

Comment,

BINDING ARBITRATION: A PROPER FORUM FOR CHILD CUSTODY?

Recently, it seems lawyers and the entire judicial system are criticized at every turn.¹ American culture is constantly raising questions about whether the traditional court system really offers the most practical and just forum for resolving disputes.² However, the search for alternative methods to solve disputes is nothing new. Labor disputes in England and America moved away from the courts and towards the alternative method of arbitration hundreds of years ago.³ Yet, only recently has arbitration

¹ See *ABC News Special: The Trouble with Lawyers* (ABC television broadcast, Jan. 2, 1996) available in LEXIS, News Library, Script File (asserting the traditional court system mainly serves the salaries of lawyers rather than justice for clients); Robert J. Samuelson, *I Am a Big Lawyer Basher*, NEWSWEEK, Apr. 27, 1992, at 62 (commenting generally about the conflict between the goals of lawyers and justice). But see Howard Rosenberg, *Television: Did You Hear the One About 'Lawyers'?*, L.A. TIMES, Jan. 1, 1996, at F1 (questioning the reliability of John Stossel's assertions in *The Trouble with Lawyers*).

² *The Trouble with Lawyers*, *supra* note 1, at 11 of script (indicating the waste of time involved with discovery. In a slander case between a dentist and ABC, John Stossel and Jamie Floyd, Stanford University Law Professor, explain the amount of discovery requested from the plaintiff:

Stossel: "Sometimes they wanted documents and, in case we didn't know what that means, they made it clear. Ready? Documents means: 'Any abstracts, accounts, accounting records, accounting advertisements, agreements, bids, bills, bills of lading, blanks, books of accounts, brochures' —That's just the A's and B's. We'll skip ahead — 'meeting reports, memoranda, memos, messages, microfilm, microfiche, minutes'. . . 'tapes telexes, telegrams, teletype messages, tests, test reports'. . ."

Floyd: "And then maybe the client'll run out of money and won't be able to continue to litigate."

In this instance, the reporter, John Stossel, asserted the entire case could have been resolved by viewing the forty minute television program where he discussed the behavior of the dentist, rather than both sides requesting every document under the sun that may or may not have been applicable to the case. He stated that even the winner feels like a loser in this type of system.)

³ Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 854-55 (1961).

spread to family law.¹² Since arbitration is still fairly new in the domestic area, many concerns still exist as to whether arbitration is really an appropriate process to determine sensitive issues such as child custody.

This article begins with a discussion of why alternative methods should be used in the first place. The parties' motives and circumstances are explored to understand why some choose to depart from the traditional court system. Next, since there are many alternatives, the choice of arbitration over other alternative methods will be investigated. Finally, the appropriateness of arbitration in child custody matters will be analyzed. Is it against public interest to take the decision away from the judge? Can parents sign away their right to appeal when the custody of their children is involved? Following the discussion of these concerns are proposed standards for legislation to allow arbitration in child custody matters while ensuring protection of the best interest of the child.

I. Why Choose ADR Methods at All?

Unfortunately, extended court delays present common and frustrating problems to divorcing parties. Some may find their needs better met by an alternative process. Alternative methods may allow parties to

¹ Stephen W. Schlissel, *Why Arbitrate Domestic Relations Matters?*, in

AMERICAN ACADEMY OF MATRIMONIAL LAWYERS ADVANCED ARBITRATION

², (Allan R. Koritzinsky et al. eds., 1995) (indicating the determination of the American Academy of Matrimonial Lawyers in 1990 "to promote the concept of arbitration in Domestic Relations matters." See also, *Matrimonial Arbitration—The Board Votes to Take the Lead*, in AMERICAN ACADEMY OF MATRIMONIAL LAWYERS NEWSLETTER, (April 1990).

reach a resolution outside the court that is quicker, less expensive, and more satisfying to the parties than traditional attorney negotiation and litigation because the parties ultimately have more control over the process themselves.³

The various alternative dispute resolution methods include mediation, arbitration, summary jury trial, and the mini-trial.⁴ Of these methods, mediation and arbitration are the most appropriate for a domestic dispute. The summary jury trial and minitrial are more accommodating to corporate suits and complex issues involving large sums of money.⁵ Causes of action involving private parties and emotional issues adjust better to arbitration and/or mediation because these methods are quicker, more cost efficient and better able to address issues involved in continuing relationships than the alternatives.⁶

Mediation involves the two disputing persons and a neutral third party.⁷ The neutral party facilitates negotiations between the disputants. It is generally a voluntary process that builds upon the parties' willingness to settle. The parties work with the mediator towards a settlement called a mediation agreement, which can be binding if the parties agree and the court accepts the agreement as a formal settlement. Party satisfaction with the end result tends to be greater since the parties themselves are responsible for the agreement. People are more willing to comply with agreements they make between themselves than those imposed upon them by a third party.⁸ The agreement will more likely meet the needs of both parties and may facilitate productive communication between them.

Although mediation may not work for everyone, it offers an appropriate choice for clients who: (1) are responsible for making a decision on their own behalf; (2) are emotionally capable of negotiating on their own behalf; and (3) are not victims of power imbalance from the other side.⁹ Disputes involving continuing relationships between the parties are more appropriate for mediation than litigation because of the win-win nature of mediation.¹⁰ The parties on both sides will feel satisfied knowing they reached an amicable agreement together. In a domestic dispute involving children, there is obviously a continuing relationship between the parties. Limiting the adversarial nature of the process increases the overall satisfaction between the parties by preserving, or at least limiting damage to, their future relationship.¹³

The greatest advantage of mediation is the increase in party satisfaction. Mediation generally offers a quicker, less expensive and more satisfactory resolution of the dispute than court resolution or attorney negotiations. The disadvantage to mediation involves a concern that the balance of power between the parties may be so skewed that a fair solution cannot be reached in mediation.¹⁴ When there's a disparity in negotiation skills, knowledge about the legal system, and relationship power between the parties, the party without power may be worse off in mediation without the aid of their own legal counsel. Some mediators may choose to intervene to lessen a power imbalance, however, such intervention presents a conflict for the mediator between being

³ Lynn A. Kerbeshian, *ADR: To Be Or . . .?*, 70 N.D. L. REV. 381 (1994).

⁴ A Leo Levin and Deirdre Golash, *Alternative Dispute Resolution in Federal District Courts*, 37 U. FLA. L. REV. 29 (1985).

⁵ *Id.* See also, Eric D. Green, *Settling Large Case Litigation: An Alternative Approach*, 11 LOY. L.A. L. REV. 493 (1978) (discussion of mini-trial).

⁶ Kerbeshian, *supra*, note 5.

⁷ Mary Pat Treuthart, *In Harm's Way? Family Mediation and the Role of the Attorney Advocate*, 23 GOLDEN GATE U. L. REV. 717 (1993).

⁸ *Id.* at 717, (stating: "[m]utually agreed solutions, rather than the public acrimony of an adversarial legal proceeding, are viewed as less destructive to family relationships, particularly parent-child ties") (citations omitted).

⁹ *Id.*

¹⁰ See generally, Jake Warner, *Mediation: A Better Way To End Disputes*,

WHOLE EARTH REVIEW, June 22, 1986, at 91 (explaining:

The adversary system encourages people to overstate their claims and often results in bitter lying contests. Once people have testified in open court about how horrible the other party is, not to mention hav-

ing experienced the paranoia and expense of a full-scale trial, there is little likelihood they will ever again have a constructive relationship. Thus, in many domestic, small-business, and neighbor law disputes, even the winner ends up losing.)

