

Why Arbitrate Family Law Matters?

by

Joan F. Kessler†

Allan R. Koritzinsky†† Stephen W. Schlissel‡

I. Introduction

Primarily as a reaction to the cost of litigation¹ and the inability in many instances to obtain a speedy trial in domestic relations matters,² in 1990 the American Academy of Matrimonial Lawyers (“AAML”), determined to promote the concept of arbitration of domestic relations matters.³ What, then, is matrimonial arbitration? What are its benefits and detriments? Can you arbitrate all issues arising from a divorce?

This article begins in Parts I and II by discussing the definition of family law arbitration, both pre- and post-divorce. Part III treats the benefits and detriments of matrimonial arbitration in great detail. Part IV contains a discussion of how the matrimonial arbitration process differs from the traditional adjudication of family law disputes. The heart of the article addresses the question of whether there can be final and binding arbitration of

† Joan F. Kessler is a partner in Foley & Lardner, Milwaukee, Wisconsin.

†† Allan R. Koritzinsky is a partner in Foley & Lardner, Madison, Wisconsin.

‡ Stephen W. Schlissel is a member of Meltzer, Lippe, Goldstein, Wolf & Schlissel, P.C., Mineola, New York.

¹ RICHARD NEELY, *THE DIVORCE DECISION* 66 (1984); *see also* Donald B. King, *Save the Court, Save the Family*, 12 CAL. LAW. 42, 44 (Jan. 1992) (arguing the adversarial system is too expensive for family disputes).

² Robert Coulson, *The Pros and Cons of Arbitrating Matrimonial Disputes*, 1 FAIRSHARE 7 (July 1981).

³ *See Matrimonial Arbitration-The Board Votes to Take the Lead*, AAML

NEWSL.(AAML, Chicago, IL), Apr. 1990; *Media Advisory, Divorce Lawyers*

Go Back to School For Training as Matrimonial Arbitrators, AAML NEWS & INFO. (AAML, Chicago, IL), Sept. 13, 1991. The AAML project was initiated primarily by Elaine G. Edinburg of Denver and Allan R. Koritzinsky. Many of the concepts addressed in this article are also addressed in the AAML’s arbitration training.

all of the issues arising in a pre-divorce matrimonial dispute, especially issues surrounding placement of minor children.

II. Definition of Family Law Arbitration

Family Law arbitration is a process in which a husband and wife, or ex-husband and ex-wife, agree to submit one or more issues arising out of their present or prior relations as spouses and/or their relations as parents of the same child or children, to a neutral third party or parties for a resolution that will be final and binding on them. It can occur at any stage of their dispute: before they are divorced; at or about the time they are divorced; or subsequent to their divorce. Once both parties agree to submit the dispute to arbitration, after a hearing the arbitrator makes a final and binding decision on the controverted matters.

The key to any arbitration is the parties *agreement* to arbitrate. That agreement will define, among other things:

1. Who is the arbitrator?
2. What powers does the arbitrators have?
3. What issues are submitted to arbitration?

Parties who have executed separation or divorce agreements resolving all their disputes without the aid of an arbitrator often provide for the resolution of all disputes arising out of that agreement to be resolved

through arbitration. The American Arbitration Association (“AAA”) has adopted rules for arbitration of such issues¹, as has the AAML.²

III. Pre-Divorce Arbitration

A new concept which has developed, however, is the arbitration of matters *pre-divorce*. This involves situations in which the parties cannot agree on one or more of the issues but do not wish to ask the court to do anything but actually divorce them. This, obviously, is different from the arbitration of an issue arising out of a prior separation agreement or divorce judgment.

In pre-divorce matrimonial arbitration, the parties have an opportunity to agree on a specific person as arbitrator, known or reputed to be the type and quality of person that the parties both desire to decide the specific disputed issues that have arisen between them.³ The arbitrator can conduct the hearing in a confidential, private setting and at a time and place convenient to all parties.

The arbitration is generally conducted informally and with relaxed rules of evidence. The arbitrator renders a decision called an “arbitration decision” or “award,” which is submitted to the court for confirmation. The parties and attorneys may agree that the arbitration award is final and binding, subject to very limited judicial review by the trial court,⁴ and with the limited rights of appeal provided in the arbitration statute in their particular state.⁵ The parties and attorneys may also agree to expand the limited rights of trial court review and appeal to an appellate court. Generally, however, arbitration hearings result in final and binding determinations which stand in place of a trial at the lower court level, with very limited rights of review and appeal.

IV. Benefits and Detriments of Matrimonial Arbitration:

A. Benefits

A principal benefit of the arbitration alternative is the ability of the parties to decide who will be their judge. Litigation leaves the parties no choice but to be bound by the luck of the draw. The choice of one’s judge is an important part of the process of “private ordering,” where people are best able to structure their future relationships and create their own problem solving techniques.⁶

¹ *Arbitration Rules for Interpretation of Separation Agreements*, AMERICAN ARBITRATION ASSOCIATION (June 1, 1988); *see generally*, Robert Coulson, *The Pros and Cons of Arbitrating Matrimonial Disputes*, 1 FAIRSHARE 7 (July 1981) (outlining the procedures of the AAA with respect to family disputes).

² American Academy of Matrimonial Lawyers, Rules for Arbitration of Financial Issues; adopted by Board of Governors, 1990. A copy can be obtained from the AAML office by calling (312) 263-6477.

