and executed by each party to a Family Part matter prior to execution of an Agreement or Consent Order submitting their family law matter dispute to arbitration/alternate dispute resolution.

ARBITRATION/ALTERNATE DISPUTE RESOLUTION

QUESTIONNAIRE FORM

1. Have you read the arbitration/alternate dispute resolution agreement?	Yes ☐ No ☐
2. Do you understand all of the terms of the arbitration/alternate dispute resolution agreement?	Yes ☐ No ☐
3. Do you understand that you have the right to a trial in the Superior Court of New Jersey in which a judge would render a decision, and that by entering into the arbitration/alternate dispute resolution agreement, you are waiving your right to a trial?	Yes ☐ No ☐
4. Do you understand by agreeing to arbitration/alternate dispute resolution that you are also waiving your right to appeal to the Appellate Division except in limited circumstances?	Yes ☐ No ☐
5. Do you understand that decisions rendered by the arbitrator/umpire cannot be challenged, vacated, amended or changed except in limited circumstances as may be set forth in the arbitration/alternate dispute resolution agreement?	Yes ☐ No ☐
6. Have you had ample time to reflect upon and consider the implications of your decision to arbitrate/resolve this case, rather than presenting it to a judge of the Superior Court of New Jersey?	Yes ☐ No ☐
7. Have you entered into the arbitration/alternate dispute resolution agreement freely and voluntarily without coercion or duress being exercised upon you?	Yes ☐ No ☐
8. Are you under the influence of any substances, such as drugs, medication or alcohol that may affect your ability to understand or voluntarily consent to the arbitration/alternate dispute resolution agreement?	Yes ☐ No ☐
9. Have you had sufficient time to have all of your questions answered by your attorney (if you have one) and if you are not represented by an attorney are you waiving your right to have an attorney answer any questions you may have regarding the arbitration/alternate dispute resolution agreement?	Yes ☐ No ☐

10. Do you agree to be bound by the arbitration/alternate dispute resolution agreement?	Yes ☐ No ☐
Please answer the following questions only if child support, custody and/or parenting time is an issue:	
11. Do you understand that an award pertaining to child support, custody or parenting time can be vacated if either you or the other party can establish that it threatens or poses a risk of harm to the child(ren)?	Yes ☐ No ☐
12. Do you understand that you will not be able to challenge, vacate, modify, or amend the arbitrator/umpire's award solely because you think the best interests of your child(ren) are better served by a different decision or because you disagree with it?	Yes ☐ No ☐
13. Do you understand that all documentary evidence and a record of testimony presented during the arbitration/alternate dispute resolution proceeding pertaining to the custody and parenting time of your child(ren) must be maintained and kept?	Yes ☐ No ☐
14. Do you understand that you may need to hire a court stenographer, for which you and/or the other party will bear the cost, to transcribe the proceeding or that the arbitrator will have to create a detailed record for review through some other agreed upon methodology?	Yes ☐ No ☐

I certify that I have read each and every question in this questionnaire. I certify that the foregoing answers made by me are true. I understand that if the foregoing answers made by me are willfully false, I am subject to punishment.

_____
(name)

_____

ATTACHMENT B

The following disclosure shall be reviewed and executed by the arbitrator/umpire prior to execution of an Agreement or Consent Order submitting a family law matter dispute to arbitration/alternate dispute resolution.

ARBITRATOR/UMPIRE DISCLOSURE FORM

_____vs._____

It is important that the parties have complete confidence in the arbitrator/umpire's impartiality. Therefore, any past or present relationship with the parties, their counsel, or potential witnesses, direct or indirect, whether financial, professional, social, or of any other kind must be disclosed. Any doubts should be resolved in favor of disclosure.

1. Do you have any financial or personal interest in the outcome of this arbitration/alternate dispute resolution proceeding?	Yes ☐ No ☐
2. Do you or your law firm presently represent any person in a proceeding involving any party to the arbitration/alternate dispute resolution proceeding?	Yes ☐ No ☐
3. Do you have any existing or past financial, business, professional, family or social relationships which are likely to affect your impartiality in this arbitration/alternate dispute resolution proceeding or which might reasonably create an appearance of partiality or bias?	Yes ☐ No ☐
4. Does your spouse, minor child(ren) residing in your household, your current employer, partner(s) or business associate(s) have any existing or past financial, business, professional, family or social relationships which are likely to affect your impartiality in this arbitration/alternate dispute resolution proceeding or which might reasonably create an appearance of partiality or bias?	Yes ☐ No ☐
5. Have you or your law firm represented any person against any party to the arbitration/alternate dispute resolution proceeding?	Yes ☐ No ☐
6. Have you had any professional or social relationship with counsel for any party in this proceeding or the firms for which they work?	Yes ☐ No ☐
7. Have you had any professional or social relationship with any parties or witnesses identified to date in this proceeding or the entities for which they work?	Yes ☐ No ☐
8. Have you or your law firm had any professional or social relationship of which you are aware with any relative of any of the parties to this proceeding, or any relative of counsel to this proceeding, or any of the witnesses identified to date in the proceeding?	Yes ☐ No ☐

9. Have you ever served as an arbitrator/umpire in a proceeding in which any of the identified witnesses or named individual parties gave testimony?	Yes ☐ No ☐
10. Have you ever served as an expert witness or consultant to any party, attorney, witness or other arbitrator identified in this proceeding?	Yes ☐ No ☐
11. Have any of the party representatives, law firms or parties appeared before you in past arbitration/alternate dispute resolution proceedings?	Yes ☐ No ☐
12. Have you ever sued or been sued by either party or their representative?	Yes ☐ No ☐
13. Are there any connections, direct or indirect, with any of the case participants that have not been covered by the above questions?	Yes ☐ No ☐

Should the answer to any question be "Yes," or if you are aware of any other information that may lead to a justifiable doubt as to your impartiality or independence or create an appearance of partiality, then describe the nature of the potential conflict(s) on an attached page.

I understand that the duty to disclose is a continuing duty, which requires me to disclose at any stage of the arbitration, any such interests, or relationship that may arise, or which are recalled or discovered and my failure to do so may be grounds to vacate the award.

_____
(Arbitrator/Umpire)

Dated: _____

ATTACHMENT C

Introductory Note:

The Supreme Court of New Jersey endorses the use of arbitration and other alternative dispute resolution processes for the resolution of disputes.

Parties and their counsel may use this form to develop an agreement or consent order for the resolution of certain family law disputes in a proceeding under the New Jersey Alternative Procedure for Dispute Resolution Act, N.J.S.A. 2A: 23A-1 to 19, (APDRA) and R. 5:1-5(a) of the Rules of Court. (Please note that N.J.S.A. 2A:23A-20 to 30 do not apply.)

The parties may agree to an alternative procedure for the resolution of certain family law disputes even if there is no pending family law proceeding in the Superior Court of New Jersey, Family Part.

The provisions of this form are acceptable to establish an enforceable agreement under the APDRA.

This form should not be used for proceedings under the Uniform Arbitration Act, N.J.S.A. 2A: 23B-1 et seq., (UAA) because that act has substantial procedural differences from the APDRA. A sample UAA agreement is in Appendix _.

Parties should understand that adding certain clauses may increase the time and cost of the proceeding. For example, electing to strictly apply the Rules of Evidence, permitting full discovery under the Rules of Court, requiring a full verbatim transcript of the proceeding where not required by case law, can, and likely will, significantly increase the duration and costs of the proceeding.

The explanatory notes in this form note that:

- Certain provisions are required to assure the enforceability of the agreement. (See paragraphs 1, 2 and 4.)

- Certain provisions are required in any agreement for an alternate proceeding for the resolution of family law disputes involving children, including custody, parenting time or child support issues. (See paragraphs 1, 14, 16 and 17.)

- Certain details of the process should be agreed upon to avoid later disputes. (See paragraphs 6, 7, 9, 11, 15, 18, 19, 20, 22 and 29.)

The remaining provisions are offered for consideration by the parties and their counsel in planning the alternate dispute resolution proceeding.

AGREEMENT TO RESOLVE DISPUTES PURSUANT TO THE NEW JERSEY ALTERNATIVE PROCEDURE FOR DISPUTE RESOLUTION ACT, N.J.S.A. 2A: 23A-1 *et seq.*

WHEREAS, the parties, fully aware of their rights to have their case heard by the Superior Court of New Jersey, Family Part, or to have their issues in dispute resolved in an alternative procedure, have agreed to resolve their disputes pursuant to the New Jersey Alternative Procedure for Dispute Resolution Act, N.J.S.A. 2A: 23A-1 *et seq*., (APDRA).