¹³ T.M., *Arms Reduction Talks*, FINANCIAL WORLD, Jan. 24, 1989, at 60 (commenting that “mediation is considered a good alternative. . .for resolving child custody or visitation rights. It’s usually in the child’s best interest, at least emotionally, to minimize the battle.”)

¹⁴ Treuthart, *supra* note 9, (commenting on the weaker bargaining position of women in many domestic disputes: With the current gender inequality which exists in our society, the mediation process fails to fully recognize that women may be seriously disadvantaged by a process which places them in an unrestrained bargaining situation with men who are generally economically dominant and more powerful. . .Many mediators, aware that there is never a perfect power balance between two parties in a relationship, believe that sufficient skill and sensitivity can tip the balance of power to produce a fair outcome. It is important for mediators to understand that no amount of skill or training can make up for the control that an abuser exerts over his victim, and negotiations between these parties cannot, in good conscience, be called ‘mediation.’)

Id. at 719, 728-29 (citation omitted).

neutral and fair. If the imbalance is significant, the parties may not be well suited for mediation.¹¹

In addition, there is concern that if an agreement is not reached, the parties will be hurt later by revealing their strategy and losing confidentiality. However, it is unlikely information will be disclosed that was not otherwise discoverable or already known by the other side. Many states have statutes protecting the confidentiality of mediation.¹² Furthermore, even without statutory protection, mediators usually require a confidentiality clause as a prerequisite to mediation to protect themselves from any future subpoenas requesting testimony from the mediator regarding information revealed during the mediation. In addition, attorneys tend to worry what their clients will say without an attorney present. Thus, attorneys might advise their clients to say nothing, which ultimately limits the effectiveness of mediation.

Another alternative method available in the area of domestic disputes is voluntary arbitration. In arbitration, the parties agree to submit their dispute to a neutral third party, called an arbitrator, who will make a binding decision upon the parties.¹³ It is similar to mediation in that the parties have more control over the process than they do in litigation. They choose the decision-maker who is usually an expert in the field, rather than an appointed judge who may or may not be an expert in the particular area of dispute.

Since the parties must choose the arbitrator together, the arbitrator is viewed as credible by the parties.¹⁴ However, the arbitrator acts more as a judge than a mediator. The most significant difference from mediation is that arbitration maintains the adversarial relationship between the parties and imposes a binding decision. If the arbitration is required by the court, then the decision is not binding in order to protect the parties constitutional right to access to court.¹⁵ Yet, when the parties voluntarily agree to submit their dispute to arbitration, they waive their access to court and the arbitrator’s decision will be binding.¹⁵¹⁶

Under binding arbitration, an arbitrator’s decision may only be overturned by evidence of (1) impartiality in the arbitrator’s appointment or conduct, or (2) if the arbitrator exceeded his or her powers by refusing to postpone a hearing upon sufficient cause or (3) if the arbitrator refused to hear evidence

¹¹ *Id.*

¹² *E.g.*, MO. REV. STAT. § 435.014 (West 1997).

¹³ Nancy Ann Holman & Jane Noland, *Agreement and Arbitration: Relief to Over-Litigation in Domestic Relations Disputes in Washington*, 12 WILLAMETTE L.J. 527 (1976).

¹⁴ Schlissel, *supra* note 4, (indicating that “confidence in the trier of fact can go a long way towards reducing the anger and frustration of the participants, as well as fostering a certain respect for decision ultimately made to resolve the matter.”) *Id.* at 5.

¹⁵ See *Beriker v. Permagrain Prod. Inc.*, 500 A.2d 178, 179 (Pa. Super. Ct. 1985; *Gaslin, Inc. v. L.G.C. Exports, Inc.*, 482 A.2d 1117 (Pa. Super. Ct. 1984);

David Co. v. Jim W. Miller Constr. Inc., 444 N.W.2d 836 (Minn. 1989). See also,

¹⁶ PA. CONS. STAT. ANN. § 7314(a)(1)(v) (1997).

admissible for controversy.¹⁷¹⁸ An arbitrator's award will not be vacated even for a mistaken interpretation of the law.¹⁹ Courts are hesitant to overturn arbitration decisions.²⁰ In fact, if the decision is overturned, courts will usually set up another arbitration with a new arbitrator.²¹

Parties choose arbitration as an alternative to litigation because it tends to be quicker, less expensive and less formal.²² In addition, the adversarial nature with a binding decision allows the parties to feel they had their day in court. Yet, arbitration is quicker and more satisfying than a traditional trial because the

¹⁹ A. Leo Levin and Deirdre Golash, *Alternative Dispute Resolution in Federal District Courts*, 37 U. FLA. L. REV. 29 (1985) (discussing the constitutionality of alternative dispute resolution). *See also*, *State ex rel. Cardinal Glennon Memorial Hosp. for Children v. Gaertner*, 583 S.W.2d 107 (Mo. en banc 1979) (stating that court-ordered alternative dispute resolution as a precondition to court access is unconstitutional).

parties select where and when the case will be heard. They are not at the mercy of the court's over booked docket. In addition, the arbitrator is better able to focus on one particular case rather than hundreds of cases at a time.²³ Through arbitration the parties avoid frustrating court-delays that lead to needless repetition of information. Thus, since the arbitrator's attention focuses solely upon the parties' case, his or her decision will be reached more quickly than in typical court proceedings.²⁴

The parties also decide the level of formality in arbitration.²⁵ The state's rules of evidence do not necessarily apply. If the parties truly want to feel as if they had their day in court, they may choose to keep the procedure as formal and traditional as possible, including use of the formal rules of evidence. However, formality is not required and the parties may feel more comfortable in a relaxed setting.²⁶ Although the arbitrator must be paid, arbitration generally costs less than traditional litigation because the less formal and quicker resolution of the dispute tends to limit the amount of attorney fees.

Arbitration originally developed in the labor context as an informal means of resolving a dispute. Since then, arbitration has spread to other areas of the law including domestic disputes. The criticisms of arbitration center around the concern that it is becoming too legalistic and formal.²⁷ The increased formality inevitably raises all the costs involved including discovery, attorney fees and arbitrator fees. However, in

¹⁷ *See, e.g.*, *Lozano v. Maryland Casualty Co.*, 850 F.2d 1470, (11th Cir. 1988), *Schnurmacher Holding, Inc. v. Noriega*, 542 So.2d 1327 (Fla. 1989); *David Co. v. Jim W. Miller Constr. Inc.*, 444 N.W.2d 836 (Minn. 1989); *School Comm. of Waltham v. Waltham Educators Ass'n.*, 500 N.E.2d 1312 (Mass.

¹⁸); *Gaslin, Inc. v. L.G.C. Exports, Inc.*, 482 A.2d 1117 (Pa. Super. Ct. 1984); *Landau v. Stracquadaine*, 536 N.Y.S.2d 664, (N.Y. Sup. Ct. 1988); *City of Philadelphia v. Fraternal Order of Police Lodge No. 5*, 558 A.2d 163 (Pa. Commw. Ct. 1989).

¹⁹ *Id.*

²⁰ *Holman & Noland, supra* note 17, at 537.

²¹ *See Landau v. Stracquadaine*, 536 N.Y.S.2d 664 (N.Y. Sup. Ct. 1988) (remanding arbitration decision back to arbitration for examination of additional evidence).

²² *Holman & Noland, supra* note 17, at 543-44. *See also*, *Schlissel, supra* note 4.