³ The American Academy of Matrimonial Lawyers has trained approximately 300 matrimonial attorneys as certified arbitrators of family law issues since June 1989. A current list of certified arbitrators in each state can be obtained from the AAML by calling (312) 263-6477.

⁴ Under the Uniform Arbitration Act (“UAA”), an arbitrator’s award is subject to attack only on the following grounds: (1) the award was procured by corruption, fraud or other undue influence; (ii) an arbitrator was partial or used corruption or misconduct which prejudiced the rights of either party; (iii) the arbitrator exceeded his or her authority; (iv) the arbitrator refused to postpone the hearing although sufficient cause for postponement was shown, or the arbitrator refused to hear material evidence or failed to conduct the hearing, which resulted in substantial prejudice to a party; or (v) there was no agreement to arbitrate and the objection was raised during the arbitration. UNIF. ARBITRATION ACT § 12(a); 7 U.L.A. 280 (1997).

⁵ Under the UAA, an appeal may be taken only from any: (i) order denying an application to compel arbitration; (ii) order granting an application to stay arbitration; (iii) order confirming or denying confirmation of an award; (iv) order modifying or correcting an award; (v) order vacating an award without directing a rehearing; or (vi) judgment or decree entered pursuant to this act. UNIF. ARBITRATION ACT § 19(a); 7 U.L.A. 216-17 (1997).

⁶ Janet M. Spencer & Joseph P. Zammit, *Reflections on Arbitration Under the Family Dispute Services*, 32 ARB. J. 111, 112 (1977). *See also* Robert

Coulson, *Family Arbitration - An Exercise in Sensitivity*, 3 FAM. L.Q. 22, 23 (1969) (“A better approach might be to permit parties to design their own settlement machinery . . . there is nothing new about voluntary conciliation of family disputes.”).

The parties may choose an arbitrator with experience in the matrimonial field and, even more particularly, experience related to the particular kind of controversy presented, i.e. custody matters. Thus, for example, the parties could choose an AAML certified arbitrator who, in addition to successfully completing the arbitration training course given by the AAML, has had to concentrate in the family law area for a certain period of time in order to become a Fellow of that Academy. Also, the procedures of the American Arbitration Association allow parties “to obtain an arbitrator with experience and training in the matrimonial field”⁷ In contrast, in many states there is no particular practice pre-requisite for a person to be elected as judge in a Family Court. Moreover, usually judges receive no specialized training to assist them in determining the difficult and often nonlegal issues involved in divorce cases. Indeed, a frequently expressed complaint of judges is that custody cases provide them with their most difficult decisions.⁸

Thus, matrimonial arbitration permits the parties to select⁹ someone who has chosen to be intensely involved in the field of divorce and has developed both an interest and expertise in that area. The authors believe that confidence in the trier of facts can go a long way towards reducing the anger and frustration of the participants, as well as fostering a certain respect for a decision ultimately made to resolve the matter. Furthermore, family disputes are essentially fact-oriented matters. Arbitration is a system largely unbound by precedent and somewhat free from judicial review, and thus is more suited to resolution of predominantly factual disputes.

Another frequently cited factor in favor of arbitration is the speed of the process.¹⁰ The parties do not have to wait to be “reached” on a court calendar, some of which are over two years behind. Not only can the parties virtually choose their date, but they can also get a full-day (or more) without interruptions by other court matters.¹¹ Because a matter submitted to arbitration usually results in a quick hearing and award, the costs of the decision-making process are greatly reduced.¹² The swiftness of the process may also reduce the time in which children are victims of the stress and tension occasioned by lack of certainty as to the outcome.

Perhaps the most significant benefit of arbitration is that it tends to be far less formal than the traditional adjudicatory process.¹³ The entire concept of arbitration permits greater self-determination of the process by the participants. Therefore, the parties are likely to be more accepting of the decision resulting from that process largely because of the parties’ expectations that they have agreed upon limited rights of review and appeal. This, in turn, is conducive to a spirit of future goodwill between the parties.¹⁴ Those who have arbitrated significant numbers of domestic relations matters have said that they do so in their offices, and that they *stress* an informal and less strict approach and relaxed rules of evidence and procedures. Five people sitting around a conference table compares quite favorably to the sterile formality of a courtroom with an isolated, black-robed fact finder.

Choosing an expert in the family law field, who has been involved as an attorney in numerous divorce situations, should also be a factor in having better control over the parties’ war-like tendencies. An arbitrator with considerable prior experience as an attorney in representing clients through contested divorces likely

⁷ Robert Coulson, *supra* note 2, at 7.

⁸ See *Lombardo v. Lombardo*, No. FA-90-0301847-S, 1991 WL 244893 at 3 (Conn. Super. Ct. Nov. 14, 1991) (describing the “painful reality of a contested custody trial”); *Johnson v. Ait-Ameur*, 769 P.2d 682 (Kan. Ct. App. 1989) (“Child custody and visitation decisions are not only difficult as previously noted, but inherently painful.”); *Matter of O’Shea v. Brennan*, 387 N.Y.S.2d 9, 216 (N.Y. App. Div. 1976) (disclosing that the judge is “anguished in making this most difficult decision”).

