Arbitration Law Review

Volume 14 Article 5

6-15-2023

Leave it to the Courts: Why Child Custody Arbitration is Improper

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LEAVE IT TO THE COURTS: WHY CHILD CUSTODY ARBITRATION IS IMPROPER

By
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The role of the court system has traditionally been viewed as a place to be heard. However, in modern America, there is wide distrust in the judicial process. Additionally, justice has become more unaccessible because of burdensome expenses, unreasonable wait times, and judges with racial biases. Due to the need for reform, more and more individuals are abstaining from resolving their conflict or utilizing alternative dispute resolution mechanisms.[1] Although family law arbitration has been around for three decades, concerns as to whether it is an appropriate process for determining such delicate and intimate issues such as child custody still remain. [2]

This article will discuss the intersection of the attributes of arbitration generally and child custody arbitration. Section I will examine the history of arbitration in the United States before the Federal Arbitration Act as well as after, along with the implications of the liberalization of arbitration. Next, section II will explore state treatment of family law arbitration in the United States. Section III focuses on the validity or invalidity of child custody arbitration amongst the states as well as procedural safeguards states impose with regard to this matter. Lastly, section IV and V concludes with justifications for the exclusion of child custody arbitration as well as how the judicial process is better equipped to deal with such delicate matters.

I. ARBITRATION: ATTRIBUTES AND ITS EXPANSION

Irrevocable, valid, and enforceable. Historically, these three attributes were not applicable to the practice of arbitration. The practice of England's non-binding arbitration came into force after it was adopted by the British colonies.[3] The rationale behind this non-binding arbitration was to correct the abuse of "ousting" the courts from issues that fell within their jurisdiction.[4] The United States Supreme Court, along with state and federal courts, continued this practice, with more hostility than acceptance of the practice of arbitration. Their reluctancy to compel arbitration was due to the belief that arbitration was

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1. *See* Andrea Kupfer Schneider, *Building A Pedagogy of Problem-Solving: Learning to Choose Among ADR Processes*, 5 HARV. NEGOT. L. REV. 113, 114 (2000) (noting negative attitudes towards the practice of law may be attributed to the adversarial system).

2. *See* Joan F. Kessler, *Why Arbitrate Family Law Matters?*, 14 J. AM. ACAD. MATRIM. L. 333, 333 (1997).

3. *See* Kenneth F. Dunham, *Southland Corp. v. Keating Revisited: Twenty-Five Years in Which Direction?*, 4 CHARLESTON L. REV. 331, 333 (2010) (citing Kenneth F. Dunham, *Sailing Around Erie: The Emergence of a Federal General Common Law of Arbitration*, 6 PEPP. DISP. RESOL. L.J. 197, 202-03 (2000)).

4. See *id.* at 334 (citing Headley v. Aetna Ins. Co., 80 So. 466, 468 (Ala. 1918)).

inefficient and inferior to judicial resolve.[5] Arbitration agreements were often revocable, invalid, and went unenforced.[6]

After the Federal Arbitration Act was created in 1925, the Supreme Court continued applying state law in federal court with caution towards arbitration.[7] Justice Douglas in *Bernhardt v. Polygraphic Co. of Am.* expressed his dissatisfaction with arbitration stating, "[t]he nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result."[8] Additionally, his opinion noted that no right to trial by jury is guaranteed if arbitration is selected. Arbitrators do not have to follow the instruction of law or explain their results. The record of arbitration proceedings is not as comprehensive as it is in a trial. Lastly, judicial review of an arbitral award is more limited than review of a trial.[9]

Despite Justice Douglas's apprehension, in 1967, arbitration was federalized with the decision of *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*[10] The Supreme Court ruled that Congress, under its Commerce Clause power, has the ability to "instruct Article III courts on how they should rule on a particular substantive question," and that "[t]he FAA constituted that instruction."[11] Today, it is a customary practice for the United States Supreme Court to dismiss challenges to arbitration.[12]

While the liberalization of arbitration has been honored amongst the courts, the effect it has had on the practice of arbitration has proven to be overreaching. Matters that should be left to the courts are no longer guaranteed sufficient protection through judicial review. The specifically delicate task of determining child custody, once within every state

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5. *See* Tobey v. Cty. of Bristol, 23 F. Cas. 1313, 1320–21 (Mass. Cir. Ct. 1845) (stressing that compelling parties to arbitration where an award shall be final, requires a consideration of whether the arbitral tribunal possesses adequate means of providing a remedy, and such coercion will result in closing the doors to the courts of justice which protect the rights of citizens).