²³ *Schlissel, supra* note 4, (stating: "[t]he 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 without interruptions by other court matters.") *Id.* at 5-6.

²⁴ *Holman & Noland, supra* note 17, at 529 (explaining: "[e]xpeditious access to an arbitrator or specialist panel usually chosen by the parties themselves, is a prospect appealing to litigants who would otherwise be frustrated by crowded docket and bear the heavy expenses of litigation in matters which should be disposed of with greater dispatch and less cost."); Telephone Interview with Lori Levine, member of the American Academy of Matrimonial Lawyers and Missouri Arbitrator, (Jan. 9, 1996).

²⁵ *Schlissel, supra* note 4 at 6.

²⁶ *Id.*

²⁷ Richard Mittenthal, *Whither Arbitration?*, *Proceedings, 44th Annual Meeting, National Academy of Arbitrators*, in *DISPUTE RESOLUTION FOR LAWYERS* 512, (Leonard L. Riskin & James E. Westbrook, 2nd ed., 1997).

certain circumstances parties are still willing to submit to a formal arbitration rather than waiting for a court date in an overcrowded docket.

II. Why Choose Arbitration Over Mediation?

In domestic relations, mediation may not offer the best alternative for resolution of the dispute. The parties in a divorce or child custody battle are often riding the biggest emotional roller coaster of their lives. Pushing emotions to the side may be extremely difficult, if not impossible. For example, in a custody battle where the parties simply cannot put aside their differences, even for the sake of the children, joint custody would not be in the best interests of the children due to the animosity between the parents. In such a situation, although there is a continuing relationship between the parties, adversity is inevitable since each side wants “his/her way” at all costs. Blinding hatred for each other may turn mediation into a waste of time by actually escalating the tension and anxiety between the parties.²⁸

In addition, mediation is not a good alternative where there is an imbalance of power between the parties. The weaker spouse tends to give in to the dominating spouse, and a satisfactory agreement to all sides is not attainable. Sometimes the power imbalance can be controlled by the mediator. However, not every mediator will intervene to protect the interests of each side in a dispute. More frequently, the mediator does not consciously allow one party to dominate the other, but rather, the mediator simply lacks the legal knowledge necessary to protect the interests of both parties.²⁹ Of course, there are mediators who are legal experts. However, mediators may also be psychologists or persons of other disciplines who do not necessarily possess an extensive legal background to ensure protection of the weaker parties.³³

Although the parties may select the type of mediator, there may be certain situations where the mediator simply cannot protect the weaker party.³⁴ In addition, some parties may have already attempted mediation without reaching an agreement.³⁵

life insurance policy. The ex-husband continued paying the premium. What the mediator didn't know was that regardless of this move, the ex-wife would still be liable for taxes on the proceeds of that policy. That blunder cost the woman thousands of dollars.)

Id.

³³ Jake Warner, *Mediation: A Better Way To End Disputes*, *WHOLE EARTH REVIEW*, June 22, 1986, at 91 (explaining:

Mediation, for all its virtues, is simply not appropriate to handle David vs. Goliath disputes. . . .

Unfortunately, there is also a risk in turning domestic mediation over to psychologists and other nonlawyer mediators. While normally very helpful when it comes to disputes around child custody and visitation, many of these people do not know enough law to flag situations in which an unsophisticated spouse is willing to give up fundamental rights without sufficient knowledge of what those rights really are.)

Id. at 92.

³⁴ This is particularly a problem in the area of domestic abuse. *See* Truethart, *supra* note 9 (asserting: There should be an assumption that a battered woman cannot voluntarily consent to participate in mediation or to the terms of a final agreement. . . .The mere presence of the abuser may be frightening and intimidating to a battered woman,

²⁸ *See*, Mary Pat Truethart, *supra* note 9, (stating that: parents may be unable. . .to focus on the children's best interests due to their own emotional states or their mistrust of one another as a result of the trauma associated with the break-up of the marriage. Even if parents try to focus on the 'best interests' of the children, there is no clear consensus of the meaning of the term and it is difficult to predict future behavior and circumstances.“)

Id. at 733.

²⁹ T.M., *Arms Reduction Talks*, *FINANCIAL WORLD*, Jan. 24, 1989, at 60 (indicating the problems involved with uneducated mediators:

Consulting an inexperienced or uninformed mediator can be costly. Raoul Felder, a New York City divorce attorney, recalls a mediator-negotiated arrangement in which the ex-wife owned her ex-husband's

to say nothing of the prospect of her attempting to negotiate with him. The coercive effect of domestic abuse automatically skews the equality of bargaining power completely to the advantage of the abuser. There should be an automatic presumption that equality of bargaining power never exists when one disputant has abused another disputant and principled mediation cannot take place under these circumstances.)

Id. at 728-29 (citations omitted).

³⁵ See Frederick P. Kessler, *An Arbitrator's Eye View of Family Law Arbitration*, in AMERICAN ACADEMY OF MATRIMONIAL LAWYERS ADVANCED ARBITRATION 93, (Allan R. Koritzinsky et al. eds., 1995) (explaining a transition from mediation to arbitration is often used in the labor context when a mediation agreement cannot be reached. In order for the same person to act as mediator and arbitrator in a family law dispute, there needs to be significant passage of time to protect the interests of both parties. Passage of time should protect Thus, in circumstances where emotions cannot be put aside and common ground is not available,³⁶ arbitration offers an alternative that allows each party to strenuously argue their position in a quicker and less expensive context than adjudication.

III. Is Arbitration Appropriate Given the Hesitancy of Courts to Accept its Binding Effect?

Applying arbitration to child custody disputes raises concerns about whether parties can legally agree to accept a binding arbitration decision over their child. Under the *parens patriae* doctrine, the court has ultimate responsibility to care for the best interests of the child³⁷ and therefore must sign off on any arbitration agreement before it is considered legally binding.³⁸ However, as stated above, arbitration decisions are rarely overturned and would only be rejected by a court in a child custody case if the arbitrator's decision was not in the best interest of the child. Obviously, the best interest of the child creates a discretionary decision, and the courts are likely to feel the arbitrator had better knowledge of the facts and circumstances of the case than the judge who oversees almost as an outsider. Yet, under the *parens patriae* doctrine courts have traditionally been the protector of the child, and family courts may be reluctant to relinquish their protection over the child.³⁹ The purpose of reaching a quicker and less expensive resolution through arbitration is seriously un-

the parties because, "[a] busy arbitrator does not really remember details of prior mediation, [and] time in fact changes position, so prior disclosures [are] presumed not to be binding at a later interval. However, this [passage of time] mitigates against the usual arbitration objective of quick resolution." *Id.* at 97.

³⁶ Warner, *supra* note 12 (explaining that "[p]art of the problem [with mediation] is that the disputants are commonly so angry at each other that they find it hard to agree on anything.") *Id.* at 92.

³⁷ O'Shea v. Brennan, 387 N.Y.S.2d 212 (N.Y. Sup. Ct. 1976).

³⁸ An example of this policy is found in the TEX. FAM. CODE ANN. § 153.0071(b) (West 1996).