¹⁰ See, e.g., Robert Coulson, *supra* note 2 at 7; John Middleton, *Burger: Arbitrate More and Litigate Less*, 68 A.B.A. J. 257 (1982).

¹¹ In the AAML arbitration training program, there is a two hour mock hearing. Students continually express surprise about the large amount of testimony that can be given in such a short time span.

¹² Richard R. Block, *Divorce Arbitration: An Alternative to Mediation*, 4 FAIRSHARE 784, 786 (Feb. 1984).

¹³ *Id.*; see also Robert Coulson, *supra* note 2; Peter J. Galasso, *Prejudging the Arbitration of Custody*, N.Y.L.J., Nov. 23, 1994, at 2.

¹⁴ See Frank Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 115 (1976).

will be more able to minimize conduct that antagonizes them. The arbitrator can structure the process so as to reduce the predictable animosity as much as possible.

Pre-arbitration conferences between counsel and the arbitrator can also be an effective tool. Judges often do not get involved themselves (other than through their clerks) until significantly more than one-half of the war arsenal has already been deployed. Thus, the availability of an informal setting, together with the relaxation of the rules of procedure and evidence, tend to alleviate the hostilities between the participants.

The arbitration process does not eliminate the need for effective advocacy by lawyers. Lawyers with years of litigation skills honed in the courtroom can utilize many of those same skills quite effectively in an arbitration. Succinct opening statements and persuasive cross-examination are as crucial in an arbitration as a trial.

B. Detriments

Principal among the arguments against arbitration of some divorce-related disputes is the proposition that there allegedly cannot be, as a matter of law, any final and binding determination made by an arbitrator in any custody case. This point is addressed in Section III below.

Another frequently cited detriment to arbitration is the belief that the parties are *not* protected by rules permitting discovery and requiring financial disclosure. Consequently, litigants ultimately have to resort to the courts for full financial disclosure. In jurisdictions which have adopted the Uniform Arbitration Act, mechanisms *are* provided for such disclosure.¹⁵ Furthermore, the parties may provide in their arbitration agreement to have the arbitrator supervise discovery, or the parties may complete court authorized and enforced discovery and *then* arbitrate.¹⁶

Another often claimed detriment to arbitration is that the arbitrators are not bound by the rules of evidence. That is generally true in the absence of anything stated to the contrary in the agreement to arbitrate.¹⁷ There is no reason, however, why the parties cannot determine in each case to what extent the arbitrator will follow the rules of evidence.¹⁸ Moreover, many courts relax the rules of evidence in custody cases anyway.¹⁹

Another fear of arbitration arises from the alleged ability of arbitrators to ignore the law. It is true that generally an arbitrator's mistake of law or fact does *not* provide a basis for refusing to confirm an award.²⁰ It is also clear, however, that the parties

¹⁵ UNIF. ARBITRATION ACT § 7, 7 U.L.A. 1, 114 (1985). See Kimberley Gibbens, et al., *The Uniform Arbitration Act*, 1995 J. DISP. RESOL. 383.

¹⁶ W. Michael Tupman, *Discovery and Evidence in U.S. Arbitration: The Prevailing Views*, 44 ARB. J. 27, 28-30 (Mar. 1989).

¹⁷ See *Affiliated Mktg., Inc. v. Ryco Chem. & Coatings, Inc.*, 340 So.2d 1240 (Fla. Dist. Ct. App. 1976), *cert. denied*, 353 So.2d 675 (1977); see also *IBSW Local 396 v. Central Tel. Co.*, 581 P.2d 865 (Nev. 1978).

¹⁸ See generally, *Wilcox Co. v. Bouramas*, 392 N.E.2d 198 (Ill. App. Ct. 1979); see also *Wayne Insulation Co. v. Hex Corp.*, 534 A.2d 1279 (D.C. 1987); *Goydor v. Detroit Auto Inter Ins. Exch.*, 216 N.W.2d 436 (Mich. Ct. App. 1974).

¹⁹ See 3 CHILD CUSTODY & VISITATION LAW AND PRACTICE § 20.02, (John P. McCahey ed. 1988); *Kallas v. Kallas*, 614 P.2d 641, 645 n.2 (Utah 1980).

²⁰ UNIF. ARBITRATION ACT § 12(a), 7 U.L.A. 1, 140 (1985); see also *Lozano v. Maryland Casualty Co.*, 850 F.2d 1470 (11th Cir. 1988), *cert. denied*, 489 U.S. 1018 (1989) (holding arbitration award not vacated because of arbitrator's mistake of law); *Schnurmacher Holding Co. v. Noriega*, 542 So.2d 1327 (Fla. 1989) (discussing arbitrator's deviance from law as invalid grounds to vacate); *School Comm. of Waltham v. Waltham's Educators Ass'n.*, 500 N.E.2d 1312 (Mass. 1986) (holding arbitration award not vacated because of mistake of law); *David Co. v. Jim W. Miller Construction, Inc.*, 444 N.W.2d 836 (Minn. Sup. Ct. 1989) (discussing arbitrator's award made according to his notion of justice); *Philadelphia v. Fraternal Order of Police*, 558 A.2d 163 (Pa. Comm. Ct. 1989) (discussing misapplication of law as an invalid ground for vacating an award).