NOW, THEREFORE, in consideration of the mutual promises contained in this agreement, the parties agree as follows:

Knowing Waiver of Certain Rights, Consent to Alternative Procedure, Scope of the Proceeding, Entry of Judgment on the Award

1. The parties acknowledge and agree to the following:

(A) The parties understand their entitlement to a judicial adjudication of their dispute and are willing to waive that right;

(B) The parties are aware of the limited circumstances under which a challenge to the award may be advanced and agree to those limitations;

(C) The parties have had sufficient time to consider the implications of their decision to agree to the alternative procedure; and

(D) The parties have entered into this agreement freely and voluntarily, after due consideration of the consequences of doing so.

Explanatory Note:

Paragraph 1 contains the language required by Fawzy v. Fawzy, 199 N.J. 456 (2009). It assures that parties to an agreement for an alternative procedure for dispute resolution involving family law disputes, including custody, parenting time or child support issues, freely and voluntarily agree to the alternative procedure for resolving those disputes.

2. The parties agree to submit certain disputes for resolution in a proceeding by an umpire under the APDRA as follows:

☐ (A) All issues that could be raised and adjudicated in the Superior Court of New Jersey, Family Part, except those excluded from such a proceeding by R. 5:1-5(a), including *pendente lite* issues, shall be subject to the jurisdiction of and determination by the umpire pursuant to the terms and procedures of this agreement. The umpire shall determine whether an issue or dispute is within the scope of the umpire's jurisdiction.

☐ (B) The parties exclude from the proceeding the following issues: (list issues or state "none") _____.

☐ (C) The parties elect to submit the following issues to the umpire for resolution: (list issues) _____.

The umpire shall determine whether an issue or dispute is within the scope of the umpire's jurisdiction.

Explanatory Note:

The parties are required to state what issues they agree to submit to the proceeding.

Paragraph 2(A) offers the parties the option of a broad scope of issues to be submitted.

Paragraph 2(B) is to be used if the parties desire to exclude certain specified issues from the proceeding. For example, some issues may be addressed in a separate mediation process or by the court.

Paragraph 2(C) may be used to designate specific issues that the parties agree to submit to the proceeding. For example, some issues already may be settled and the proceeding will be limited to the remaining issues.

3. The parties agree that the provisions of this agreement govern the proceeding if there is a conflict between the APDRA and this agreement but only if the conflicting provisions of the APDRA may be waived.

Explanatory Note:

The parties may change some provisions of the APDRA, and may not change others. Paragraph 3 confirms the parties' intent to change only those provisions of the statute that may be changed.

4. Judgment on the award rendered by the umpire may be entered in any court having jurisdiction thereof.

Explanatory Note:

Paragraph 4 is to assure that the award is enforceable.

5. Neither party shall have the right or power to expand, narrow, amend or revoke this agreement without the consent in writing of the other party.

Explanatory Note:

Paragraph 5 is to make clear to the parties the irrevocability of their agreement.

Appointment of Umpire; Location of the Proceeding

6. The parties appoint (name(s)) _____ as the umpire. If the parties appoint more than one umpire, the word "umpire" in this agreement shall refer to the panel. The umpire has made full disclosures as required by the APDRA as detailed within Rider A to this agreement. The parties have made full disclosure of any known facts that a reasonable person would consider likely to affect the impartiality of the umpire. The parties waive any objections to the service of the umpire.

Explanatory Note:

Disclosures by both the umpire and the parties are necessary to assure there is no later objection to the umpire based on information known to anyone at the time the umpire is selected.

If the parties do not name an umpire, or a panel of umpires, or do not agree on a process for selecting an umpire, the court will need to be involved to appoint an umpire under the APDRA, N.J.S.A. 2A: 23A-9(a). The appointment of a panel of umpires will increase the cost and likely extend the duration of the proceeding.

7. The umpire's compensation and other expenses of the proceeding shall be borne by the parties as follows:

☐ (A) Equally;

☐ (B) In the following proportion: (state percentages borne by each party)

_____.

8. In any interim or final award, the umpire ☐ (A) may ☐ (B) may not reallocate the parties' percentage contribution to the umpire's compensation and other expenses of the proceeding.

9. Unless otherwise agreed, ordered, or awarded, the parties shall be responsible for paying their own attorney's fees and expenses.

10. In any interim or final award, the umpire ☐ (A) may ☐ (B) may not award reasonable attorney's fees and other reasonable expenses of the proceeding.

<u>Explanatory Note:</u>

Parties should agree on certain details of the process, such as the allocation of the responsibility for umpire compensation, including the source of payment, to avoid later disputes about those details.

Paragraphs 8 and 10 confirm what the statute provides (<u>N.J.S.A.</u> 2A: 23A-17 and 23) and offers the parties the option to bar the umpire from reallocating umpire compensation and other expenses or from awarding attorney's fees and costs.

11. The proceeding shall be conducted at (designate place) _____, or such other location as the parties agree or as selected by the umpire.

<u>Explanatory Note:</u>

Parties should agree on certain details of the process to avoid later disputes about those details.

12. The parties confirm the following role or roles for the umpire:

☐ (A) The umpire has not served, and shall not serve, in another capacity in the proceeding, in particular, the umpire has not served, and shall not serve in the dual capacity as mediator, settlement facilitator, parenting coordinator, or *guardian ad litem*; or

☐ (B) The parties shall participate in a mediation process before or during the proceeding with an independent mediator who is not serving, and shall not serve, as umpire for the parties; or

☐ (C) The parties may jointly ask the umpire at any time during the course of the proceeding to serve also as a settlement facilitator, during which time the umpire shall meet with the parties and their representatives all together, at the same time, and discuss with them various options for resolution of their disputes.

☐ (D) The parties may jointly ask the umpire at any time during the course of the proceeding to serve also as a mediator, during which time the umpire may meet with the parties and their representatives all together, at the same time, or in caucus or in any other manner that a mediator would employ, and discuss with them various options for resolution of their disputes. By electing this option, paragraph 12(D), the parties also incorporate by reference all of paragraph 13 below.

Explanatory Note:

> ***Paragraphs 12(A), (B) and (C) define the role the parties expect of the umpire. It is intended to avoid the problem that arises if, during the course of the proceeding, the parties ask the umpire to assist in settlement discussions as mediator and the umpire conducts private meetings with one party and then the other. While that is permissible, it would not then be permissible for the umpire, after unsuccessfully mediating the disputes, to resume the role of umpire and to decide disputed issues unless the parties have elected paragraph 12 (D) .***
>
> ***Otherwise, such dual roles may result in awards being vacated and the parties being required to start the process again before a new neutral.***
>
> ***Paragraph 13 is required if the parties elect paragraph 12(D) above where the umpire will serve in the dual roles of umpire and mediator at any time and in any order during the process. It makes clear the risks inherent in having an umpire assume the role of mediator and then resume the role of umpire. Failure to object to the mediator resuming the role of umpire is deemed a waiver of the right to object.***
>
> ***Further, the dual role of umpire and guardian ad litem is not permitted. See, Fawzy v. Fawzy, 199 N.J. 456 (2009).***

13. The parties acknowledge that the law does not favor an umpire also serving in the role of mediator in the same proceeding unless the parties are advised of the benefits and risks and expressly agree in writing to such a process. The parties have been advised of the holding in Minkowitz v. Israeli, 433 N.J. Super. 111 (App. Div. 2013). That case addressed some of the issues that arise when one person acts in the dual capacities of arbitrator (or umpire) and

mediator and concluded that dual roles are to be avoided unless the parties consent in writing. Issues include:

(a) The mediator meets separately with the parties and their counsel and learns information that in mediation is both confidential and privileged and that the mediator is required under section 7 of the Uniform Mediation Act, N.J.S.A. 2A: 23C-7, (UMA) not to disclose to the other party without the consent of the disclosing party;

(b) If the umpire is required by the parties to disclose such confidential and privileged information to the other party, the willingness of the parties to engage in a meaningful exchange of private confidential information during the mediation process is likely to be compromised, thereby making the mediation process itself less likely to be effective in resolving the disputes because successful mediation depends on confidentiality;

(c) The party to whom the umpire is required to disclose such confidential and privileged information can never be completely sure that they received a complete and accurate report of the information conveyed between the other party and the umpire during the confidential mediation process;

(d) Such confidential and privileged information is inadmissible in another proceeding (*see* UMA, N.J.S.A. 2A: 23C-4(c) and 7(c)), including the proceeding before the umpire;

(e) Such inadmissible, confidential and privileged information is likely to influence the decision of the umpire if the mediation is unsuccessful and the umpire is then called on to decide the disputed issues;

(f) These issues can lead to grounds for vacating an award and would require the parties to engage in a second proceeding before a different umpire.