³⁹ See Faherty v. Faherty, 477 A.2d 1257 (N.J. 1984) (explaining its cautious reluctance to relinquish its *parens patriae* power of the child:

As we gain experience in the arbitration of child support and custody disputes, it may become evident that a child's best interests are as well protected by an arbitrator as by a judge. If so, there would be no necessity for our *de novo* review. However, because of the Court's

determined if the judge ultimately refuses to sign off on the arbitrator's decision.⁴⁰

Not all judges believe the sole responsibility over children lies within the court. For instance, when Chief Justice Burger was asked about alternatives to the overloaded court system, he admitted the court might not offer the best forum for certain types of disputes.⁴¹ Specifically, he stated, "[s]erious study should be given to whether divorce and child-custody matters should be in the courts."⁴² He believed there was a better way to resolve such disputes than in an adversarial system, and he particularly favored the use of arbitration. He stated:

Arbitration is a very ancient mechanism for resolving disputes. It has been neglected in this country. Arbitration began at least as far back as Homer, was used by the Phoenicians and later by the Hanseatic League. In my travels, I have found in many others countries that something in the nature of arbitration is the dominant method of settling disputes.

It is generally cheaper and speedier than a trial, causes less wear and tear on the participants and will very likely produce a more satisfactory result. Unless the experience of all these other societies for hundreds of years is wrong—and I don't believe it is wrong—we have been neglecting a very valuable tool.

The lawyers go at it just as vigorously as they do in a courtroom. But the pace can be faster and the process simpler. You are able to do a

parens patriae tradition, at this time we prefer to err in favor of the child's best interest.”

Id. at 1263. *See also*, Schlissel, *supra* note 4, at 12.

⁴⁰ Holman & Noland, *supra* note 17, explaining:

[T]he determination of the arbitrator may not be upheld if a reviewing court feels that the determination is not in the best interests of the child. This of course means that there is a potential two-stage determination, a lessening of finality, and an increase in the expense that the parties wished to avoid in the first place (citations omitted).

Id. at 540-41. However, the authors go on to indicate that arbitration of child custody questions would not be entirely useless, “[i]f it could be shown that all interests, particularly those of the children, were adequately represented during the arbitration process, there would seem to be no reason for the court to reverse the arbitrator's award” (citations omitted). *Id.* at 542. The authors suggest the appointment of a guardian ad litem to protect the child's interests.

⁴¹ *Unclogging the Courts—Chief Justice Speaks Out*, U.S. NEWS & WORLD REPORT, Feb. 22, 1982 at 36. ⁴² *Id.* great many things informally, instead of by the horribly expensive process of pretrial discovery, for example.⁴³

Chief Justice Burger clearly felt arbitration may serve an important place in the area of family law. Nevertheless, courts today seem to be struggling with the concept of allowing an outside party to make a binding decision regarding child custody. Courts all over the nation are reaching different and conflicting conclusions to whether an arbitrator may hear and determine issues of child custody.⁴⁴ Some argue that taking child custody issues outside the court would be against public policy since the court has traditionally been the ultimate protector of the child under the parens patriae doctrine. However, resolutions reached outside the court leading to greater party satisfaction arguably promote the public interest because children grow up happier with parents who are more content with the outcome than they might have been in traditional litigation.³⁰ Even when the parents develop their own settlement regarding the children, the

⁴³ *Id.*

⁴⁴ *Dick v. Dick*, 534 N.W.2d 185, 191 (Mich. Ct. App. 1995) (an arbitrator's decision regarding child custody may not be overturned without allegations of fraud, duress or other procedural problems); *M.F.M. v. J.O.M.*, 889 S.W.2d 944 (Mo. Ct. App. 1995) (only a judge may hear issues regarding child custody). *See also* *Glauber v. Glauber*, 192 A.D.2d 94, (N.Y. App. Div. 1993) (holding child custody arbitration agreements should not be enforced); *Sheets v. Sheets*, 22 A.D.2d 176, (N.Y. App. Div. 1964) (parents may submit dispute to arbitration, but the court maintains the right to intervene if the award is adverse to the best interests of the child).

court maintains ultimate authority to accept or reject such an agreement under the parens patriae doctrine.³¹

³⁰ *See e.g.*, Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L. J. 239, 249 (1987) (commenting:

In a marriage dissolution proceeding, for example, how a court resolves a dispute over the custody of a minor child can have important consequences not only for the parents and the child, but for society at large. A parent, disgruntled at the outcome of a custody issue, can direct his or her displeasure at the child in ways that are difficult to detect, but which can cause the child to suffer in its development, and eventually to engage in behavior that could injure large numbers of other people. If a conciliated or mediated settlement of the custody issue, approved by a court, produces great post-marital harmony between the former spouses and between them and the child or children who were the objects of the custody dispute—as the proponents of such settlements suggest—are not public interests better served than if the matter had been determined by a court?)

³¹ *See e.g.*, *Baumler v. Baumler*, 368 So. 2d 864, 865 (Ala. Civ. App. 1979) (indicating, “the court is not bound by an agreement of the parties, but may adopt or reject such parts of it as it may deem proper from the situation of the parties as shown by the evidence”) (citations omitted); *Mayeur v. Mayeur*, 355 N.E.2d 358 (Ill. App. Ct. 1976) (asserting the trial court has ultimate authority to determine alimony, child support and property interests).

Many parents wonder what makes the judge the best person to determine the best interests of the child. The judge does not know the parties involved. Instead, the judge learns about the parties through the careful advocacy of the attorneys. The judge absorbs the information amidst an overloaded docket and often amongst other unrelated types of cases. There is no requirement that the judge be an expert in family law.³² In addition, if there is any complexity to the case, chances are good the case will be divided over months for just a few days at a time.³³ At each hearing, the parties must waste valuable time backtracking over their case and reminding the judge of significant details.³⁴ Meanwhile, during their breaks from court, the parties cannot separate themselves from the case since it involves the deepest essence of how they live their everyday lives.

Although this notion seems based in the premise of mediation, arbitration also applies to this argument because the parties choose the arbitrator, a person whom they respect, to make the decision. Thus, the parties are more likely to comply with an arbitrator's decision than they are with an unknown judge.

Family law cases differ from other causes of action because the parties cannot separate themselves from their pending action. Until the case is resolved, temporary restrictions exist regarding child visitation, finances and even upon the personal conduct of the parties themselves. Each party must be extra careful because any unusual conduct might be interpreted negatively and used against them by the other side's attorney. In addition, the delay puts the non-custodial parent at a disadvantage, not only due to lack of time spent with the child, but also because the longer the delay, the more likely the custodial parent will be awarded the child.³⁵

Thus, a speedy resolution is extremely important for a couple fighting over child custody,³⁶ but most courts simply cannot offer a speedy decision. The docket is too overloaded. Such frustrations with the traditional system may lead more couples to choose arbitration. When the parties are too antagonistic to benefit from mediation, they may find satisfaction with arbitration. Arbitration provides a binding decision maker who is trusted by the parties; who will abide by rules set by the parties; who will act as formal as the parties desire; and who will hear the case and make a decision within a time frame set by the parties.³⁷ Even though the arbitrator only knows the parties through their attorneys, the effect of less formality and being chosen by the parties because of his or her level of expertise may very well make the arbitrator a better

³² Interview with Michael J. Albano, a Past President of the American Academy of Matrimonial Lawyers, in Lee's Summit, MO (January 13, 1996) (indicating that in Missouri, new judges may actually be assigned to the family court as "punishment." In this sense, they know very little about family law and would prefer not to be adjudicating domestic issues. Obviously, parties would be better off with a family law expert than a judge unfamiliar with the intricate aspects of family law.)

³³ See, Jay Romano, *Divorce Logjam Leads to Alternatives*, N.Y. TIMES, July 26, 1992, at 13NJ (exemplifying the real problem of court delay, "Ms. Corigliano said her divorce trial started in April of this year. 'We had two days in April, three days in June, and now we have two days scheduled in August,' she said. 'It will probably take another year to finish this. And the only ones who win are the lawyers.'") *Id.*

³⁴ Interview with Michael J. Albano, a Past President of the American Academy of Matrimonial Lawyers, in Lee's Summit, MO (Jan. 9, 1996), Telephone Interview with Lori Levine, Missouri Arbitrator (Jan. 9, 1996).