can agree that an arbitrator *will* be bound by the substantive law of the state. Since any arbitration is pursuant to contract, the parties can provide in the contract the parameters that will bind the arbitrator, i.e., the agreement can bind the arbitrator to follow the law. Moreover, certain courts have held that where an arbitrator's misapplication of the law is "so gross" a departure from what the law is, then the court may refuse to confirm the award.²¹ This may provide some protection for the parties. This issue must, however, be addressed with the client before she or he executes *any* agreement to arbitrate. In the opinion of the authors, this considerably overstates the issue. While arbitrators are not specifically required to follow whatever the law on an issue may be, that rule is designed to prevent future litigations rather than encourage random and arbitrary decision making. No arbitrator with a willful ignorance of the law will be asked to decide future cases. Likewise the most scholarly lawyer in town will not be asked to arbitrate if that person is viewed as capricious and unpredictable in personal matters.

The inability of an arbitrator to enforce his or her decisions is another frequently cited detriment to arbitration. In those jurisdictions which have adopted the Uniform Arbitration Act, the making of an arbitration agreement initiates court involvement.²² The remedies for enforcement, contempt and the like *are* available. They reside in the court which, after confirming the arbitration award making it a judgment of the court,²³ can take any necessary enforcement action as it would with any other judgment. An arbitrator designated a special master or referee by the court may well be delegated those powers, by court order or statute.

V. Can There be Final and Binding Arbitration of Pre-Divorce Matrimonial Disputes?

Most case law dealing with matrimonial arbitration is in reference to controversies arising *after* execution of a separation or other agreement incident to a divorce. In those situations the agreement provides the method for resolution of future issues arising under it. Nevertheless, these cases help lead to certain conclusions regarding final and binding arbitration of pre-divorce matrimonial disputes.

Generally speaking, the cases have held that property division may be arbitrated and the result will be final and binding on the parties.²⁴ The general rationale upon which this conclusion is based is that parties may release property rights by contract.²⁵ Since parties agree by contract to arbitration, the agreement as to process can be enforced. The decision (or award) resulting from arbitration has limited review and limited appeal rights, not unlike arbitration awards in other areas.²⁶

Awards by arbitrators of spousal support, maintenance and/ or alimony are almost always final and binding because they, too, are contracts to determine an adult property right.²⁷ Such arbitration decisions, consistent with other arbitration awards, are subject to limited review and appeal rights.

²¹ See *Pacific Gas & Elec. Co. v. Superior Court*, 277 Cal. Rptr. 694 (Cal. Ct. App. 1991); *In re Arbitration Between U. S. Turnkey Exploration, Inc. and PSI, Inc.*, 577 So.2d 1131 (La. Ct. App. 1991); *Prince George's County Educators Ass'n, Inc.*, 486 A.2d 228 (Md. 1984), *aff'd* 522 A.2d 931 (1987) *Landau v. Stracquada* 536 N.Y.S.2d 664 (N.Y. Sup. Ct. 1988).

²² UNIF. ARBITRATION ACT § 17, 7 U.L.A. 1, 211 (1985). See *United Cable TV Corp. v. Northwest Illinois Cable Corp.*, 538 N.E.2d 547 (Ill. 1989); *Gaslin Inc. & Cairo v. L.G.C. Exports, Inc.*, 482 A.2d 1117 (Pa. Super. Ct. 1984).

²³ UNIF. ARBITRATION ACT § 14, 7 U.L.A. 1, 204 (1985). See, e.g., *Bingham County Comm'n. v. Interstate Elec. Co.*, 697 P.2d 1195 (Idaho Ct. App. 1985).

²⁴ See, e.g., *Spencer v. Spencer*, 494 A.2d 1279 (D.C. App. 1985).

²⁵ *Alves v. Alves*, 262 A.2d 111, 118 (D.C. 1970).

²⁶ See *supra* notes 48-74 and accompanying text.

²⁷ *Spencer*, 494 A.2d 1279; *Faherty v. Faherty*, 477 A.2d 1257 (N.J. 1984); *Sheets v. Sheets*, 254 N.Y.S.2d 320 (N.Y. App. Div. 1964); *Crutchley v. Crutchley*, 293 S.E.2d 793 (N.C. 1982); see also *supra* note 25 and accompanying text.

Child custody, visitation, and child support issues present different problems. The traditional role of the court as *parens patriae* requires it to act to protect the child.²⁸ Generally, courts have not been willing to allow absolutely final and binding arbitration in child support cases.²⁹ The advent of child support guidelines, however, may change this since there is less “discretion” if the arbitrator properly applies the guidelines, which may dispense with the need for review.