Notwithstanding these issues, the parties have been advised that they may consent in writing to the umpire acting as mediator and then resuming the role of umpire. The parties intend this agreement to constitute such consent in writing.

Therefore, each party hereby consents to the umpire acting as a mediator for any issues (or only for certain issues) identified in writing by the parties.

Each of the parties waives all claims of confidentiality and privilege under the UMA and the common law for all communications, including private *ex parte* and otherwise confidential and privileged communications that the parties may have with the umpire while the umpire is serving as mediator.

The parties instruct the umpire to waive the mediator privilege under the UMA. Upon beginning or resuming the proceeding, the parties consent to and instruct the umpire to disclose fully and completely to the other party all otherwise confidential and privileged communications between the parties and the umpire while serving as mediator.

The parties waive any objection to the umpire considering as admissible evidence any confidential or privileged information received from the other party. Upon beginning or resuming the proceeding, the parties shall require the umpire to put all confidential and privileged information on the record, insofar as the issues in the proceeding relate to custody and parenting time.

The umpire may also serve as mediator at any time during the proceeding in any order and may thereafter resume the role of umpire, free of any objection from any party.

The parties acknowledge that the umpire is not exceeding the umpire's authority by acting as mediator and then resuming the role of umpire.

If a party proceeds with the next hearing in the proceeding without an objection to the umpire resuming the role of umpire, the party will be held to have waived any right to object.

Explanatory Note:

Paragraph 13 is optional unless the parties selected paragraph 12(D), in which case Paragraph 13 is required. It makes clear the risks inherent in having an umpire assume the role of mediator and then resume the role of umpire. Failure to object to the umpire resuming the role of umpire is deemed a waiver of the right to object.

Required Record Keeping

14. In any proceeding involving custody or parenting time issues, the parties shall have a record made of the proceeding as to those issues. Such record shall include: (i) a record of all documentary evidence; and (ii) all testimony shall be recorded verbatim. A record of testimony may be made by one of the following: (i) certified shorthand reporter; (ii) electronic recording; or (iii) audio or video recording. Absent agreement of the parties, the umpire shall decide the proper allocation of the costs of the record.

15. In any proceeding that does not involve custody or parenting time issues, the parties:

☐ (A) Shall not require a record to be kept of the proceeding; or

☐ (B) Shall require a record to be kept of the proceeding relating to certain issues as follows: (list issues) _____; or

☐ (C) Shall require a record to be kept of the entire proceeding.

Explanatory Note:

The parties may choose whether or not to have a record made of the proceeding as noted in the optional parts (A), (B) and (C) of paragraph 15. The parties may choose to have a verbatim record made in child support cases that deviate from the guidelines to assure that the court may properly review any resulting award if there is an appropriate objection to it.

Requiring a formal record to be kept, depending on the nature of the record, may increase the cost of the proceeding.

16. All documentary evidence introduced at the hearing shall be maintained by the umpire until the issuance of the award and the parties shall either keep a copy of all such evidence or obtain the evidence from the umpire after issuance of the award and retain it until the expiration of the time for the filing of any appeal from an order or judgment confirming, vacating or modifying the award, or from the expiration of the time to apply for an order or judgment to vacate or modify the award.

Explanatory Note:

Paragraphs 14 and 16 are required in any agreement in which issues involving children, including custody or parenting time, will be determined. This assures that the court may properly review any resulting award if there is an appropriate objection to it. See, Fawzy v. Fawzy, 199 N.J. 456 (2009).

Required Findings; Form of Award

17. In any proceeding involving custody, parenting time or child support issues, the parties shall require the umpire to make findings of fact and conclusions of law with respect to child-custody, parenting-time or child support issues. As to those issues, the umpire shall state in writing or otherwise record findings of fact and conclusions of law with a focus on the best-interests standard.

Explanatory Note:

Paragraph 17 is required in any agreement in which issues involving children, including custody, parenting time or child support, will be addressed. This assures that the court may properly review any resulting award if there is an appropriate objection to it. See, Fawzy v. Fawzy, 199 N.J. 456 (2009).

18. In any proceeding that does not involve custody, parenting time or child support issues, the parties shall require the umpire to prepare an award stating findings of fact and conclusions of law.

Explanatory Note:

Paragraph 18 confirms what the statute provides under N.J.S.A. 2A: 23A-12(a). It requires the umpire to make findings of fact and conclusions of law. A detailed award is needed under the APDRA since the APDRA permits a court to review an award for errors of fact or law committed by the umpire.

If the parties do not desire or need that level of review or that detailed an award, they should consider instead an agreement to arbitrate under the Uniform Arbitration Act, N.J.S.A. 2A: 23B-1 et seq. (UAA). Under the UAA there is more limited court review and the parties may opt for a simple award or an award with a brief explanation of the arbitrator's reasons. This may reduce the cost of the proceeding. See UAA Arbitration Agreement form at Appendix D.

Law to Be Applied

19. This agreement shall be interpreted according to the laws of the State of New Jersey.

Explanatory Note:

Paragraph 19 gives guidance to the umpire about what rules of construction are to be used in interpreting the agreement (i.e., New Jersey law).

20. The issues in this proceeding shall be determined in accordance with applicable principles of substantive law of the State of New Jersey.

Explanatory Note

Paragraph 20 confirms what the statute provides, N.J.S.A. 2A: 23A-12(e).

21. The proceeding shall be conducted pursuant to rules of procedure as determined in the discretion of the umpire, consistent with this agreement and the applicable statute(s).

Explanatory Note:

Paragraph 21 confirms what the statute provides. See generally N.J.S.A. 2A: 23A-11. Note that parties remain free in their agreement to provide for whether there is to be a hearing, and for specific aspects of the conduct of the hearing including when and where a hearing is held. N.J.S.A. 2A: 23A-11(g) (1), (2) and (3).

Confidentiality

22. Except as may be required by law, the parties and the umpire shall keep the existence, content (including all testimony and documentary evidence presented) and the results of the proceeding confidential. Neither the parties nor the umpire may disclose the existence, content, or results of any proceeding under this agreement without the prior written consent of the parties.

Explanatory Note:

The umpire must keep confidential the umpire's knowledge of the proceeding. However, the parties are not required to keep anything about the proceeding confidential unless they agree to do so. An important reason some parties agree to such a proceeding is to maintain certain information confidential and this optional paragraph 22 provides that.

Discovery and Rules of Evidence

23. The parties agree that the following discovery procedures shall apply to the proceeding:

☐ (A) Depositions, inspection and copying of documents and interrogatories when authorized by leave of the umpire in accordance with the New Jersey Rules of Court; or

☐ (B) Limited discovery as follows: (specify agreed upon discovery) _____; or

☐ (C) No discovery.

Explanatory Note:

The APDRA provides for relatively broad discovery subject to extension of time to complete it or termination of it by the umpire, and the decision of the umpire is subject to summary review by the Superior Court when the umpire is shown to have exceeded the umpire's discretion, under N.J.S.A. 2A: 23A-10(a) and (b).

The parties may choose paragraph 23(A), which confirms that the scope of discovery is as provided under the APDRA.

Choosing to do expansive discovery such as that provided under the APDRA may substantially increase the cost of the proceeding, and may not be necessary to a full and fair presentation of the issues to the umpire.

The parties may choose paragraph 23(B) to specify what discovery is needed (e.g., disclosure of closely held business records).

The parties may choose paragraph 23(C) for no discovery if the issue to be resolved is one where no discovery is necessary and all information to be presented to the umpire is already in the hands of the parties or if the parties choose to save legal costs of formal discovery requests and responses by agreeing to work cooperatively to exchange necessary information.

24. The parties agree that the following shall govern the admissibility of evidence in the proceeding:

☐ (A) Such evidence shall be admitted in the discretion of the umpire pursuant to the APDRA; or

☐ (B) The New Jersey Rules of Evidence shall apply; or

☐ (C) The (specify source of other rules) _____ Rules of Evidence shall apply.