³⁵ Romano, *supra* note 48, at 13NJ (quoting nationally recognized expert on child custody, Dr. Richard A. Gardner: "The longer a custody battle goes on, . . . the more likely it is that the court will award custody to the parent with whom the child is living. . . . Even if that parent is the less desirable one, the child will become more bonded and won't want to change. . . . As a result. . . the court will be less willing to order a change.")

³⁶ See Schlissel, *supra* note 4, at 6 (explaining: "[t]he swiftness of the process also reduces the time which the parents have to use their children as weapons or otherwise harm them during the divorcing process.") *Id.*

³⁷ Janet Maleson Spencer & Joseph P. Zammit, *Reflections on Arbitration Under the Family Dispute Services*, 32 ARB. J. 111, 119 (1977) (commenting on the advantage of choosing the decision-maker:

[I]t permits the parties to choose an arbitrator who shares their values, a parent surrogate who attempts to make the decision that they would make absent their present hostility. Indeed, this traditional advantage to arbitration is one which should be enhanced, to the point where the courts can no longer credibly claim to be in the best position to judge a child's interests.) *Id.* at 119.

person to determine the best interests of the child than a judge.³⁸³⁹ In addition, the parties may request the arbitrator address future issues regarding the children. Sometimes courts will refuse to address the potential of future decisions regarding the children at the initial trial. Rather than leaving certain issues undecided, arbitration offers the possibility for the parties to settle all foreseen disputes at once in one decision. Of course, the biggest problem is still the limited scope of review. Even if the arbitrator is a better person to determine the best interest of the child, it may not be in the best interests of the child to waive the access to appeal.

As the use of arbitration for child custody matters increases, courts are beginning to address this question of whether an arbitrator can make a binding decision over child custody in light of the *parens patriae* doctrine.⁴⁰ A New York appellate court addressed this question in 1964 in *Sheets v. Sheets*.⁴¹ Determining whether arbitration should be available for child custody, the *Sheets* court held parties do have the right to choose arbitration for child custody.⁴² However, *Sheets* also emphasized the court's *parens patriae* role by reserving the right to conduct a *de novo* review upon a showing that the arbitrator's award "might be adverse to the best interests of a child."⁴³ Although the parents could be bound by an arbitrator's decision, the child's interest could never be completely bound by an arbitrator because of the court's continued interest in protecting the child.⁵⁸ In addition, the court cautioned they would not intervene upon the whim of just any unsatisfied parent,

the award could not be effectively attacked by a dissatisfied parent merely because it affected the child. Obviously every such award will have that effect. What must be shown to evoke judicial intervention is that the award adversely affects the welfare and best interest of the child—clearly a much narrower issue.⁵⁹

Thus, the court realized any parent on the losing end of the decision might desire the heightened review of a *de novo* trial; however, the court requires a concern that the decision was adverse to the child's best interest before they will intervene upon an arbitrator's decision.⁶⁰

Although the *Sheets* decision allowing arbitration with a heightened form of review has been widely followed in many different states,⁶¹ questions still arise regarding such a heightened

⁵⁸ *Sheets*, 22 A.D.2d 176 (N.Y. App. Div. 1964) explaining the court's ultimate responsibility to protect the interests of the child:

To the extent that such an [arbitration] award conflicted with the best interests of the child, courts would treat as a nullity insofar as the child is concerned, irrespective of what binding effect it may have on the parents. . . The controlling factor would be, as always, what was for the best interests of the child; and the provisions of any award could be challenged in court on that basis at the instance of a parent, a grandparent, an interested relative, or the child himself by a friend. Thus, the best interest of the child is assured protection by this omnipresent judicial check against arbitration awards in custody matters attaining the unassailable finality of awards in other arbitrations. Nor could any such award in a custody matter be given any *res judicata* consequences against the child, who was not a party to the arbitration. However, such an award would effectively bind the parents of the child to the extent that it settled their disputes, but only insofar as the award did not adversely affect the substantial interest of the child.

³⁸ *Id.*, Interview with Michael J. Albano, a Past President of the American Academy of Matrimonial Lawyers, in Lee's Summit, MO (Jan. 13, 1996), Telephone Interview with Lori Levine, member of the American Academy of Matrimonial Lawyers, Missouri Chapter and a Missouri Arbitrator (Jan. 9,

³⁹). *See also*, Holman & Noland, *supra*, note 17, at 544 (explaining that "[s]ympathetic, well-trained arbitrators genuinely interested in this field of law could avert the full blown litigation that is often inspired by frustration. . . . Skilled arbitrators might devote their expertise and time to financial appraisals and counseling which the courts are simply not able to take the time to do.")

⁴⁰ *See* Schlissel, *supra* note 4, at 12.

⁴¹ *Sheets v. Sheets*, 22 A.D.2d 176, (N.Y. App. Div. 1964).

⁴² *Id.* (encouraging arbitration but reserving a right to intervene regarding child custody: "[arbitration] should be encouraged as a sound and practical method for resolving such [custody and visitation] disputes. But. . . arbitration awards which may adversely effect the best interest of the child will be disregarded by the courts whose paternal jurisdiction is paramount.")

Id. at 179-80.

⁴³ *Id.* at 178.

Id. at 178.

⁵⁹ *Id.* at 179.

⁶⁰ *Id.* at 178.

⁶¹ *Spencer v. Spencer*, 494 A.2d 1279 (D.C. Cir. 1985) (agreement to arbitrate, like separation agreements between the parties, is all right but the court maintains ultimate power to review the arbitrator's decision in light of best interest of the child); *Kelm v. Kelm*, 623 N.E.2d 39 (Ohio 1993) (arbitration of child custody appropriate but court always maintains power to intervene); form of review. The *Sheets* rule states the court will only review an arbitrator's decision in limited circumstances, yet the best interest of the child is certainly a discretionary concern. It is unclear exactly when a judge will find a decision to be clearly adverse to a child's interest. *Sheets* attempted to explain this ambiguity by stating the arbitrator's award should not be disturbed if it merely "affects" a child. In order to intervene, the award must have "adversely affected" the child's interest.⁶² Unfortunately, determining when a child's interest has been "adversely affected" may not always be clear, and leaving a window for de novo review may subject parties to essentially experiencing two trials.⁶³

The concern of subjecting the parties to two trials in order to maintain the court's *parens patriae* power was addressed more recently in *Glauber v. Glauber* where a different New York appellate court refused to follow *Sheets* and held arbitration was not a proper forum for child custody.⁶⁴ While admitting arbitration has its advantages,⁶⁵ the court noted the reluctance of courts to overturn arbitration agreements and ultimately determined child custody and visitation are "inappropriate for resolution by

Faherty v. Faherty, 477 A.2d 1257 (N.J. 1984) (court maintains heightened form of review to arbitration award regarding children because of *parens patriae* doctrine); *Crutchley v. Crutchley*, 293 S.E.2d 793 (N.C. 1982) (court maintains the power to review and modify an arbitration decision regarding child custody); *Kovacs v. Kovacs*, 633 A.2d 425 (Md. Ct. Spec. App. 1993) (all right for court to adopt arbitrator's decision but only after holding an independent review; analogizes to independent review of a master's decision); *Miller v. Miller*, 620 A.2d 1161 (Pa. Super. Ct. 1993) (arbitration not against public policy, but court maintains de novo review); *Lieberman v. Lieberman*, 566 N.Y.S.2d 490 (N.Y. Sup. Ct. 1991) (arbitration of child custody allowed but court maintained heightened form of review to protect the child); *Rustad v. Rustad*, 314 S.E.2d 275 (N.C. Ct. App. 1984) (arbitration of custody all right as long as court maintains power to review).