6. *See* Kenneth F. Dunham, *Binding Predispute Arbitration Clauses in Alabama: A Checkered Past but A Solid Future*, 11 T.G. JONES L. REV. 1, 2 (2006) (stating that English common law employed revocable arbitration agreements).

7. *But see* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (stating the FAA was enacted with the purpose of "reversing the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.").

8. Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 203 (1956).

9. *See id.*

10. *See generally*, Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

11. Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 CLEV. ST. L. REV. 233, 250 (2008); *see also* Southland Corp. v. Keating, 46 U.S. 1, 2 (1984).

12. *See* James P. Buchele & Larry R. Rute, *The Changing Face of Arbitration: What Once Was Old Is New Again*, 72 J. KAN. B. ASS'N 36, 36 (2003).

court's sole jursidcition, has now been expanded into the realms of arbitration.[13] Although many advantages stem from arbitration generally, the disadvantages that accompany child custody arbitration far outweigh said advantages. The next section will discuss the process of family law arbitration.

II. FAMILY LAW ARBITRATION GENERALLY

Family law, as well as society's perception of what constitutes a family, has vastly evolved in the past century.[14] In response to the cost of litigation and backlogged court dockets, beginning in 1990, the American Academy of Matrimonial Lawyers ("AAML"), endorsed the concept of arbitration of family-related and child-related disputes.[15] Arbitration assumes a more flexible procedure, allowing for parties to choose their venue, arbitrators, and choice of law.[16] However, "[l]ike a judge in domestic matters, the arbitrator is duty-bound to safeguard the interests of the public, to promote public policy, and to protect the interests of the parties, particularly minor children."[17] Before divorce, at the time of divorce, or subsequent to divorce, the parties have the ability to "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."[18] Once an agreement between the parties has been reached, the issue may be submitted to arbitration, and after a hearing an arbitrator will render a decision on the submitted matters.

Matters pertaining to family law are especially emotional. State law controls whether or not an issue relating to domestic or child-related disputes may be submitted to

13. *See* LINDA D. ELROD, CHILD CUSTODY PRACTICE & PROCEDURE § 16:5, Westlaw (database updated June 2021) (noting that in the last thirty years, individuals have begun to use arbitration clauses in separation agreements).

14. *See* Linda D. Elrod & Milfred D. Dale, *Golden Anniversary Issue, Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381, 386 (2008).

15. *See* Kessler, *supra* note 2, at 333.

16. *See* THOMAS H. OEHMKE & JOAN M. BROVINS, 118 AM. JUR. TRIALS 305 *Mediation and Arbitration of Family Law Disputes – Property, Support, Custody, and Parenting Time* § 7, Westlaw (database updated Oct. 2021).

17. *Id.* at § 7.

18. Kessler, *supra* note 2, at 334.

arbitration and the scope of said arbitration.[19] The majority of states rely on their own family law arbitration acts or common-law arbitration.[20]

A minority of states have forgone the ability to adopt their own family law arbitration act and have instead enacted the Uniform Family Law Arbitration Act ("UFLAA").[21] The UFLAA uses the procedural aspects of a state's existing arbitration law, whether that be the Revised Uniform Arbitration Act or the Uniform Arbitration Act, and supplements it with family law issues.[22] The UFLAA prohibits the arbitrator from making certain status determinations.[23] The primary focuses of the UFLAA are family-law disputes[24] and child-related disputes.[25] Due to a minority of states finding child-custody to be inarbitrable, the Act allows for states to withdraw from the practice.[26] The UFLAA has been enacted in Montana, Arizona, North Dakota, and Hawaii, and it has been introduced in the District of Columbia, Massachusettes, and Pennsylvania.[27] The purpose of the Act is "to promote the fairness and efficiency of the process and to protect the interests of vulnerable family members."[28]

The Act extends protection to vulnerable family members and ensures that safeguards for children are enforced, similar to the court's *parens patriae* duty. The process begins similarly to any issue submitted to arbitration. Parties agree to submit an issue to

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19. *See* LINDA D. ELROD, KANSAS LAW & PRACTICE, FAMILY LAW § 16:4, Westlaw (database updated Feb. 2022) (noting that all states except Kentucky authorize arbitration in family law matters, either under general arbitration law, by court proscription, state family law arbitration act, or case law).