Notwithstanding the foregoing, all statutes and common law rules relating to privilege shall remain in effect.

Explanatory Note:

The parties may choose paragraph 24(A), which confirms that the admissibility of evidence is left to the discretion of the umpire, who is not bound to the statutory and common law rules of evidence. N.J.S.A. 2A: 23A-11(d).

The parties may choose paragraphs (B) or (C) to designate particular rules of evidence. However, applying any rules of evidence may require the services of a lawyer as the umpire, whereas an accountant or social services professional may be the more suitable selection as umpire, depending on the issues to be resolved. Also, applying rules of evidence in the hearing may increase the time and expense of the hearing.

Proceedings at the Hearing and Witnesses/Experts

25. The umpire may hold conferences with the parties. The umpire may require the attendance of any person as a witness and the production of any book or written instrument or document. The fees for the attendance of the witness shall be those allowed witnesses in a civil action. Subpoenas shall issue in the name of and be signed by the umpire, and shall be directed to the person therein named and served in accordance with R. 1:9-3 of the Rules of Court. Parties may enforce subpoenas as provided by the APDRA.

Explanatory Note:

Paragraph 25 confirms what the statute provides. N.J.S.A. 2A: 23A-11(b) and (c) and 24.

26. If the umpire is of the opinion that evidence by impartial experts would be of assistance, the umpire may direct that expert evidence be obtained. The fees and expenses of expert witnesses shall be paid by the parties as directed by the umpire. The parties remain free to retain their own experts to challenge the report of the impartial expert and to cross-examine the impartial expert.

Explanatory Note:

Paragraph 26 confirms what the statute provides. N.J.S.A. 2A: 23A-11(f). It also confirms the right of the parties to retain their own experts and to cross-examine the impartial experts.

***Pendente Lite* (Interim) Relief**

27. Any determination reached before a final award that is an intermediate ruling shall be considered *pendente lite* (interim) relief.

28. Any party may seek *pendente lite* (interim) relief from the umpire to the same extent as such relief could be requested in the Superior Court of New Jersey, Family Part. Any

party may then ask the court to confirm, enforce, modify, correct, or vacate the intermediate ruling in accordance with the APDRA, N.J.S.A. 2A: 23A-6(a) and R. 5:3-8(a) or (b).

29. The proceeding shall not be abated, stayed or delayed by the court's review or enforcement of a *pendente lite* (interim) award unless the umpire or the court so determines.

Explanatory Note:

Paragraph 28 confirms what the statute provides. N.J.S.A. 2A: 23A-6(a).

Paragraph 29 confirms what the statute provides. N.J.S.A. 2A: 23A-7(a) provides that a motion/application to the court to address a pendente lite (interim) award does not affect the ongoing proceeding on other issues.

Final Determination

30. An award shall be made within (state number) ____ days following the close of evidence or submission of summations, whichever is later. The umpire, with the consent of the parties, may extend the time for making the award.

Explanatory Note:

Paragraph 30 is desirable to assure a timely completion of the award. A 30-day time limit, or slightly longer, is typical.

Post-Award Review, Modification or Correction of the Award by the Umpire

31. On application to the umpire by a party to the proceeding, the umpire may modify or correct the award:

(1) If there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award;

(2) If the umpire has made an award based on a matter not submitted to the umpire and the award may be corrected without affecting the merits of the decision on the issues submitted;

(3) If the award is imperfect in a matter of form, not affecting the merits of the controversy; or

(4) If the rights of the party applying for the modification were prejudiced by the umpire erroneously applying law to the issues and facts presented for alternative resolution.

Explanatory Note:

Paragraph 31 confirms what the statute provides. N.J.S.A. 2A: 23A-12(d) and 13(e). The parties may include this paragraph in their agreement if the parties want to incorporate for reference the standards for when an umpire may be asked to review the award but they may not vary these four standards governing the umpire's review.

32. A written application to the umpire for modification or correction shall be made to the umpire and written notice given to all parties within 20 days after delivery of the award to the applicant. Written objection to modification must be served on the umpire and other parties to the proceeding within 10 days of receipt of the notice. Any reply shall be made and notice given to all parties within 7 days. The umpire shall dispose of any application, in writing, signed and acknowledged by the umpire, within 30 days after either the reply is made or the time for serving an objection or a reply has expired, whichever is earlier.

Explanatory Note:

Paragraph 32 confirms what the statute provides about the timing of an application to the umpire and the opposition. N.J.S.A. 2A: 23A-12(d). This paragraph further provides for the option of a reply.

33. There shall be no further jurisdiction of the umpire to consider any further applications of the parties, absent written consent of the parties to expand the scope of the proceeding.

Explanatory Note:

Paragraph 33 confirms that the umpire's authority ends completely upon the issuance of a final award and the expiration of the short time within which to seek modification or clarification of the award from the umpire. However, parties, in writing, may expand the scope of the umpire's jurisdiction. Such expansion may include agreement that the umpire may continue to exercise jurisdiction over issues beyond those addressed in the final award.

34. The parties agree that the umpire has jurisdiction after the issuance of any award in order to be able to reconsider the award based upon any factor set forth in R. 4:49-2 or R. 4:50-1 of the Rules of Court. Any reconsideration application under this paragraph shall be made and notice given to all parties within 20 days of receipt of the award. Objection to the reconsideration application and notice to all parties shall be made within 10 days of receipt of the application. Any reply shall be made and notice given to all parties within 7 days. The umpire shall render a decision within 30 days following receipt of the reply or the time for filing an objection or a reply has expired, whichever first occurs.

Explanatory Note:

Paragraph 34 expands the umpire's jurisdiction beyond that in paragraph 31 and allows a short, 20-day continuation of the jurisdiction of the umpire in order to hear applications to change the award on various grounds beyond the limited grounds described in the statute. Continuing the jurisdiction of the umpire may increase the cost of the process.

Confirmation of the Award

35. The court shall confirm an award upon application of a party made within one year after its delivery to the party, unless the award is vacated or modified as provided under the APDRA.

Explanatory Note:

Paragraph 35 confirms what the statute provides. N.J.S.A. 2A: 23A-12(f) and 14.

Modification of the Award by the Court

36. On motion/application to the court by a party to the proceeding within 45 days after the award is delivered to the applicant or within 30 days after receipt of an award modified by the umpire pursuant to paragraph 31 above and N.J.S.A. 2A: 23A-12(d) the court shall modify the award if:

(1) There was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award;

(2) The umpire has made an award on a matter not submitted to the umpire and the award may be corrected without affecting the merits of the decision upon the issues submitted;

(3) The award is imperfect in a matter of form not affecting the merits of the controversy; or

(4) The rights of the party applying for the modification were prejudiced by the umpire erroneously applying law to the issues and facts presented for alternative resolution.

If the motion/application is granted, the court shall modify the award. A decision of the umpire on the facts shall be final if there is substantial evidence to support that decision. If it

appears to the court that the umpire committed prejudicial error in applying applicable law to the issues and facts presented, the court, after modifying the erroneous determination of the umpire, shall appropriately set forth the applicable law and arrive at an appropriate determination under the applicable facts determined by the umpire and then confirm the award as modified.

Explanatory Note:

Paragraph 36 confirms what the statute provides. N.J.S.A. 2A: 23A-13(b) and (e). The parties may include this paragraph in their agreement if the parties want to incorporate for reference the standards for when a court may be asked to modify the award, but they may not vary these standards governing the court's review.

Vacating an Award

37. A party to the proceeding may apply to the court to vacate the award within 45 days after the award is delivered to the party or within 30 days after receipt of an award modified by the umpire as provided in paragraphs 31 and 32 above and the provisions of the APDRA, N.J.S.A. 2A: 23A-12. Upon the filing of such application, the court shall vacate an award if the rights of the party were prejudiced by:

(1) Corruption, fraud or misconduct in procuring the award;

(2) Partiality of an umpire appointed as a neutral;

(3) In making the award, the umpire's exceeding the umpire's power or so imperfectly executing that power that a final and definite award was not made;

(4) Failure to follow the procedures set forth in the APDRA, unless the party applying to vacate the award continued with the proceeding with notice of the defect and without objection; or

(5) The umpire's committing prejudicial error by erroneously applying law to the issues and facts presented for alternative resolution;

(6) The award, pertaining to the issues of custody, parenting time or child support:

a. Does not contain detailed findings of fact and conclusions of law; or

b. Is not in compliance with the provisions of R. 5:1-5 of the Rules of Court; or

c. There is evidential support that establishes a *prima facie* claim of harm to the child.