⁶² *Sheets v. Sheets*, 22 A.D.2d at 179.

⁶³ *See Glauber v. Glauber*, 192 A.D.2d 94, (N.Y. App. Div. 1993) (refusing to allow determination of custody in arbitration and distinguishing *Sheets* by pointing out the inefficiency of the result of heightened review which ultimately requires two trials of the same issue.)

⁶⁴ *Id.*

⁶⁵ *Id.* (stating that "[t]he arbitration process can be less formal, expedient, and less costly than litigation, and can even provide the parties an opportunity to have their dispute heard by a person or persons they believe to be especially well qualified.") *Id.* at 96.

arbitration."⁶⁶ The court acknowledged the heightened form of review given to arbitration of child custody in *Sheets*, but stated the courts' *parens patriae* duty takes such precedence over the parties' decision to arbitrate that:

[D]uplication of time, expense and effort seems inevitable. Nor does it seem advantageous to the best interests of the child that the question of custody be postponed while a rehearsal of the decisive inquiry is held. . . If an issue is to be arbitrated, the expectation is that an award will not be disturbed. Nevertheless, if custody and visitation are in issue, the court's role as *parens patriae* must not be usurped. The court's traditional power to protect the interests of children cannot yield to the expectation of finality of arbitration awards. (citations omitted).⁴⁴

Therefore, although some courts have said arbitration of child custody is not against public policy, other courts have come to the exact opposite conclusion.⁴⁵ In January 1995, a Missouri appellate court held that

⁴⁴ *Id.* at 98.

⁴⁵ *Id.* *See also*, *M.F.M. v. J.O.M.*, 889 S.W.2d 944 (Mo. Ct. App. 1995) (courts cannot delegate child custody decisions, not even to a special master);

courts may never delegate the issue of child custody, not even to a special master.⁴⁶ Referring to whether child custody should be heard in front of a special master, the court stated:

⁶⁶ *Glauber v. Glauber*, 192 A.D.2d 94, 97 (N.Y. App. Div. 1993) (ultimately stating that “. . .when circumstances require determining which living arrangements are in the best interests of children, the courts alone must undertake the task. Accordingly, we hold that the issues of custody and visitation must be put before the court for determination and may not be submitted to arbitration.”) *Id.* at 99.

Where the best interests of a child are concerned, it is essential that the trial court have the opportunity to observe the demeanor of the conflicting parties. . . .Where a master is used, the trial court sees not the child, but only a cold record of the interview. . . .[W]e cannot emphasize too strongly our disapproval of the use of masters in custody proceedings.⁴⁷

Although, the Missouri court clearly indicates a disapproval for any type of delegation of custody matters, arbitration of child custody still occurs in Missouri. Apparently, as long as the parties choose arbitration on their own, the court’s approval is not considered an official “delegation” of its authority.⁴⁸ However, this obviously presents a tricky question of semantics, and may place parties submitting to arbitration at risk. If a court signs off on an arbitration decision regarding child custody, is that not the same as reviewing a “cold record” of an interview which the Missouri court was attempting to avoid?⁴⁹ Until Missouri legislates some guidance over the area of child custody and arbitration, the potential for the court starting over with a *de novo* review is a realistic risk under current Missouri law.⁵⁰

In addition, the confusion caused by conflicting laws around the country regarding child custody and arbitration would not be complete, of course, without a court swinging again in the opposite direction, allowing for the broadest form of arbitration available. In May of 1995, the Michigan Court of Appeals held that arbitration of child custody was not only proper, but binding within the meaning of the Uniform Arbitration Act (UAA).⁵¹ This ruling is surprising because it seems to relinquish the court somewhat from its traditional *parens patriae* duty. By limiting review to the UAA rules, the court may only intervene upon allegations of fraud, duress or other undue means.⁵² Although Michigan case law emphasized the court’s duty to protect the best interest of the child, the Michigan court in this case deferred to statutory law to reach its conclusion. In light of (1) the UAA’s clearly stated intention to include all types of civil disputes; (2) no specific exemption of custody disputes in the UAA; and (3) no specific exemption of child custody disputes from alternative methods in Michigan’s statute, the court found no reason to exempt child custody

Kelm v. Kelm (dissent), 1992 Ohio App. LEXIS 2868 (Ohio Ct. App. 1992) (dissent) (stating there should be no binding arbitration for child support or child custody); *Biel v. Biel*, 336 N.W.2d 404 (Wis. Ct. App. 1983) (courts cannot delegate the issue of child custody).

⁴⁶ *M.F.M. v. J.O.M.*, 889 S.W.2d 944, 957 (Mo. Ct. App. 1995) (specifically stating:

A court cannot abdicate or delegate, in whole or in part, its judicial power. [The trial court] has a special obligation in orders pertaining to custody of minor children and must act upon evidence adduced. The court must act in the best interests of the child. Permitting others to alter custody arrangements is an impermissible delegation of judicial authority) (citations omitted).

(The court admitted it would allow a delegation upon a showing of exceptional circumstances, however, in this case calendar congestion was not considered an exceptional circumstance.) *Id.* at 949.

⁴⁷ *Id.* at 950-51.

⁴⁸ Interview with Michael J. Albano, a Past President of the American Academy of Matrimonial Lawyers, in Lee’s Summit, MO (Jan. 9, 1996).

⁴⁹ *M.F.M. v. J.O.M.*, 889 S.W.2d 944, 950-51 (Mo. Ct. App. 1995).

⁵⁰ *See* MO. REV. STAT. § 435.350 (1996) (containing no provision regarding child custody).

⁵¹ *Dick v. Dick*, 534 N.W.2d 185, (Mich. Ct. App. 1995).

⁵² *Id.* Specifically, the court states:

[A]n arbitration award may not be set aside unless (1) the arbitrator or another is guilty of corruption, fraud, or used other undue means; (2) the arbitrator evidenced partiality, corruption, or misconduct prejudicing a party’s rights; (3) the arbitrator exceeded the arbitrator’s

from the strict rules of the UAA.⁵³ Thus, the Michigan Court of Appeals allows arbitration of child custody without retaining any form of heightened review. By treating arbitration of child custody no differently than any other type of arbitration, the Michigan court limits the parties' right to appeal. Yet, some may argue this is the best direction because it allows the experts in family law to make a binding decision without fear

power; or (4) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear material evidence, or conducted the hearing to prejudice substantially a party's rights (citations omitted).

Id. at 191. *See also*, *Fritz v. Fritz*, 186 A.D.2d 625, (N.Y. 1992) (avoiding arbitrator's decision for violation of duty and improper use of knowledge in reaching a decision where the arbitrator was the wife's father).

of repetitious litigation from a court's discretionary *de novo* review.

As this overview of current case law has shown, the law regarding arbitration and child custody is anything but clear, especially in states such as Missouri which lack any type of legislative guidance.⁵⁴ So why do parties continue to choose arbitration over litigation with so much uncertainty involved?