20. *See id.*

21. *See* UNIF. FAMILY LAW ARBITRATION ACT § 1 (NAT'L CONF. OF COMMISIONERS ON UNIFORM ST. L. 2016).

22. National Conference of Commissioners on Uniform State Laws, Annotation, *Uniform Family Law Arbitration Act* § 1 et seq.

23. *See* UNIF. FAMILY LAW ARBITRATION ACT § 3 (status determinations include terminating parental rights, granting an adoption or guardianship, granting a divorce or annulment, etc.).

24. *See id.* § 2 (defining "[f]amily law dispute" as "a contested issue arising under the [family] [domestic relations] law of this state.").

25. *See id.* (defining "[c]hild-related dispute" as "a family law dispute regarding [legal custody, physical custody, custodial responsibility, parental responsibility or authority, parenting time, right to access, visitation], or financial support regarding a child.").

26. *See id.* § 1.

27. *See Family Law Arbitration Act*, UNIF. LAW COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=ddf1c9b6-65c0-4d55-bfd7-15c2d1e6d4ed (last visited Oct. 26, 2021).

28. National Conference of Commissioners on Uniform State Laws, Annotation, *Uniform Family Law Arbitration Act* § 1 et seq.

arbitration before or after such issue arises.[29] Next, the parties must select arbitrators.[30] If at any time during the arbitration of a child-related dispute, an arbitrator suspects abuse or neglect of a child who is the subject of the proceeding, the arbitrator must terminate the arbitration and report the suspected abuse or neglect.[31] During arbitration, an arbitrator must keep a record if the award relates to a child-related dispute; an award must state the reasons on which it is based.[32] Additionally, a party must seek confirmation of an award through court order.[33] Confirmation of an award will occur only if the court finds the award to be in the child's best interest and is in accordance with the law of that state.[34] Grounds for vacatur include the award being contrary to the best interests of the child, or the record or statement of reasons in the award being inadequate for judicial review.[35]

III. CHILD CUSTODY ARBITRATION: GENERALLY

In essence, child custody determinations are current predictions about parental fitness based on a set of factors. Such determinations will alter a non-consenting third party's trajectory in life. Thus, "[t]he law on custody is unique in giving one human being the right to control the body and mind of another, without requiring either the subject person's consent or an individualized finding of lack of capacity."[36] While states generally permit binding and final arbitration surrounding issues of property division and alimony, child custody issues do not receive the same treatment.[37] As Thomas H. Oehmke notes, "[t]he process of arbitration, useful when the mundane matter of the amount of child

29. *See* UNIF. FAMILY LAW ARBITRATION ACT § 5.

30. *See id.* § 8(a)(1)-(2) (stating that unless the parties agree otherwise, an arbitrator is required to be "an attorney in good standing admitted to practice. . . in a state; and . . . trained in identifying domestic violence and child abuse").

31. *See id.* § 12 (mediators have a similar duty to arbitrators); *see also* Art Hinshaw, *Mediators As Mandatory Reporters of Child Abuse: Preserving Mediation's Core Values*, 34 FLA. ST. U. L. REV. 271, 285 (2007) (stating mediators report suspected abuse to the proper state authorities depending on the state's statute).

32. *See* UNIF. FAMILY LAW ARBITRATION ACT § 14.

33. *See* UNIF. FAMILY LAW ARBITRATION ACT § 15.

34. *See id.* § 16.

35. *See id.* § 19.

36. Barbara Bennett Woodhouse, *Child Custody in the Age of Children's Rights: The Search for A Just and Workable Standard*, 33 FAM. L.Q. 815, 816 (1999).