A decision of the umpire on the facts shall be final if there is substantial evidence to support that decision. However, when the application to the court is to vacate the award pursuant to subparagraphs (1) through (4) above, the court shall make an independent determination of any relevant facts thereto *de novo*.

Explanatory Note:

Paragraph 37 confirms what the statute provides. N.J.S.A. 2A: 23A-13(b) and (c).

Part 6 of Paragraph 37 includes the standards for the court to use to review an award involving issues affecting children, including custody, parenting time and child support. These provisions are consistent with provisions required in an agreement involving such issues (see paragraphs 14, 16, and 17 above.)

The parties may include this paragraph in their agreement if the parties want to incorporate for reference the standards for when a court may be asked to vacate the award but they may not vary these standards.

Other Review

38. The parties agree to permit an appeal of the final award to a panel of one or more private appellate umpires to be agreed upon by the parties or provided by a third party, such as the American Arbitration Association. Such appeal shall be filed within 30 days of receipt of the final or corrected, modified award. The parties agree that the standard of review shall be as

follows: (state a standard of review) _____. If an appeal is filed, the award shall not be deemed final for purposes of confirmation pending the appeal. The appellate panel may adopt the original award, modify the original award or substitute its own award. The decision of the appellate panel shall be final and binding and judgment may be entered by any court having jurisdiction thereof. The appellate panel shall consist of:

☐ (A) One umpire (arbitrator);

☐ (B) A panel of umpires (arbitrators); or

☐ (C) The following umpires (arbitrator(s)): (name(s)) _____.

Explanatory Note:

Various third party alternate dispute resolution provider organizations, including the American Arbitration Association, offer parties the option under a set of appellate rules to take an appeal to a panel of arbitrators (umpires) of an award issued by another arbitrator (umpire.) Parties may want to consider this option if they desire to have an appeal from an award rather than being limited to the statutory grounds for vacating an award but, for confidentiality reasons or otherwise, do not desire to provide for review by the court under paragraph 37 above.

_____	_____
Attorney for Plaintiff	Plaintiff
_____	_____
Attorney for Defendant	Defendant
	_____
	Date

ATTACHMENT D

Introductory Note:

The Supreme Court of New Jersey endorses the use of arbitration and other alternative dispute resolution processes for the resolution of disputes.

Parties and their counsel may use this form to develop an arbitration agreement or consent order for the arbitration of certain family law disputes under the Uniform Arbitration Act, N.J.S.A. 2A: 23B-1 et seq., (UAA) and R. 5:1-5(a) of the Rules of Court.

The parties may agree to arbitrate certain family law disputes even if there is no pending family law proceeding in the Superior Court of New Jersey, Family Part.

The provisions of this form are acceptable to establish an enforceable arbitration agreement under the UAA. However, parties are free to substitute their own provisions sufficient to establish an enforceable arbitration agreement under other arbitration statutes.

This form should not be used for proceedings under the Alternative Procedures for Dispute Resolution Act, N.J.S.A. 2A: 23A-1 et seq., (APDRA) because that act has substantial procedural differences from the UAA. A sample APDRA agreement is in Appendix _.

Parties should understand that adding certain clauses may increase the time and cost of arbitration. For example, electing to strictly apply the Rules of Evidence, permitting full discovery under the Rules of Court, requiring a full verbatim transcript of the proceeding where not required by case law, or requiring full findings of fact and conclusions of law where not required by case law, can and likely will significantly increase the duration and costs of arbitration.

The explanatory notes in this form note that:

- Certain provisions are required to assure the enforceability of the arbitration agreement. (See paragraphs 1, 2, and 4.)

- Certain provisions are required in any arbitration agreement for family law disputes involving children, including custody, parenting time or child support issues. (See paragraphs 1, 14, 16 and 17.)

- Certain details of the arbitration process should be agreed upon to avoid later disputes. (See paragraphs 6, 7, 9, 11, 15, 18, 19, 20, 22, and 29)

The remaining provisions are offered for consideration by the parties and their counsel in planning the arbitration proceeding.

AGREEMENT TO ARBITRATE
PURSUANT TO THE UNIFORM ARBITRATION ACT, N.J.S.A. 2A: 23B-1 *et seq.*

WHEREAS, the parties, fully aware of their rights to have their case heard by the Superior Court of New Jersey, Family Part, or to have their issues in dispute resolved in arbitration, have agreed to arbitrate pursuant to the Uniform Arbitration Act, N.J.S.A. 2A: 23B-1 *et seq*., (UAA).

NOW, THEREFORE, in consideration of the mutual promises contained in this agreement, the parties agree as follows:

Knowing Waiver of Certain Rights, Consent to Arbitrate, Scope of Arbitration, Entry of Judgment on the Arbitration Award

1. The parties acknowledge and agree to the following:

(A) The parties understand their entitlement to a judicial adjudication of their dispute and are willing to waive that right;

(B) The parties are aware of the limited circumstances under which a challenge to the award may be advanced and agree to those limitations;

(C) The parties have had sufficient time to consider the implications of their decision to arbitrate; and

(D) The parties have entered into this arbitration agreement freely and voluntarily, after due consideration of the consequences of doing so.

Explanatory Note:

Paragraph 1 contains the language required by Fawzy v. Fawzy, 199 N.J. 456 (2009). It assures that parties to an arbitration agreement involving family law disputes, including custody, parenting time or child support issues, freely and voluntarily agree to arbitrate those disputes.

2. The parties agree to arbitrate certain disputes as provided in this agreement as follows:

☐ (A) All issues that could be raised and adjudicated in the Superior Court of New Jersey, Family Part, including *pendente lite* issues, except those excluded from arbitration by R. 5:1-5(a) shall be subject to the jurisdiction of and determination by the arbitrator pursuant to the terms and procedures of this agreement.

☐ (B) The parties exclude from arbitration the following issues: (list issues or state "none") _____.

☐ (C) The parties elect to arbitrate the following issues: (list issues)

_____.

The arbitrator shall determine whether an issue or dispute is within the scope of the arbitrator's jurisdiction.

Explanatory Note:

The parties are required to state what issues they agree to arbitrate.

Paragraph 2(A) offers the parties the option of a broad scope of issues to be arbitrated.

Paragraph 2(B) is to be used if the parties desire to exclude certain specified issues from arbitration. For example, some issues may be addressed in a separate mediation process or by the court.

Paragraph 2(C) may be used to designate specific issues that the parties agree to arbitrate. For example, some issues already may be settled and the arbitration will be limited to the remaining issues.

3. The parties agree that the provisions of this agreement govern the arbitration proceeding if there is a conflict between the UAA and this agreement but only if the conflicting provisions of the UAA may be waived.

Explanatory Note:

The parties may change some provisions of the UAA, and may not change others. See N.J.S.A. 2A: 23B-4(c). Paragraph 3 confirms the parties' intent to change only those provisions of the statute that may be changed.

4. Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

Explanatory Note:

Paragraph 4 is to assure that the arbitration award is enforceable.

5. Neither party shall have the right or power to expand, narrow, amend or revoke this agreement without the consent, in writing, of the other party.

Explanatory Note:

Paragraph 5 is to make clear to the parties the irrevocability of their agreement to arbitrate.

Appointment of Arbitrator; Location of the Arbitration

6. The parties appoint (names(s)) _____ as the arbitrator(s). If the parties appoint more than one arbitrator, the word "arbitrator" in this agreement shall refer to the panel. The arbitrator has made full disclosures as required by the UAA as detailed in Rider A to this agreement. The parties have made full disclosure of any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator. The parties waive any objections to the service of the arbitrator.

> ***Explanatory Note:***
>
> ***Disclosures by both the arbitrator and the parties are necessary to assure there is no later objection to the arbitrator based on information known to anyone at the time the arbitrator is selected.***
>
> ***If the parties do not name an arbitrator, or a panel of arbitrators, or do not agree on a process for selecting an arbitrator, the court will need to be involved to appoint an arbitrator under the UAA, N.J.S.A. 2A: 23B-11. The appointment of a panel of arbitrators will increase the cost and likely extend the duration of the arbitration proceeding.***

7. The arbitrator's compensation and other expenses of the arbitration proceeding shall be borne by the parties as follows:

☐ (A) Equally;

☐ (B) In the following proportion: (state percentages borne by each party)

_____.

8. In any interim or final award, the arbitrator ☐ (A) may ☐ (B) may not reallocate the parties' percentage contribution to the arbitrator's compensation and other expenses of the arbitration proceeding.