Arbitration awards of visitation and custody matters are rarely final and binding, and specifically are subject to a special review and/or trial *de novo*, if the court concludes the award is adverse to the child’s best interest. The authors believe, however, that pre-divorce custody and visitation issues should be subject to final and binding arbitration, with an extremely limited ability of a court to vacate the award, i.e. only if the award is clearly contrary to the best interests of the child.³⁰

A change from the present method of resolving custody and visitation disputes is required for a number of reasons. First, because the present method for resolution of custody disputes is decidedly an adversarial one,³¹ the parents are almost required to “dig up dirt” on the other. Although the usual standard is the “best interests of the child,” in an initial custody determination each of the parents tries to prove the other less fit. “This adversarial emphasis is directly contrary to the child’s interests in stability of environment and civility and cooperation between his or her parents.”³²

Litigation increases the opportunity for parents to use children as “bait” to improve their financial or emotional position. It often creates adjustment problems for the children because of the perceived tug-of-war between the parents.³³ The New York Law Revision Commission has remarked on these adjustment problems that:

The available evidence points almost without equivocation to the conclusion that children are better off if both parents are meaningfully involved in their lives after their separation. . . . Therefore, the challenge for the custody dispute resolution system is now to organize itself so as to maximize the number of families in which both parents are involved in the child’s post-separation life. Available evidence suggests that reliance on adversary litigation controlled by the parents and their lawyers as a primary technique for dispute resolution does not further this goal and, indeed, works against it.³⁴

The Commission concluded that the adversarial process exacerbated the harmful effects of divorce on children.³⁵

Since the arbitration process is also an adversarial one, it is a setting in which litigation skills prove helpful to the clients. Even so, arbitration conducted in a less formal atmosphere, often in a shorter time span than a trial, and always with a fact-finder of the parties’ own choosing, is often far less antagonistic

²⁸ For a discussion of the historical development of the Court’s role as *parens patriae*, see Henry H. Foster & Doris Jonas Freed, *Child Custody* (Pt.1), 39 N.Y.U. L. REV. 413, 423-25 (1964). See also Note, *Domestic Relations-New York Court Approves Use of Arbitration in Custody Disputes*, 33 FORDHAM L. REV. 726, 727-28 (1965).

²⁹ See, e.g., *Harris v. Harris*, N.Y.L.J., Aug. 8, 1996, at 21.

³⁰ See, e.g., 1995 TEX. GEN. LAWS § 751 (“If the parties agree to binding arbitration, the court shall render an order reflecting the arbitrator’s award unless the court determines that the award is not in the best interest of the child.”); WIS. STAT. § 802.12(3) (1997) (offering statutory guidance regarding binding arbitration for custody and child placement). See also *supra* notes 49-74 and accompanying text.

³¹ See Andrew Schepard, et al; *Perspective: Peace: A Program of Parental Education*, N.Y.L.J., Dec. 5, 1991, at 2.

³² *Id.*

³³ See JAY FOLBERG, *DIVORCE MEDIATION - PROMISES AND PROBLEMS IN DISPUTE RESOLUTION* 317-318 (1985).

³⁴ *Recommendation of the Law Revision Commission to the 1985 New York Legislature Relating to the Child Custody Decisions-Making Process*, 19

COLUM. J. L. & SOC. PROBS. 105, 119 (1985).

³⁵ *Id.*

and nasty than typical courthouse litigation.³⁶ In light of the fact that arbitration is generally a condensed version of a full trial, even more persuasiveness and witness-examining ability is required.

Second, custody litigation is very costly from the perspective of both the court and the divorcing or separating couple. Matrimonial cases occupy a great deal of scarce judicial time and money.³⁷ Moreover, a typical divorce case consumes a substantial part of the wealth available to the parties, often reducing the parties' future standard of living.³⁸

Third, "bitterly contested cases often produce court orders which are resented and violated, leading to repeated rounds of litigation."³⁹ Many custody cases seem to outlive the parents, or continue for years, ending just before the children reach majority. Litigation in a courtroom may be best suited for situations in which a judgment must be made concerning present consequences of past behavior. Yet in family law the objective is not a final resolution of issues but determination of a program of future conduct, under which matters the parties must thereafter remain in constant contact with each other. "Unlike a settlement in a tort case, where the parties usually never see each other again, parents in a divorce need to maintain a continuing relationship."⁴⁰ In domestic relations cases, and especially in custody cases, more often than not there are hosts of future problems that must be resolved.

All of the above present sound policy reasons to consider applying non-litigation alternatives such as arbitration to the resolution of custody disputes.⁴¹ If, however, the arbitration of a custody dispute is not final and binding, but is subject to *de novo* review by a court, then does arbitration lose much of its attractiveness? Quite simply, why do it twice?

Many of the cases decided to date involve modifying or enforcing the parties' prior agreement (made before they divorced and fixing custody as between themselves), to submit all future issues of custody to final and binding arbitration. Those cases do not address whether a court will enforce an agreement made as part of the *pre-divorce* process, in which the parents agree by written contract that the *initial* determination of custody will be made by an arbitrator. Absent legislation or court rule, the authors conclude that courts will be reluctant to support pre-divorce final and binding arbitration of custody and visitation when the arbitration agreement includes an effort to limit judicial review.

Some commentators argue that the state's role as *parens patriae* is at stake in arbitration agreements which limit judicial review. When divorcing parents agree concerning custody, courts often hold that such an agreement cannot be absolutely binding upon a court, because of the state's special interest in its children.⁴² Courts generally are reluctant to interfere with the parties' private agreement regarding custody,

³⁶ See *supra* notes 9 and 15 and accompanying text.