37. *See* Porritt v. Straus, No. 227041, 2002 WL 499460, at *1 (Mich. Ct. App. Apr. 2, 2002); *see also* 2 LLOYD T. KELSO, N.C. FAM. L. PRAC. *Advantages and Disadvantages of Arbitration for Resolving Family Disputes* § 15:9, Westlaw (database updated December 2020).

support is in issue, is less [useful] when balancing the best interests of a child."[38] This section will discuss how United States courts view child custody arbitration, whether through exclusion or acceptance, and how courts justify the adoption of child custody arbitration through their judicial review regimes.

A. Best Interests of the Child Standard

Historically, the disposition of child custody determinations turned on gender.[39] During the colonial period, common law enforced a presumption in favor of the father being the custodian; this presumption was based on Roman law which held a father out to be the "master" of the family.[40] Judges would only depart from this presumption if law so required.[41] Today, child custody determinations are made based on a court or third party's analysis of the best interests of the child standard.[42] "Depending on the jurisdiction, a court may apply the best interests balancing test, a contemporary statute that does not impose a presumption, or the totality of the circumstances common law approach."[43] The Uniform Marriage and Divorce Act provides that a court shall consider all relevant factors including: the wishes of the parents, the wishes of the child, interaction and interrelationship of the child with the parents and siblings, the child's adjustment to school, home, and community, and the mental and physical health of the individuals involved.[44]

Due to the court's function of determining the best interests of the child, some states exclude child custody arbitration entirely.[45] States may allow child custody arbitration, but in order to have the award be reviewed by a court, a high standard must be met. For example, New Jersey requires that an allegation of harm to the child be present.[46] Conversely, other states mandate judicial review and ongoing judicial supervision of child

38. OEHMKE, *supra* note 16, at § 28.

39. *See* DOUGLAS E. ABRAMS ET. AL., CONTEMPORARY FAMILY LAW 793 (5th ed. 2019).

40. *See id.* at 793.

41. *See id.*

42. *See id.* at 794.

43. *Id.* at 812.

44. ABRAMS, *supra* note 39, at 804 (citing UNIF. MARRIAGE & DIVORCE ACT § 402 9A U.L.A. 282 (1998)).

45. *See* discussion *infra* Part III.B.

46. *See* Fawzy v. Fawzy, 973 A.2d 347, 361 (N.J. 2009) (declaring "where no harm to the child is threatened, there is no justification for the infringement on the parents' choice to be bound by the arbitrator's decision.").

custody awards in order to ensure it meets the best interests test.[47] The rationale behind review and exclusion is that only courts are authorized to create final resolutions relating to child custody per the *parens patriae* power of the court.[48]

The *parens patriae* or "Parent of the Country" power, now assigneed to state courts, "originates from the English common law as a prerogative of the Crown arising from the Sovereign's duty to protect infants and those of legal disability unable to protect themselves."[49] Child-related disputes, such as maintenance or child support, custody, visitation, and overall their best interest, have always been subject to the supervision of the courts despite any agreements to the contrary.[50] Similar to the colonial period, the courts of the United States have been reluctant to accept child custody arbitration. It has been characterized as a dangerous encroachment on a court's role as *parens patriae*.[51]

B. Exclusion of Child Custody Arbitration Amongst the States

Courts may view their *parens patriae* duty as unable to be reassigned to a third party.[52] "[A]ccordingly, courts either: (1) completely prevent arbitration of custody disputes; or (2) allow arbitration and subject the custody award to de novo judicial review."[53] Florida and Connecticut are the only states with statutorily defined exclusion of child custody arbitration.[54] Other states have made procedural, public policy, and jurisdictional justifications for its exclusion. For example, in *Glauber v. Glauber*, the New York Court of Appeals held that child custody could not be subjected to arbitration.[55] The

47. *See* ELROD, *supra* note 19; *see also* TEX. FAM. CODE ANN. § 153.0071 (West 2017); *see also* Crutchley v. Crutchley, 293 S.E.2d 793, 798 (N.C. 1982); *see also* Miller v. Miller, 620 A.2d 1161, 1164 (Pa. Super. Ct. 1993); Bayati v. Bayati, 691 N.W.2d 812, 814 (Mich. Ct. App. 2004).

48. *See* OEHMKE, *supra* note 16, at § 4.