The answer is that in complicated cases, arbitration may offer the only realistic way for the parties to resolve the dispute and get on with their lives. The possibility of a judge refusing to accept the arbitrator's decision may be a risk the parties are willing to take. For example, a Kansas City couple chose arbitration over adjudication after the court refused to allow them enough court time to hear their entire case.⁵⁵ The case was complicated because the parties had a significant amount of money and assets to divide, and both were willing to pay high attorney fees to gain sole custody of their children. The anxiety from the divorce made it nearly impossible for the parties to get along amicably, and a quick resolution was imperative for everyone involved. The parties were not well-suited for mediation because they were unwilling to agree on nearly everything, and they could not stand to be in the same room together. The husband tended to exert intimidation tactics over the wife, and the wife resented his power plays. The parties had been arguing about the divorce and the custody of their children long enough to know they would not reach a compromise. They wanted a competent third party to make the decision for them, and since the court could not offer a quick resolution, arbitration seemed the best way for both to "have their day in court." They agreed to abide by the arbitrator's ultimate decision because they respected the expertise of the arbitrator, and they knew a resolution was important so they could both move on with their lives. They hoped that once the divorce and

⁵³ *Id.* The Uniform Arbitration Act of 1963, which became M.S.A. § 27A.5001 under Michigan law, provides:

(1) All persons, except infants and persons of unsound mind, may, by an instrument in writing, submit to the decision of 1 or more arbitrators, any controversy existing between them, which might be the subject of a civil action, except as herein otherwise provided, and may, in such submission, agree that a judgment of any circuit court shall be rendered upon the award made pursuant to such submission. . . [w]e find no clear prohibition in case law, court rule, or statute against the use of binding arbitration in the resolution of custody disputes. Binding arbitration is an acceptable and appropriate method of disputes resolution in cases where the parties agree to it. Furthermore, the decision of an arbitrator does not prevent a party from seeking to change custody or modify support in the future. . . [we] conclude that, having invoked binding arbitration, the parties are required to proceed according to the applicable statute [MSA] and court rule.

Id. at 189-91. The court rule for arbitration states an arbitration award may not be set aside without evidence of fraud, duress, or other inappropriate conduct by the arbitrator. *See also*, *Schlissel*, *supra* note 4 (stating that "there is nothing in the Uniform Arbitration Act which requires or even permits such *de novo* review." *Id.* at 26).

⁵⁴ Interestingly, a bill before the 1996 Missouri Legislature, L2276.01, would have required arbitration over all child visitation disputes. Although the Bill did not pass, its proposal indicates the intent of the legislature to address this question of whether an alternative forum outside the court may determine issues affecting the child, and a potential inclination by the legislature to allow binding decisions regarding children outside the court.

⁵⁵ Interview with Michael Albano, attorney for the wife, in *Lee's Summit, MO* (Jan. 9, 1996) (asserting that "Missouri courts won't give up six to eighteen days of court time for one case because it takes too much time away from other cases."). *But c.f.*, Telephone Interview with Michael C. McCurley, Texas attorney and First Vice-President Elect of the American Academy of Matrimonial Lawyers, (Jan. 9, 1996) (indicating that waiting for court time is not a problem in Texas. The Texas courts are apparently very timely in accommodating family issues. Mr. McCurley admitted that this is one of the reasons arbitration is rarely sought as an option in Texas.)

custody fight was over, they could begin a new type of amicable relationship with each other and the children.⁵⁶

Although the arbitration proved faster than adjudication in this complicated case, that did not mean the arbitration itself was not complicated or expensive. The parties chose an arbitrator who was well respected and considered an expert in the area of matrimonial law. However, the process of choosing could have become a difficult and complex game between the attorneys. Fortunately, the attorneys foresaw such a problem and developed an interesting and practical procedure for choosing the arbitrator. Each side recommended an attorney whom they respected for their expertise in matrimonial law in Missouri. Then the two recommended attorneys collaborated to choose an expert matrimonial attorney in Missouri to perform the arbitration. Both parties agreed ahead of time to accept the recommendation of the selected attorneys. Through this process, the parties ended up with a credible and respected expert as their arbitrator.⁵⁷

In addition, the parties chose to submit all issues in the divorce before the arbitrator. They were ready for the entire divorce to be over. Their desire for a speedy trial may have actually raised the costs in this case, because the parties had to pay for the arbitrator,⁵⁸ the court reporter, and the processing of the transcripts. Such fees would not be charged to the parties in adjudication.⁵⁹

Another choice made by the parties in this case was to keep the procedure formal. By keeping formality, the parties felt they had their day in court, and the attorneys were more comfortable in a familiar court-like atmosphere. The arbitration sessions were held in a courtroom, the arbitrator wore a robe and the parties referred to the arbitrator as “Your Honor.”⁶⁰ In addition, the parties agreed the arbitrator would follow Missouri law in rendering a decision.⁶¹ Since the formality so greatly resembled traditional adjudication, why choose arbitration? The answer for these parties was time. Here, the parties had already been through the wait for a trial date. They showed up, had one day of trial, and the judge declared a mistrial because it was clear the case could not be completed in the four days scheduled on the docket. Staying within traditional means did not appeal to the parties because the court would allow only a few days at a time to hear the case. The case would be tried piecemeal and it could take anywhere from six to eighteen months to reach a final judgment. Instead of waiting for court time, the parties chose arbitration and they were able to complete the entire case and reach a binding decision within three months of signing the arbitration agreement.⁸⁵

Arbitration apparently met the needs of this Kansas City couple without compromising the best interests of the children. Yet, with so many of the arbitration rules left to the discretion of the parties, how can we be certain the best interest of the child will be protected every time? Can the child’s best interest be protected in an informal process? The answer likely depends upon how closely the arbitrator follows the law when rendering a decision. Since traditional arbitration rules refuse the overturning of an arbitration award for misapplication of the law, such limited review might have serious consequences in a case regarding a child. For such reasons, it is imperative the arbitrator be an expert in the area of family law.⁶² Otherwise, the legal rights of the child may be overlooked. However, formality may not necessarily be

⁵⁶ Interview with Michael Albano, attorney for the wife, in Lee’s Summit, MO (Jan. 9, 1996).

⁵⁷ *Id.*

⁵⁸ *Id.* The arbitrator in this case charged the regular hourly fee she normally charges as an attorney.

⁵⁹ *Id.*

⁶⁰ Albano, *supra* note 79.

⁶¹ The arbitration agreement specifically stated that “[t]he parties agree to be bound by Chapter 452, RSMo; the Missouri Arbitration Statute (Section 435.350 RSMo), and the Arbitrator agrees to be guided by Missouri case law and Missouri Statutory Chapter 452 of the Revised Statutes of Missouri in her decision-making, except as otherwise set forth herein.”⁸⁵ See Albano, *supra* note 79.

⁶² Interview with Michael J. Albano, a Past President of the American Academy of Matrimonial Lawyers, in Lee’s Summit, MO (Jan. 13, 1996), Telephone Interview with Lori Levine, member of the American Academy of Matrimonial Lawyers, Missouri Chapter and Missouri Arbitrator (Jan. 9, 1996); Telephone Interview with Michael C. McCurley, Texas attorney and First Vice-

required for the best interests of the child to remain secure. As long as the arbitrator is considered an expert in family law, the best interests of the child should be protected. Since there is no guarantee, some obviously believe it is important for the court to retain ultimate supervisory control and a heightened level of review⁸⁷ so the right to appeal is not completely abandoned. Yet, if legislation is passed requiring expertise of arbitrators and adherence to state law in rendering an arbitration decision, the best interest of the child should be protected and there may be no need for reservation of de novo court intervention.