³⁷ Andrew Shepard, *Divorce, Interspousal Torts, and Res Judicata*, 24 FAM. L.Q. 127, 134, n.9 (1990) ("Divorce litigation comprises a major portion of the caseload of many large state court systems."). For example, in 1988, New York's docket consisted of 48,185 uncontested matrimonial actions. Notes of Issue indicating readiness for trial were filed in 9,488 matrimonial cases. The total number of issues disposed of was 62,752. *Id.*

³⁸ Lengthy divorce trials produce huge attorneys' fees and litigation costs for both parties. See Laura B. Black, et al; *Survey: Developments in Maryland Law: 1985-1988*, 46 MD. L. REV. 738 (1987); Meyer v. Meyer, 441 N.W.2d 544, 548 (Minn. Ct. App. 1989) (stating that there was an imperative need for reform due to escalation of legal costs).

³⁹ Rudolph J. Gerber, *Recommendation on Domestic Relations Reform*, 32 ARIZ. L. REV. 9, 11 (1990).

⁴⁰ *Id.*

⁴¹ Nancy Ann Holman & Jane Noland, *Agreement and Arbitration: Relief to Over-Litigation in Domestic Relations Disputes in Washington*, 12 WILLAMETTE L.J. 527, 544 (1976) ("[a]n obvious way to avoid the time and cost of . . . litigation[,] . . . and to anticipate the possibility of future disputes" is to use arbitration); Martha Brannigan, *Warring Couples Shun Divorce Mediators and Opt to Battle It Out in Court Instead*, WALL ST. J., Mar. 27, 1990, at B1 (recommending arbitration to "avoid pinning blame, enable couples to retain mutual respect, and to avoid much of the long and costly trauma of divorce").

⁴² See generally Anderson v. Anderson, 481 P.2d 881 (Ariz. Ct. App. 1971) (trial court not bound by the terms of the parties' agreement regarding custody); In re Marriage of Lawson, 608 P.2d 378 (Colo. Ct. App. 1980) (custody arrangement only temporary unless approved by proper statutory standards); Falk v. Falk, 395 N.E.2d 750 (Ill. App. Ct. 1979) (court will not be bound by custody arrangement agreed to by parents); Glauber v. Glauber, 600 N.Y.S.2d 740. (N.Y. App. Div. 1993)(court cannot be bound by custody agreement and simultaneously act as *parens patriae* on behalf of the child); Perry v. Perry, 234 S.E.2d 449 (N.C. Ct. App. 1977)(separation agreement not binding as to custody).

but they often reserve the power to review such private agreements. Experience, however, shows that this power is rarely exercised.

The question can be stated simply: if Dick and Jane can privately agree as to their child's custody (subject only to limited judicial review), why can't they agree an arbitrator will make the initial determination of custody and that they will be completely bound by any decision the arbitrator makes? Stated differently, if the parties are legally permitted to agree to a substantive resolution of a custody dispute, why can't the parties agree to a *process* to resolve the same custody dispute? In both instances, custody *is* resolved by agreement of the parties. Since knowing, willful delegation of a parties' decision-making rights usually is valid and binding in most areas of the law;⁴³ it should be in the custody area as well. Prior law has not fully considered this particular analysis of the issue of arbitration of custody related matters.⁴⁴ Indeed, many of the earlier cases seemed to limit the ability of parents to agree to final and binding awards in custody cases.

Thus, in the leading case of *Crutchley v. Crutchley*,⁴⁷ the Supreme Court of North Carolina, in pure *obiter dictum*⁴⁸ stated that:

while there also exists no prohibition to the parties settling the issues of custody and child support by arbitration, the provision of an award for custody or child support will always be reviewable and modifiable by the courts. It is a well-established rule that the parties cannot by agreement deprive the court of its inherent and statutory authority to protect the interests of *their* children.⁴⁹

Two years later, a lower court in North Carolina tried to clarify the *Crutchley* decision in *Rustad v. Rustad*,⁵⁰ stating that in *Crutchley* "our Supreme Court made it clear, moreover, that the policy underlying the recently adopted Uniform Arbitration Act . . . , favoring arbitration as a means of dispute resolution, extends to domestic relations disputes."⁵¹ The *Rustad* court reminded litigants, however, that the court always retained "ultimate authority to review and modify arbitration awards involving custody"⁵²

Crutchley involved a pre-divorce initial determination of custody submitted to a non-lawyer for arbitration. *Rustad* involved a post-divorce custody modification proceeding. The rule in North Carolina seems clear: one cannot expect to have final and binding arbitration in a custody matter; the court always preserves its right to "review." The courts, however, have not, explained whether this is a *de novo* review or some form of limited review.

⁴⁷ 293 S.E.2d 793 (N.C. 1982).

⁴⁸ The court in *Crutchley* held that an arbitration award for alimony, custody and child support was void *ab initio* since the trial court had no authority to order arbitration after the action was filed. Thus, the quoted language was not necessary to the decision rendered.

⁴⁹ 293 S.E.2d at 797 (emphasis added).

⁵⁰ 314 S.E.2d 275 (N.C. Ct. App. 1984).

⁵¹ *Id.* at 277. ⁵² *Id.*

⁴³ See UNIF. ARBITRATION ACT § 1, 7 U.L.A. 1, 5 (1985); 1995 TEX. GEN. LAWS § 751. See, e.g., *Hyster Co. v. Independent Towing & Lifting Machine Ass'n*, 519 F.2d 89 (7th Cir. 1975), *cert. denied*, 428 U.S. 910 (1975) (arbitration in labor disputes); *Gold Coast Mall, Inc. v. Larner Corp.*, 468 A.2d 91 (Md. 1983) (arbitration in tenant rental dispute); *Sullivan v. Belmont*, 386 N.E.2d 1288 (Mass App. Ct. 1979) (arbitration of public employment agreements).