49. Hoefers v. Jones, 288 N.J. Super. 590. 607 (N.J. Super. Ct. Ch. Div. 1994) (citing Borawick v. Barba, 81 A.2d 766, 774 (N.J. 1951) (Heher, J., dissenting); BLACK'S LAW DICTIONARY (5th Ed. (1979)).

50. *See* Faherty v. Faherty, 477 A.2d 1257, 1262 (N.J. 1984).

51. *See* Kelm v. Kelm, 749 N.E.2d 299, 303 (Ohio 2001); *see also* Myers v. Parks, 855 N.E.2d 112, 113 (Ohio Ct. App. 2006) (stating "The continuing jurisdiction of domestic relations courts over matters involving children has been deemed fundamental to upholding the state's interest in children's welfare.").

52. *See* Aaron E. Zurek, *All the King's Horses and All the King's Men: The American Family After Troxel, the Parens Patriae Power of the State, A Mere Eggshell Against the Fundamental Right of Parents to Arbitrate Custody Disputes*, 27 HAMLINE J. PUB. L. & POL'Y 357, 359–60 (2006).

53. *Id.* at 360 (citing E. Gary Spitko*, Reclaiming the "Creatures of the State": Contracting for Child Custody Decisionmaking in the Best Interests of the Family*, 57 WASH. & LEE L. REV. 1139, 1154 (2000)).

54. *See* FLA. STAT. ANN. § 44.104 (West 2006); *see also* CONN. GEN. STAT. ANN. § 46b-66 (West 2021); Toiberman v. Tisera, 998 So. 2d 4, 5 (Fla. Dist. Ct. App. 2008).

55. *See* Glauber v. Glauber, 192 A.D.2d 94, 99 (N.Y. App. Div. 1993).

court reasoned that "[i]f an issue is to be arbitrated, the expectation is that an award will not be disturbed."[56] However, when custody and visitation are submitted to arbitration, the court's role as *parens patriae* competes with the expectation of finality; "[t]he court's traditional power to protect the interests of children cannot yield to the expectation of finality of arbitration awards."[57]

The state of Ohio excludes child-custody disputes through judicial proscription, continuously reiterating the court's duty in domestic-relations matters.[58] In *Pulfer v. Pulfer*, Ohio joined New York by holding "matters of child custody may only be decided by the trial court and are not subject to arbitration despite any agreement entered into by the parties."[59] The court reasoned that due to the complex nature of child custody, a court could not sufficiently protect the best interests of the child through the limited review available.[60] In 2019, the South Carolina Court of Appeals in *Kosciusko v. Parham* held that "submission of children's issues to binding arbitration would be an improper delegation of the family court's authority and violative of South Carolina law."[61] The court reasoned that because of the limited procedures mandated by the Uniform Arbitration Act, the court would be prevented from allowing the family court determine whether an award is in the child's best interest.[62] The procedures under the Uniform Arbitration Act only allow for review of an award when there is a claim of "corruption, fraud or other undue means; evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party; or arbitrators exceeded their powers."[63] Because the court would be constricted by the UAA review procedures, a finding in accordance with the child's best interests could not be made.

The above courts comprehend the harm that follows from a final decision that inevitably alters the trajectory of children and parents' lives. Parents unsatisfied with the arbitral award are left with limited recourse, potentially stripped away from their childrens' lives for an indefinite period of time. The finality and limited review

56. *Glauber*, 192 A.D.2d at 98.

57. *Id.*

58. *See* Pulfer v. Pulfer 673 N.E.2d 656, 659 (Ohio Ct. App. 1996); *see also* Kelm v. Kelm, 749 N.E.2d 299, 303 (Ohio 2001); Myers v. Parks, 855 N.E.2d 112, 113 (Ohio Ct. App. 2006).

59. *Pulfer*, 673 N.E.2d at 659.

60. *See id.*

61. Kosciusko v. Parham, 836 S.E.2d 362, 372 (S.C. Ct. App. 2019).

62. *See Kosciusko*, 836 S.E.2d at 372.

63. UNIF. ARBITRATION ACT § 12 (UNIF. L. COMM'N 1956); *see also* Dick v. Dick, 534 N.W.2d 185, 191 (Mich. Ct. App. 1995) (finding review of arbitrator's decision regarding custody is limited to the UAA's procedures for review).

procedures that accompany arbitration may be justified where the issue is transactional. Where children are concerned, however, finality is improper and detrimental.