IV. Under What Circumstances Should a Court Allow a Decision to be Binding?

Under the appropriate circumstances, arbitration may be a proper mechanism to determine child custody and possibly even a better alternative to traditional litigation. A binding decision may actually further the public interest if the proper legislative precautions are taken to protect the best interest of the child. First, and most importantly, the legislation must require the arbitrator be an expert in family law and child custody.⁸⁸ In order to secure the expertise of the arbitrator, certain qualifications

President Elect of the American Academy of Matrimonial Lawyers, (Jan. 9, 1996). *See also*, Leo Kanowitz, *Alternative Dispute Resolution and the Public*

Interest: The Arbitration Experience, 38 HASTINGS L. J. 239 (1987) quoting Judge Story who commented in 1845 that the qualifications of arbitrators were not as reliable as those required of judges:

arbitrators, at the common law, possess no authority whatsoever, even to administer an oath, or to compel the attendance of witnesses. . . They are not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually, in complicated cases; and hence it has often been said, that the judgment of arbitrators is but rusticum judicium.

Id. at 254. Therefore, heightened requirements for arbitrators will increase their credibility and ability to make a decision in the best interest of children outside the court. Also, *see generally*, Holman & Noland, *supra* note 17, at 543, indicating arbitrator's are not necessarily bound by principles of law and evidence.

⁸⁷ Faherty, 477 A.2d 1257, 1262. ⁸⁸ *Supra* note 86.

should be required, as well as adherence to certain procedural requirements. The following is a list of proposed qualifications, modeled after the Standards for Admission for the American Academy of Matrimonial Lawyers and the Missouri requirements for appointment of a Master, that will ensure ultimate protection of the parties' interests as well as the best interest of the child in a forum outside the court:⁶³

- a. the arbitrator must have been a practicing attorney for at least ten years before becoming an arbitrator, and
- b. during the five years immediately preceding becoming an arbitrator, devoted at least 75% of their practice to the area of matrimonial law,
- c. must be recognized by the bench and bar in his or her jurisdiction as an expert in matrimonial law,
- d. must be recognized by the bench and bar in his or her jurisdiction as one who practices with honesty, integrity and professionalism, e. must have substantial trial experience in all areas of matrimonial law, including child custody, and must be able to competently handle complex matrimonial law litigation as the lead counsel,
- f. if the state has a board certification test for family law, the arbitrator must be board certified, and if no such certification exists, the arbitrator must be required to pass a family law certification test for arbitrators consisting of the relevant state law regarding matrimonial issues,
- g. the arbitrator cannot be related to any party or attorney in the dispute,
- h. the arbitrator cannot be interested in the outcome of the dispute,
- i. the arbitrator must take an oath to hear and examine all issues impartially and to make an impartial and just decision in light of the facts,

⁶³ Many of the listed requirements were modeled after the requirements of admission for the American Academy of Matrimonial Lawyers, *Standards of Admission* (1995), and the requirements for appointing a Master in Missouri, MO. REV. STAT. §68.01(Vernon's 1997).

- j. the arbitrator must reach a decision that complies with state and local law,
- k. the arbitrator must adhere to the procedural rules set by the parties in the arbitration agreement,
- l. the arbitration agreement should contain provisions defining which state approved arbitrator was chosen by the parties, the powers of the arbitrator, and the issues to be determined in the arbitration,
- m. attorneys should submit written Proposed Findings of Fact and Conclusions of Law within a reasonable time (preferably the first 30 days) following the arbitration. This will ensure the arbitrator has all the facts and law pertaining to the issue at his or her fingertips.
- n. the arbitrator should include written Findings of Fact and Conclusions of Law regarding his or her final decision. Such written information will aid the judge in determining whether the arbitrator performed his or her duties properly.
- o. the arbitrator shall retain jurisdiction for at least fourteen days following the award to allow time to receive any motions regarding potential errors or omissions in the award.⁶⁴

Adherence to these qualifications ensures protection for the best interest of the child. A qualified arbitrator will be aware of the intricacies of the matrimonial laws of the state and will apply them to the best interests of the child or children involved in the case. As long as the arbitrator complies with state law, procedural rules set by the parties, and the general UAA rules regarding fraud and improper use of authority, there is really no reason the decision should not be binding upon the parties. Such a binding decision should be allowed because the arbitration would adhere to all the legal safeguards used by a judge to protect the child. If an arbitrator strays from the law, the court may still intervene. However, such intervention would involve a procedural inquiry, which differs from a heightened form of review involving a substantive inquiry. Under the procedural review, if the arbitrator does not follow all the above proposed requirements, the court may step in. Yet, the intervention would not require a *de novo* review unless the decision of the arbitrator clearly violates state law.⁶⁵ In this sense, the parties' access to appeal remains similar to that required of a trial court judge.⁶⁶ In addition, once a court confirms an arbitrator's award, the parties retain the right to appeal to the next judicial level.⁹³ Therefore, as long as the court retains ultimate signatory power on the arbitration award, the parties never completely waive their access to appeal.

V. Conclusion

Extending the use of arbitration to the area of family law and child custody raises questions regarding the protection of the best interest of the child. Courts in many jurisdictions have shown reluctance to allow a binding determination over the child to occur in an alternative forum because the court has traditionally maintained the ultimate paternal role as the sole protector of the child. However, with overloaded dockets, high costs and delays, the traditional judicial system may not offer the best forum for the child.

With the proper precautions, the child's best interest may be met by a forum outside the traditional system such as arbitration. As courts and legislatures struggle with the question of whether the child's best interest may be protected outside the court, they must analyze all the combinations of factors that make up the child's best interest. Such factors include the parents' satisfaction in the result of the case and the emotional toll taken from a long battle with the frustration of many delays. The advantages found in arbitration with speed, lower cost, and greater party satisfaction may better address the needs of the child when the arbitrator's decision conforms with the laws of the state.

⁶⁴ *Id.*, Hanley M. Gurwin, *Arbitration Hot Tip*, in AMERICAN ACADEMY OF MATRIMONIAL LAWYERS ADVANCED ARBITRATION 59 (Allan R. Koritzinsky et al. eds., 1995).

⁶⁵ An award clearly adverse to the child's best interests would be considered a violation of state law. *See*, TEX. FAM. CODE ANN. § 153.0071(b) (West 1996) (stating: "[i]f the parties agree to binding arbitration, the court shall render an order reflecting the arbitrator's award unless the court determines at a non-jury hearing that the award is not in the best interest of the child."); WIS. STAT. ANN. § 802.12(1)(a) (West 1995) (indicating binding arbitration will be subject to judicial review to ensure the award conforms to applicable law).

⁶⁶ The appellate standard of review is given in *M.F.M. v. J.O.M.*, 889 S.W.2d at 949-50, ("The appellate court must sustain the judgment of the trial

Whether or not the court retains a heightened form of de novo review, the courts should recognize that arbitration offers a viable forum for the determination of child custody. There is no reason to assume a person with a judicial title is more qualified to determine the best interest of a child than a person considered an expert in the area of family law. Parents should be able to choose which forum is best for themselves and their children.

court ‘unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.’” quoting *Murphy v. Carron*, 536 S.W.2d 30 (Mo. 1976) (en banc).)

⁹³ Schlissel, *supra* note 4, at 25.

Through proper legislation involving strict requirements for the qualifications of arbitrators, and a requirement that the arbitrator’s decision stay consistent and within the bounds of state law, the best interest of the child can be protected in the alternative forum of arbitration.

Christine Albano