⁴⁴ We have found only one case, *Dick v. Dick*, 534 N.E.2d 185 (Mich. Ct. App. 1995), which touches on this idea. The court in *Dick* specifically balances case law, the Michigan Child Custody Act and the Uniform Arbitration Act, as well as giving significant weight to the *parties'* decision, stating: "if the parties agree to binding arbitration, they effectively remove the dispute to a different forum." This case is addressed more completely in text at notes 72-73.

In *Faherty v. Faherty*,⁵³ a child support case, a New Jersey court indicated that a reviewing court would have to conduct a *de novo* review of an arbitrator's award of child support "unless it is clear on the face of the award that the award would not adversely affect the substantial best interests of the child."⁵⁴ This suggests that a carefully reasoned award is more likely to be enforced while sloppy analysis may abort the whole process.

*Spencer v. Spencer*⁵⁵ involved, in part, a pre-divorce arbitration of custody. After the parents were divorced, the ex-wife wanted to relocate. The court found that the parties had not provided for arbitration of such future disputes. Further, the court determined that *it* had the authority to resolve those future disputes, finding an arbitration award akin to a separation agreement, and deciding that since a separation agreement was subject to specific enforcement, so too was an arbitration award. The court went on to protect its own powers, however, in the following language:

Parties are free to choose the method for resolving their disputes, but once they seek judicial resolution of their disputes, the court may not relegate its duty in all respects . . . [Thus] provisions concerning custody and child support would continue to be within the court's jurisdiction despite prelitigation or mid-litigation arbitration or agreement.⁵⁶

Thus, the *Spencer* court appears to give support to a concept of only a limited review of an arbitrator's custody award, more limited than the courts in the North Carolina cases.⁵⁷ The authors maintain though that the *Spencer* court's reasoning is faulty. If a

⁵³ 477 A.2d 1257 (N.J. 1984); *see also* *Bloksberg v. Bloksberg*, 387 N.E.2d 156 (Mass. App. Ct. 1979) (arbitration clause in decree nisi did not preclude court's jurisdiction to modify or enforce.) ⁵⁴ 477 A.2d at 1263.

⁵⁵ 494 A.2d 1279 (D.C. 1985). In so holding, the court stated, "[s]eparation agreements and arbitration are similar to the extent that both reduce court congestion and afford parties an opportunity to settle their disputes without court intervention, with speed, economy and substantial justice However, if arbitration is undertaken, the role of the court in interpreting the arbitration decision may be more limited than it would be were the court interpreting a separation agreement." *Id.* At 1284.

⁵⁶ *Id.* at 1285.

⁵⁷ *See also* *Goldberg v. Goldberg*, 691 S.W.2d 312 (Mo. Ct. App. 1985) (the court indicated in passing that a rule requiring binding arbitration of custody might not be valid).

court can specifically enforce a separation agreement, why does it not have the same power to specifically enforce an agreement to arbitrate?

In *Lieberman v. Lieberman*,⁵⁸ a trial court in New York gave great weight to the parties' agreement to arbitrate custody before a Beth Din (a religious court) and upheld the arbitrators' ultimate award. The court raised no question as to the ability of the parties to submit the issue of custody to such final and binding arbitration. The court explained though that since it retained supervisory power as "*parens patriae*" over separation agreements, it would exercise the same power in reviewing the arbitrators' award and would intervene upon a "showing that a provision of an award might be adverse to the best interest of a child."⁵⁹ It was not enough to cause the court to intervene since the award only "affected" the child. Thus, the court obviously limited the scope of its review and did not permit a *de novo* hearing or trial.

Another judge in the same court reached substantially the same result a year earlier,⁶⁰ holding specifically that custody and visitation matters *may* be submitted to arbitration, subject to modification or a declaration that they are null and void, but only if contrary to the clear best interests of the child.⁶¹

Subsequent to those two cases, however, one of the four intermediate appellate courts in New York State held, in *Glauber v. Glauber*, that custody and visitation are not subjects for arbitration as they are "so interlaced with strong public policy considerations" they are beyond the reach of the arbitrator's discretion.⁶² This overrules the decisions reached in *Lieberman* and *Lemmer*.

Just as recently, though, in *Miller v. Miller*,⁶³ an appellate court in Pennsylvania and in *Kelm v. Kelm*,⁶⁴ the Supreme Court

⁵⁸ 566 N.Y.S.2d 490 (N.Y. Sup. Ct. 1991).

⁵⁹ *Id.*

⁶⁰ Lemmer v. Lemmer, N.Y.L.J., Sept. 28, 1990, at 23 (not otherwise reported).

⁶¹ The court cited *Sheets v. Sheets*, 254 N.Y.S.2d 320 (App. Div. 1964) for its authority. *Sheets* held that an arbitration award will bind the parents “insofar as the award did not adversely affect the substantial interests of the child.” *Id.* at 324.

⁶² 192 A.D.2d 94, 600 N.Y.S.2d 740 (App. Div. 1993).