C. Judicial Review of Award—Limited Circumstances

Judicial review of an arbitrator's decision is limited; it does not necessarily permit a court to review the merits of the decision.[64] Because arbitration has become a favored mechanism, courts "must indulge every reasonable presumption in favor of upholding the award and it may not be set aside even if there is a mistake of law or fact."[65] Close judicial scrutiny is based on the idea that "judges do not wish to see the minor children of divorced parents become economic wards of the state."[66] However, due to the nationwide policy favoring the enforcement of arbitration agreements, courts are hesitant to inhibit the parties' private agreement regarding custody.[67] Although courts "often reserve the power to review such private agreements, [e]xperience . . . shows that this power is rarely exercised."[68]

States that do allow for arbitration of child custody, may require procedural safeguards such as an arbitral record.[69] Unlike any other state, New Jersey has recognized that the "right to parental autonomy subsumes the right to submit issues of child custody and parenting time to arbitrator."[70] Additionally, the standard of review for an award determining child custody is much higher than New Jersey's sister states.[71] Instead of de novo review, New Jersey requires that there be a claim of harm to the child in order to trigger judicial review of the award.[72] Furthermore, when issues of parenting-time and

64. *See* OEHMKE, *supra* note 16, at § 67 (stating that "a review will blend the criteria for vacatur under a state's general arbitration law with a de novo review . . . and [ensure] that [the award] is fair, equitable, and does not harm the affected parties.").

65. In re T.B.H.-H., 188 S.W.3d 312, 314 (Tex. App. 2006) (citing Stieren v. McBroom, 103 S.W.3d 602, 605 (Tex. App. 2003); *see also* Vernon E. Faulconer, Inc. v. HFI Ltd. P'ship, 970 S.W.2d 36, 39 (Tex. App. 1998) (noting that a reviewing court may not substitute its judgment even if it would have reached a dissimilar result.)).

66. OEHMKE, *supra* note 16, at § 1.

67. *See* Kessler, *supra* note 2, at 345.

68. *Id.*

69. UNIF. FAMILY LAW ARBITRATION ACT § 14 (noting that states may mandate an arbitral record).

70. Fawzy v. Fawzy, 973 A.2d 347, 360 (N.J. 2009).

71. *See* Miller v. Miller, 620 A.2d 1161, 1165 (Pa. Super. Ct. 1993) (stating "agreements entered into between parties are binding as between the parties, [but] they may not bind the court once its jurisdiction is invoked. . . . an award . . . [is] subject to the supervisory power of the court in its *parens patriae* capacity in a proceeding to determine the best interests of the child.").

72. *Fawzy*, 973 A.2d at 361 (declaring "If there is a finding of harm, . . . it will fall to the court to decide what is in the child's best interests.").

child custody are submitted to arbitration "a record of all documentary evidence shall be kept; all testimony shall be recorded verbatim; and the arbitrator shall state in writing or otherwise record his or her findings of fact and conclusions of law with a focus on the best-interests standard."[73] Although New Jersey's approach in requiring an arbitral record may seem laudable, it is not. Because such a high standard for judicial review must be met, the procedure ignores the undeniable fact that harm to the child may be present, yet not in the arbital record. Such tremendous authority over individuals' lives should not be possible unless review is permissive.

In *Harvey v. Harvey*, the Supreme Court of Michigan stated that under Michigan law, there is an "authoriz[ation] [for] a circuit court to modify or vacate an arbitration award that is not in the best interests of the child. It requires the circuit court to review the arbitration award in accordance with the requirements of other relevant statutes, including the Child Custody Act."[74] The court reasoned that "[p]ermitting the parties, by stipulation, to limit the trial court's authority to review custody determinations would nullify the protections of the Child Custody Act and relieve the circuit court of its statutorily imposed responsibilities."[75]

In *Patin v. Patin*, Mr. Patin argued that an arbitrator's award should be enforced without judicial review because arbitral awards centering on disposition of property and spousal support were considered binding and enforceable unless against "public policy or unconscionable."[76] The Virginia circuit court denied outright enforcement of an arbitrator's award of child custody without judicial review.[77] The court reasoned that "child custody is qualitatively different from spousal support or property settlement disputes."[78] Additionally, the court emphasized that property distribution and spousal support only recognize the interests of the parties to such an agreement.[79] Arbitration of child custody, on the other hand, involves more than the interests of the parents. Notably, the court

73. *Id.* at 362 (reasoning that "it is only upon such a record that an evaluation of the threat of harm can take place without an entirely new trial.").