9. Unless otherwise agreed, ordered, or awarded, the parties shall be responsible for paying their own attorney's fees and expenses.

10. In any interim or final award, the arbitrator ☐ (A) may ☐ (B) may not award reasonable attorney's fees and other reasonable expenses of arbitration.

Explanatory Note:

Parties should agree on certain details of the arbitration process, such as the allocation of the responsibility for arbitrator compensation, including the source of payment, to avoid later disputes about those details.

Paragraphs 8 and 10 confirm what the statute provides (N.J.S.A. 2A: 23B-21(b) and (d)) and offers the parties the option to bar the arbitrator from reallocating arbitrator compensation and other expenses or from awarding attorney's fees and costs.

11. The arbitration shall be conducted at (designate place) _____, or such other location as the parties agree or as selected by the arbitrator.

Explanatory Note:

Parties should agree on certain details of the arbitration process to avoid later disputes about those details.

12. The parties confirm the following role or roles for the arbitrator:

☐ (A) The arbitrator has not served, and shall not serve, in another capacity in the matter being arbitrated. In particular, the arbitrator has not served, and shall not serve in the dual capacity as mediator, settlement facilitator, parenting coordinator, or *guardian ad litem*; or

☐ (B) The parties shall participate in a mediation process before or during the arbitration proceeding with an independent mediator who is not serving, and shall not serve, as arbitrator for the parties; or

☐ (C) The parties may jointly ask the arbitrator at any time during the course of the arbitration proceeding to serve also as a settlement facilitator, during which time the arbitrator shall meet with the parties and their representatives all together, at the same time, and discuss with them various options for resolution of their disputes.

☐ (D) The parties may jointly ask the arbitrator at any time during the course of the arbitration proceeding to serve also as a mediator, during which time the arbitrator may meet with the parties and their representatives all together, at the same time, or in caucus, or in any other manner that a mediator would employ, and discuss with them various options for resolution of their disputes. By electing this option, paragraph 12(D), the parties also incorporate by reference all of paragraph 13 below.

Explanatory Note:

Paragraphs 12(A), (B) and (C) define the role the parties expect of the arbitrator. Each of these paragraphs is intended to avoid the problem that arises if, during the course of the arbitration proceeding, the parties ask the arbitrator to assist in settlement discussions as mediator and the arbitrator conducts private meetings with one party and then the other. While that is permissible, it would not then be permissible for the arbitrator, after unsuccessfully mediating the disputes, to resume the role of arbitrator and to decide disputed issues unless the parties have elected paragraph 12 (D).

Otherwise, such dual roles may result in arbitration awards being vacated and the parties being required to start the arbitration process again before a new arbitrator.

Paragraph 13 is required if the parties elect paragraph 12(D) above where the arbitrator will serve in the dual roles of arbitrator and mediator at any time and in any order during the process. It makes clear the risks inherent in having an arbitrator assume the role of mediator and then resume the role of arbitrator. Failure to object to the mediator resuming the role of arbitrator is deemed a waiver of the right to object.

Further, the dual role of arbitrator and guardian ad litem is not permitted. Fawzy v. Fawzy, 199 N.J. 456 (2009).

13. The parties acknowledge that the law does not favor an arbitrator also serving in the role of mediator in the same proceeding unless the parties are advised of the benefits and risks and expressly agree in writing to such a process. The parties have been advised of the holding in Minkowitz v. Israeli, 433 N.J. Super. 111 (App. Div. 2013). That case addressed some of the issues that arise when one person acts in the dual capacities of arbitrator and

mediator and concluded that dual roles are to be avoided unless the parties consent in writing. Issues include:

(a) The mediator meets separately with the parties and their counsel and learns information that in mediation is both confidential and privileged and that the mediator is required under section 7 of the Uniform Mediation Act, N.J.S.A. 2A: 23C-7, (UMA) not to disclose to the other party without the consent of the disclosing party;

(b) If the arbitrator is required by the parties to disclose such confidential and privileged information to the other party, the willingness of the parties to engage in a meaningful exchange of private confidential information during the mediation process is likely to be compromised, thereby making the mediation process itself less likely to be effective in resolving the disputes because successful mediation depends on confidentiality;

(c) The party to whom the arbitrator is required to disclose such confidential and privileged information can never be completely sure that he/she received a complete and accurate report of the information conveyed between the other party and the arbitrator during the confidential mediation process;

(d) Such confidential and privileged information is inadmissible in another proceeding (see UMA, N.J.S.A. 2A: 23C-4(c) and 7(c)), including the proceeding before the arbitrator;

(e) Such inadmissible, confidential and privileged information is likely to influence the decision of the arbitrator if the mediation is unsuccessful and the arbitrator is then called on to decide the disputed issues;

(f) These issues can lead to grounds for vacating an arbitration award and would require the parties to engage in a second arbitration before a different arbitrator.

Notwithstanding these issues, the parties have been advised that they may consent in writing to the arbitrator acting as mediator and then resuming the role of arbitrator. The parties intend this agreement to constitute such consent in writing.

Therefore, each party hereby consents to the arbitrator acting as a mediator for any issues (or only for certain issues) identified in writing by the parties.

Each of the parties waives all claims of confidentiality and privilege under the UMA and the common law for all communications, including private *ex parte* and otherwise confidential and privileged communications that the parties may have with the arbitrator while the arbitrator is serving as mediator.

The parties instruct the arbitrator to waive the mediator privilege under the UMA. Upon beginning or resuming the arbitration, the parties consent to and instruct the arbitrator to disclose fully and completely to the other party all otherwise confidential and privileged communications that the parties had with the arbitrator while the arbitrator was serving as mediator.

The parties waive any objection to the arbitrator considering as admissible evidence any confidential or privileged information received from the other party. Upon beginning or resuming the arbitration, the parties shall require the arbitrator to put all confidential and privileged information on the record, insofar as the issues in the proceeding relate to custody and parenting time.

The arbitrator may also serve as mediator at any time during the proceeding in any order and may thereafter resume the role of arbitrator, free of any objection from either party.

The parties acknowledge that the arbitrator is not exceeding the arbitrator's authority by acting as mediator and then resuming the role of arbitrator.

If a party proceeds with the next arbitration hearing without an objection to the arbitrator resuming the role of arbitrator, the party will be held to have waived any right to object.

Explanatory Note:

Paragraph 13 is optional unless the parties selected paragraph 12(D), in which case paragraph 13 is required. It makes clear the risks inherent in having an arbitrator assume the role of mediator and then resume the role of arbitrator. Failure to object to the mediator resuming the role of arbitrator is deemed a waiver of the right to object.

Required Record Keeping

14. In any arbitration proceeding involving custody or parenting time issues, the parties shall have a record made of the arbitration proceeding as to those issues. Such record shall include: (i) a record of all documentary evidence; and (ii) all testimony shall be recorded verbatim. A record of testimony may be made by one of the following: (i) certified shorthand reporter; (ii) electronic recording; or (iii) audio or video recording. Absent agreement of the parties, the arbitrator shall decide the proper allocation of the costs of the record.

15. In any arbitration proceeding that does not involve custody or parenting time issues, the parties:

☐ (A) Shall not require a record to be kept of the arbitration proceeding; or

☐ (B) Shall require a record to be kept of the arbitration proceeding relating to certain issues as follows: (list issues) _____; or

☐ (C) Shall require a record to be kept of the entire arbitration proceeding.

Explanatory Note:

The parties may choose whether or not to have a record made of the arbitration proceeding as noted in the optional parts (A), (B) and (C) of paragraph 15. The parties may consider having a verbatim record made in all child support cases in which a deviation from the guidelines is sought to assure that the court may properly review the arbitrator's award. Requiring

a formal record to be kept, depending on the nature of the record, may increase the cost of the arbitration.

16. All documentary evidence introduced at the hearing shall be maintained by the arbitrator until the issuance of the award and the parties shall either keep a copy of all such evidence or obtain the evidence from the arbitrator after issuance of the award and retain it until the expiration of the time for the filing of any appeal from an order or judgment confirming, vacating or modifying the award, or from the expiration of the time to apply for an order or judgment to vacate or modify the award.