⁶³ 620 A.2d 1161 (Pa. App. Div. 1993). ⁶⁴ 68 Ohio St. 3d 26 (Sup. Ct. 1993).

in Ohio, each held that a parental agreement calling for binding arbitration to determine custody and child support is not void as against public policy, but the arbitration award *is* subject to review upon a challenge that it is adverse to the best interests of the child. In *Miller*, the court stated that:

arbitration generally is a favored remedy . . . and if the parties choose to arbitrate their domestic differences they should be permitted to do so . . . [A]rbitration provisions regarding custody are not . . . void as against public policy . . . However . . . an arbitration award on the issue of custody is subject to review by a court . . . to look to the best interests of the child.⁶⁵

The *Miller* court, however, specifically held that the award is subject to being challenged “as not being in the best interests of the child.”⁶⁶ It would seem, therefore, that the award has some presumptive binding effect until it is challenged.

In *Kelm*, the Ohio Supreme Court held that:

the best interest of a child . . . can be protected as well by the arbitration process as by a trial court. However, if the arbitration process fails in any respect to protect the best interest of a child . . . trial courts have authority to use . . . their contempt powers to ensure that the process is accomplished in an expeditious, efficient, and reasonable manner.⁶⁷

Accordingly, it appears that certain state courts are beginning to appreciate the benefits of arbitration, specifically to child custody issues, despite their prior positions regarding this area.

In *Biel v. Biel*,⁶⁸ a Wisconsin court held, in a pre-divorce custody case, that “custody and visitation determinations must be made by the Court and cannot be delegated by it to any other person,”⁶⁹ striking down an order directing mediation of custody and visitation by a social worker with arbitration ordered by the court if the mediation failed.⁷⁰ Since that time the Wisconsin Legislature has addressed those issues by adopting a statute allowing for binding arbitration in actions for custody, visitation

⁶⁵ 620 A.2d 1161.

⁶⁶ 620 A.2d at 1164.

⁶⁷ 68 Ohio St.3d 26 (Sup. Ct. 1993).

⁶⁸ 336 N.W.2d 404 (Wis. Ct. App. 1983).

⁶⁹ *Id.* at 406.

⁷⁰ *Id.* There is nothing in the decision which indicates that anything turned on the fact that the arbitrator was not an attorney.

and/or child support, and providing specific, but limited, judicial review.⁷¹

A recent Michigan Court of Appeals’ case has explicitly upheld the validity of binding arbitration of a matrimonial dispute, including custody. In *Dick v. Dick*,⁷² the Michigan Court of Appeals affirmed a circuit judge’s adoption of an arbitrator’s child custody determination. That court relied not only on statutory authority, but also on case law and court rules, in concluding that there was no clear prohibition against the use of binding arbitration to resolve custody disputes.⁷³

The most recent judicial statement impacting on these issues was by a Massachusetts intermediate appellate court in *Reynolds v. Whitman*.⁷⁴ While approving the concept of arbitration of alimony and property division, the court held that any “award must, of course, be subject to review by the judge, who has the authority, and the obligation . . ., to make a fair and equitable distribution of property.”⁷⁵ The law continues to evolve in this area, and it is not clear whether the Massachusetts court really took a step forward.



VI. Conclusion

Courts will jealously guard their supervisory powers over custody disputes. The real issues are *why* should the courts find an arbitrator's award to be "reviewable" at all (except upon appeal from a judgment confirming such an award), and if it is "reviewable", *what* the standard for that review should be.

The few cases which have addressed these issues seem to permit or even require some limited judicial review of an arbitrator's award of custody. It appears that, at the least, courts are preserving for themselves a role as a fail-safe mechanism in case of clearly erroneous awards. It seems, however, that courts do not issue any solid reasoning on the point: reference to their obligation as *parens patriae* seems to begin and end the discussion. If the court has the power to refuse to confirm an award that is

⁷¹ WIS. STAT. § 802.12 (1994). For a detailed analysis of the limiting aspects of the Wisconsin statute, see WIS. STAT. § 802.12(3) (1994).

⁷² 534 N.E.2d 185 (Mich. Ct. App. 1995).

⁷³ *Id.* at 6.

⁷⁴ 40 Mass. App. Ct. 315 (1996). ⁷⁵ *Id.*

contrary to public policy where an error by the arbitrator is "so gross" as to shock its conscience,⁴⁵ that should supply a satisfactory safety net.

Nothing in the Uniform Arbitration Act requires or even permits the *de novo* review which many courts impose for custody cases. One should question whether family law is well served by one rule for custody arbitration and another for financial matters, even where the Uniform Arbitration Act has been adopted. This judicial legislation may not be appropriate or necessary.⁴⁶

The authors suspect that part of the judicial reluctance to give approval to final and binding arbitration of family law matters rests, at least in part, on the prior failure to have a group of well-trained and highly competent family law arbitrators. We hope that the recent development of such a group by both the AAML and the Family Law Section of the ABA⁴⁷ will lead to a realization that there are appropriately trained and experienced family law arbitrators whom the courts can trust.

⁴⁵ See *supra* note 23 and accompanying text.

⁴⁶ See *Friedman v. Friedman*, 419 A.2d 1221 (Pa. Super. Ct. 1980) (holding that in Pennsylvania, the Uniform Arbitration Act does not apply unless the parties' agreement states that it does); Pennsylvania has created a system known as "common-law" arbitration for such cases.

⁴⁷ The American Bar Association has trained approximately 50 family lawyers since June 1995.