74. Harvey v. Harvey, 680 N.W.2d 835, 839 (Mich. 2004) (citing MICH. COMP. LAWS ANN. § 600.5080 (West 1961)).

75. *Id.* at 839.

76. Patin v. Patin, No. 150131, 1998 WL 972221, at *1 (Va. Cir. Ct. June 4, 1998) (quoting Bandas v. Bandas, 430 S.E.2d 706, 708 (Va. Ct. App. 1993)).

77. *See id.* at *2.

78. *Id.*

79. *See id.* (stating that "Although parties to a property settlement agreement or spousal support agreement may contract away their rights, public policy cannot permit parents to contract away the child's best interest or the Court's responsibility to act in the best interest of the child.").

stressed that an arbitrator's decision, although impactful, cannot be a tool to deprive the court of the opportunity to decide what is in the best interests of the child.[80]

IV. WHY CHILD CUSTODY ARBITRATION SHOULD BE LEFT TO THE COURTS

When child custody is at issue, the advantages normally gained through arbitration such as securing expeditious, inexpensive, private, and binding results, generally employ caveats. Critics often cite public policy reasons for not enforcing private custody resolutions.[81] For example, with arbitration there is little assurance that the parties' arbitrator(s) will have the fitness to adjudicate a profoundly personal and emotional dispute.[82] Additionally, unless otherwise agreed upon by the parties, it is within an arbitrator's discretion to disregard well settled law.[83] Lastly, arbitration awards receive very limited judicial review.[84] Today, most courts allow for the judge to consider the child's preferences in an "in-camera" interview.[85] However, this process of considering a child's desires is not accounted for in arbitration; instead, witnesses, such as children, depending on the arbitrator's preferences, may or may not be subpoenaed.[86] Therefore, the child who is the basis of the action, may have no voice in the matter.

A. Finality and Limited Review Restrictions: Is it Proper in Child-Related Disputes?

Two downfalls exist with judicial review of child custody arbitration. First, arbitration alongside judicial review creates a reversion to non-binding arbitration.[87] Second, although judicial review is emphasized as being of the utmost importance in

80. *See* Zurek, *supra* note 52, at 372 n.59 (noting "lack of review disregards the best interests of the child").

81. *See* Andre R. Imbrogno, *Arbitration As an Alternative to Divorce Litigation: Redefining the Judicial Role*, 31 CAP. U. L. REV. 413, 414 (2003) (arguing judicial intervention is appropriate in order to protect children and disadvtanged spouses).

82. *See* Christine Albano, Comment, *Binding Arbitration: A Proper Forum for Child Custody?*, 14 J. AM. ACAD. MATRIM. LAW. 419, 441 (1997) (noting that the legal rights of children may be overlooked where the arbitrator is unfamiliar with family law).

83. *See* Kessler, *supra* note 2, at 339 (stating review for mistake of law by an arbitrator is not available).

84. *See id.*

85. *See* Woodhouse, *supra* note 36, at 827 (explaining that "One of the most important rights for a child in the middle of a custody dispute is the right to be heard; the child's future care and welfare will be impacted forever.").

86. *See* Albano, *supra* note 82, at 441 n.86.

87. See ELROD, *supra* note 19 (declaring the non-binding nature of child custody arbitration as a disadvantage).

securing the child's best interest, in practice, courts are often reluctant to deviate from an arbitrator's award because alternate dispute resolution has been widely accepted amongst the courts.[88]