Explanatory Note:

Paragraphs 14 and 16 are required in any arbitration agreement involving custody or parenting time issues. This assures that the court may properly review any resulting arbitration award if there is an appropriate objection to it. See, Fawzy v. Fawzy, 199 N.J. 456 (2009).

Required Findings; Form of Award

17. In any proceeding involving custody, parenting time or child support issues, the parties shall require the arbitrator to make findings of fact and conclusions of law with respect to child-custody, parenting-time, or child support issues. As to those issues, the arbitrator shall state in writing or otherwise record findings of fact and conclusions of law with a focus on the best-interests standard.

Explanatory Note:

Paragraph 17 is required in any arbitration agreement in which issues involving children, including custody, parenting time or child support issues, will be addressed. This assures that the court may properly review any resulting arbitration award if there is an appropriate objection to it. See, Fawzy v. Fawzy, 199 N.J. 456 (2009).

18. In any arbitration proceeding that does not involve custody, parenting time or child support issues, the parties:

☐ (A) Shall require the arbitrator to prepare an award stating no reasons; or

☐ (B) Shall require the arbitrator to prepare an award briefly stating the reasons for the decision of the arbitrator; or

☐ (C) Shall require the arbitrator to prepare an award stating findings of fact and conclusions of law.

Explanatory Note:

Absent agreement of the parties or requirements under the law, the arbitrator will decide the form of the award. If the parties desire an explanation of the award because of the particular issues involved, they may select option (B). If the parties want to expand the scope of judicial review under N.J.S.A. 2A: 23B – 4(c), they should consider selecting option (C). However, if the parties decide to ask the arbitrator to state the reasons for the award or to make findings of fact and conclusions of law, it may increase the cost of the arbitration.

Law to Be Applied

19. This agreement shall be interpreted according to the laws of the State of New Jersey.

Explanatory Note:

Paragraph 19 gives guidance to the arbitrator about what rules of construction are to be used in interpreting the agreement (i.e., New Jersey law).

20. In all cases involving custody, parenting time, or child support issues, the arbitrator shall be bound to apply the substantive laws and remedies of the State of New Jersey. All other issues in this arbitration shall be determined by:

☐ (A) The substantive laws and remedies of the State of New Jersey or the State of (identify governing law) _____ which the arbitrator shall be bound to apply; or

☐ (B) The substantive law of the State of New Jersey or the State of (identify governing law) _____, but the arbitrator may award such remedies as the arbitrator considers just and appropriate under the circumstances. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award or for vacating an award.

Explanatory Note:

Paragraph 20 gives guidance as to which law to apply to the particular issues in dispute. The parties may require the arbitrator to be bound to apply the substantive law and remedies as stated in Paragraph 20(A). Alternatively, Paragraph 20 (B) allows the parties to select the substantive law and grant the arbitrator broad discretion in fashioning remedies that may be outside of the remedies available under the substantive law. For example, the parties may ask the arbitrator to award a lump sum of alimony.

See also paragraph 10, offering the parties the option to limit the arbitrator's authority to reallocate or award attorney's fees and expenses.

21. The arbitration shall be conducted pursuant to rules of procedure as determined in the discretion of the arbitrator, consistent with this agreement and the applicable statute.

Explanatory Note:

Paragraph 21 confirms what the statute provides under N.J.S.A. 2A: 23B-15. The parties remain free to choose another set of procedural rules to govern the arbitration process.

Confidentiality

22. Except as may be required by law, the parties and the arbitrator shall keep the existence, content (including all testimony and documentary evidence presented) and the results of the arbitration proceeding confidential. Neither the parties nor the arbitrator may disclose the existence, content, or results of any arbitration under this agreement without the prior written consent of the parties.

Explanatory Note:

The arbitrator must keep confidential the arbitrator's knowledge of the arbitration proceeding. However, the parties are not required to keep anything about the arbitration proceeding confidential unless they agree to do so. An important reason some parties agree to arbitrate is to maintain certain information confidential and this optional paragraph 22 provides that.

Discovery and Rules of Evidence

23. The parties agree that the following discovery procedures shall apply to the arbitration proceeding:

☐ (A) Such discovery as the arbitrator determines appropriate under the UAA; or

☐ (B) Discovery conducted in accordance with the New Jersey Rules of Court; or

☐ (C) Limited discovery as follows: (specify the agreed discovery) _____; or

☐ (D) No discovery.

Explanatory Note:

The parties have various options ranging from full discovery under the Rules of Court to no discovery at all.

The parties may choose paragraph 23(A), which confirms that the scope of discovery is left to the discretion of the arbitrator as provided under N.J.S.A. 2A: 23B-17.

The parties may also choose to do expansive discovery such as that under the New Jersey Rules of Court as provided in paragraph 23(B). However, one of the advantages of arbitration is the limited and expedited scope of discovery. Choosing paragraph 23(B) will substantially increase the cost of the arbitration proceeding, and may not be necessary to a full and fair presentation of the issues to the arbitrator.

The parties may choose paragraph 23(C) to specify what discovery is needed (e.g., disclosure of closely-held business records).

The parties may choose paragraph 23(D) for no discovery if the issue to be arbitrated is one where no discovery is necessary and all information to be presented to the arbitrator is already in the hands of the parties or if the parties choose to save legal costs of formal discovery requests and responses by agreeing to work cooperatively to exchange necessary information.

24. The parties agree that the following shall govern the admissibility of evidence in the arbitration proceeding:

☐ (A) Such evidence shall be admitted in the discretion of the arbitrator pursuant to the UAA; or

☐ (B) The New Jersey Rules of Evidence shall apply; or

☐ (C) The (specify source of other rules) _____ Rules of Evidence shall apply.

Notwithstanding the foregoing, all statutes and common law rules relating to privilege shall remain in effect.

Explanatory Note:

The parties may choose paragraph 24(A), which confirms that absent agreement of the parties, the admissibility of evidence is left to the discretion of the arbitrator, who is not bound to apply any rules of evidence. N.J.S.A. 2A: 23B-15(a).

The parties may choose paragraphs (B) or (C) to designate particular rules of evidence. However, applying any rules of evidence may require the services of a lawyer as the arbitrator, whereas an accountant or social services professional may be the more suitable selection as arbitrator, depending on the issues to be arbitrated. Also, applying rules of evidence in the arbitration hearing may increase the time and expense of the arbitration hearing.

Arbitration Proceedings and Witnesses/Experts

25. The arbitrator may hold conferences with the parties. The arbitrator may require the attendance of any person as a witness and the production of any book or written instrument or document. The fees for the attendance of the witness shall be those allowed witnesses in a civil action. Subpoenas shall issue in the name of and be signed by the arbitrator, and shall be directed to the person therein named and served in accordance with R. 1:9-3 of the Rules of Court. Parties may enforce subpoenas as provided by the UAA.

Explanatory Note:

Paragraph 25 confirms what the statute provides. N.J.S.A. 2A: 23B-15(a) and 17(g).

26. If the arbitrator is of the opinion that evidence by impartial expert(s) would be of assistance, the arbitrator may direct that expert evidence be obtained. The fees and expenses of

expert witnesses shall be paid by the parties as directed by the arbitrator. The parties remain free to retain their own experts to challenge the report(s) of the impartial expert(s) and to cross-examine the impartial expert(s).

Explanatory Note:

Paragraph 26 assures that the arbitrator may direct that expert evidence be obtained and confirms the right of the parties to retain their own expert(s) and to cross-examine the impartial expert(s).

***Pendente Lite* (Interim) Relief**

27. Any determination reached before a final award shall be considered *pendente lite (interim)* relief.

28. Any party may seek *pendente lite* (interim) relief from the arbitrator, to the same extent as such relief could be requested in the Superior Court of New Jersey, Family Part. Any party may request that the ruling be incorporated into an award. Any party may then ask the court to confirm, enforce, modify, correct, or vacate the award in accordance with R. 5:3-8(a) or (b).

29. The arbitration proceeding shall not be abated, stayed or delayed by the court's review or enforcement of a *pendente lite* (interim) award unless the arbitrator or the court so determines.

Explanatory Note:

Paragraph 28 confirms what the statute provides. N.J.S.A. 2A: 23B-18.

Paragraph 29 provides that a motion/application to the court to address a pendente lite (interim) award does not affect the ongoing arbitration proceeding on other issues.

Final Determination

30. An award shall be made within (state number) ____ days following the close of evidence or submission of summations, whichever is later. The arbitrator, with the consent of the parties, may extend the time for making the award.

Explanatory Note:

Paragraph 30 is desirable to assure a timely completion of the award by the arbitrator. A 30-day time limit, or slightly longer, is typical.

Post-Award Review, Modification or Correction of the Arbitration Award by the Arbitrator

31. On application to the arbitrator by a party to the arbitration proceeding, the arbitrator may modify or correct the award:

(1) If there was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;

(2) If the award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted; or

(3) If the arbitrator has not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(4) To clarify the award.

Explanatory Note:

Paragraph 31 confirms what the statute provides. N.J.S.A. 2A: 23B-20 and 24 (a)(1) and (3). The parties may include this paragraph in their agreement if the parties want to incorporate, for reference, the standards for when an arbitrator may be asked to review the award but they may not vary these four standards governing the arbitrator's review. N.J.S.A. 2A: 23B-4(c).

32. An application shall be made and notice given to all parties within 20 days after the aggrieved party receives notice of the award. Objection to the application and notice to all parties shall be made within 10 days of receipt of the application. Any reply shall be made and notice given to all parties within 7 days. The arbitrator shall render a decision within 30 days following receipt of the reply or the time for filing an objection or a reply has expired, whichever first occurs.

Explanatory Note:

Paragraph 32 confirms what the statute provides about the timing of an application to the arbitrator and the opposition. N.J.S.A. 2A: 23B-20. This paragraph further provides for the option of a reply.

33. There shall be no further jurisdiction of the arbitrator to consider any further applications of the parties, absent written consent of the parties to expand the scope of the arbitration.

Explanatory Note:

Paragraph 33 confirms that the arbitrator's authority ends completely upon the issuance of a final award and the expiration of the short time within which to seek modification or clarification of the award from the arbitrator. However, the parties, in writing, may expand the scope of the arbitrator's jurisdiction. Such expansion may include agreement that the arbitrator may continue to exercise jurisdiction over issues beyond those addressed in the final award.

34. The parties agree that the arbitrator has jurisdiction after the issuance of any award in order to be able to reconsider the award based upon mistake of fact or mistake of law or any factor set forth in R. 4:49-2 or R. 4:50-1 of the Rules of Court. Any reconsideration application under this paragraph shall be made and notice given to all parties within 20 days of receipt of the award. Objection to the reconsideration application and notice to all parties shall be made within 10 days of receipt of the application. Any reply shall be made and notice given

to all parties within 7 days. The arbitrator shall render a decision within 30 days following receipt of the reply or the time for filing an objection or a reply has expired, whichever first occurs.

Explanatory Note:

Paragraph 34 expands the arbitrator's jurisdiction beyond that in paragraph 31 and allows a short, 20-day continuation of the jurisdiction of the arbitrator in order to hear applications to change the award on various grounds beyond the limited grounds described in the statute. Continuing the jurisdiction of the arbitrator may increase the cost of the arbitration process.

Confirmation of the Arbitration Award

35. After a party to the arbitration proceeding receives notice of an award, the party may apply under R. 5:3-8 to the Superior Court or New Jersey, Family Part for an order confirming the award. The court shall issue a confirming order unless the arbitration award is modified, corrected or vacated.

Explanatory Note:

Paragraph 35 confirms what the statute provides. N.J.S.A. 2A: 23B-22. The procedure for confirming the award may not be changed by the parties. N.J.S.A. 2A: 23B-4(c).

Modification or Correction of the Arbitration Award by the Court

36. On motion/application to the court by a party to the arbitration proceeding within 120 days after the party receives notice of the award or of a modified or corrected award, the court shall modify or correct the award if:

(1) There was an evident mathematical miscalculation or an evident mistake in the description of a person, thing or property referred to in the award;

(2) The arbitrator made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted; or

(3) The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

If the motion/application is granted, the court shall modify or correct and confirm the award as modified or corrected, unless a motion/application to vacate the award is pending.

Explanatory Note:

Paragraph 36 confirms what the statute provides. N.J.S.A. 2A: 23B-24. The parties may include this paragraph in their agreement if the parties want to incorporate, for reference, the standards for when a court may be asked to modify or correct the award but they may not vary these three standards governing the court's review. N.J.S.A. 2A: 23B-4(c).

Vacating an Arbitration Award

37. A party to the arbitration proceeding may apply to the court to vacate the award within 120 days after receiving notice of the award or the modified or corrected award, unless the aggrieved party alleges that the award was procured by corruption, fraud or other undue means, in which case the application to the court shall be made within 120 days after the ground is known or by the exercise of reasonable care would have been known by the aggrieved party. Upon filing of such application, the court shall vacate an award made in the arbitration proceeding if:

(1) The award was procured by corruption, fraud, or other undue means;

(2) The court finds evident partiality by an arbitrator, corruption by an arbitrator, or misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(3) The arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing in a manner so as to substantially prejudice the rights of a party to the arbitration proceeding;

(4) The arbitrator exceeded the arbitrator's powers;

(5) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection not later than the beginning of the arbitration hearing;

(6) The arbitration was conducted without proper notice of the initiation of the arbitration so as to substantially prejudice the rights of a party to the arbitration proceeding;

(7) The award, pertaining to the issues of custody, parenting time or child support:

a. Does not contain detailed findings of fact and conclusions of law; or

b. Is not in compliance with the provisions of R. 5:1-5 of the Rules of Court; or

c. There is evidential support that establishes a *prima facie* claim of harm to the child.

Explanatory Note:

Paragraph 37 confirms what the statute provides. N.J.S.A. 2A: 23B-23.

Part 7 of Paragraph 37 includes the standards for the court to use to review an award involving issues affecting children, including custody, parenting time and child support. These provisions are consistent with provisions required in an arbitration agreement involving such issues (see paragraphs 14, 16, and 17 above.)

The parties may include this paragraph in their agreement if the parties want to reference the standards for when a court may be asked to vacate the award but they may not vary these standards. N.J.S.A. 2A: 23B-4(c).

However, the parties may expand the scope of judicial review under that section of the UAA. See sample paragraph 38 below.

Expanding the Scope of Judicial Review

38. The parties agree to expand the scope of review by the Superior Court of New Jersey, Family Part under the UAA to require the court to review any award on the following standards:

☐ (A) Errors of law; or

☐ (B) Substantial evidence; or

☐ (C) Abuse of discretion; or

☐ (D) Such other standard as the parties may agree: (state a standard of review) _____.

Explanatory Note:

N.J.S.A. 2A: 23B-4(c) provides the parties the option of expanding the scope of judicial review of an arbitration award according to standards they define. Based on such an agreement, the court may modify, correct or vacate the award using the agreed standard. However, such review may require that a record be made of all testimony in order to permit such review by the court, and that may substantially increase the cost of the arbitration and adversely affect the finality of the arbitration award. Expanding the scope of judicial review can also adversely impact the confidentiality of the arbitration proceeding itself because of the need to file the record of the arbitration proceeding with the court. However, note that the parties may not confer jurisdiction on the Appellate Division to review errors of law or fact.

Other Review

39. The parties agree to permit an appeal of the final award to a panel of one or more private appellate arbitrators to be agreed upon by the parties or provided by a third party, such as the American Arbitration Association. Such appeal shall be filed within 30 days of receipt of the

final or corrected, modified award. The parties agree that the standard of review shall be as follows: (state a standard of review) _____. If an appeal is filed, the award shall not be deemed final for purposes of confirmation pending the appeal. The appellate panel may adopt the original award, modify the original award or substitute its own award. The decision of the appellate panel shall be final and binding and judgment may be entered by any court having jurisdiction thereof. The appellate panel shall consist of:

☐ (A) One arbitrator;

☐ (B) A panel of arbitrators; or

☐ (C) The following arbitrator(s): (name(s)) _____.

Explanatory Note:

Various third party arbitration provider organizations, including the American Arbitration Association, offer parties the option, under a set of appellate rules, to take an appeal to a panel of arbitrators of an arbitration award issued by another arbitrator. Parties may want to consider this option if they desire to have an appeal from an award rather than being limited to the statutory grounds for vacating an award but, for confidentiality reasons or otherwise, do not desire to provide for review by the court or expanded review by the court under paragraphs 37 and 38 above.

_____	_____
Attorney for Plaintiff	Plaintiff
_____	_____
Attorney for Defendant	Defendant
	_____
	Date