The finality that accompanies arbitration is typically absent in child custody disputes submitted to arbitration.[89] The UFLAA, as well as many state acts, require arbitrators to keep a record of matters pertaining to child-related disputes, for purposes of safeguarding judicial review.[90] Arbitrators not only must shun their tendency to issue only cursory awards, which they are accustomed to since they generally are not required to provide reasonings for their awards, but instead, must "write like a judge concerned about being upheld on appeal: that is, issue a reasoned award."[91] In essence, the review of awards by a court, becomes a duplicative process; it requires the parties to incur additional expenses and impinges on resources and time-management. Additionally, state law may require courts to independently determine what is in the best interest of the child.[92] This "review" process surely then begins to resemble litigation, obliterating arbitration's promise of speed and finality.[93] Judicial review complicates child-related disputes. In the end, the courts' competing policy concerns, the *parens patriae* duty and binding arbitration, have been completely obscured.[94] Family and marriage are immensely private in nature. However, with the introduction of children, state courts are reluctant to give up control over determinations respecting the custody of children.[95] An inevitable conflict exists between arbitration and the court's responsibilities to the parties and children that appear before them.[96] Where a child's trajectory in life is concerned, it is vital that the court be privy to observe the demeanor, conduct, and emotions of the conflicting parties. Through the use of arbitration and thereby judicial review of the record, the court analyzes not the

88. *See* Kessler, *supra* note 2, at 345.

89. *See* ELROD, *supra* note 19 ("[T]he nonbinding nature of the child custody issue means that the entire custody case may be 'retried' by a party in front of a judge. In addition, the arbitrator does not have the power to enforce an arbitration award.").

90. *See* UNIF. FAMILY LAW ARBITRATION ACT § 14; *see also* Fawzy v. Fawzy, 973 A.2d 347, 361 (N.J. 2009); WIS. STAT. ANN. § 802.12(e) (West 2007) (requiring the arbitrator's award set forth detailed findings of fact).

91. OEHMKE, *supra* note 16, at § 66.

92. *See* MICH. COMP. LAWS ANN. § 600.5080 (West 1961).

93. *See* OEHMKE, *supra* note 16, at § 28 (citing Kelm v. Kelm, 749 N.E.2d 299, 302 (Ohio 2001)).

94. *See* Imbrogno, *supra* note 81, at 436–37.

95. *See id.*

96. *See id.*

child or the parents, but only an unresponsive record, thereby hindering the ability of the court to determine the best interests of the child.[97]

B. Neutrality and Competency: Is it Sincere?

Proponents of arbitration argue that judges who rule on child-related disputes are inexperienced and have inadequate knowledge on the law of custody.[98] A question must then be raised as to whether or not arbitrators are more competent to decide on such matters. Undoubtedly, the parties have the right to choose their arbitrator(s)—experienced in the law of child custody or not. However, as the New York Supreme Court noted in *Agur v. Agur*, "[t]here is no assurance of the qualifications of the arbitrators, no necessity that the parties nominate persons whose background or competence would certify a provident decision."[99] Additionally alarming is the fact that the parties compensate the arbitrators directly. In contrast, Judges do not receive compensation directly from either party; judges have no stake in the matter other than making a decision which promotes the best interests of the child. In arguing against private dispute resolution, Owen Fiss asserts that "[a]djudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials . . . possess a power that has been defined and conferred by public law, not by private agreement."[100] Additionally, Fiss notes that the role of a judge is not to confer a benefit upon the private parties, "but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them."[101] Judges utilize testimony, discovery, expert witnesses such as child appointed psychologists, etc. in order to determine the best interests of the child according to state statute.[102] In contrast, arbitrators may have no experience dealing with child custody law.[103]

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97. *See* Albano, *supra* note 82, at 437.

98. *See* Audrey J. Beeson, Esq., *Arbitration. A Promising Avenue for Resolving Family Law Cases?*, 18 PEPP. DISP. RESOL. L.J. 211, 229 (2018).

99. Agur v. Agur, 32 A.D.2d 16, 20, 298 N.Y.S.2d 772, 777 (N.Y. Sup. Ct.1969).

100. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

101. *Id.*

102. *See generally*, LINDA D. ELROD, CHILD CUSTODY PRACTICE & PROCEDURE § 13:11, Westlaw (database updated June 2021) (discussing forms of evidence able to be presented by the parties to the litigation).

103. *See* Albano, *supra* note 82, at 442 (noting that there is no guarantee that an arbitrator will have family law expertise).

In the case of *N.L. v. V.M.*, a private attorney was hired as the parties' arbitrator.[104] On appeal, the wife argued that the award should be vacated because the arbitrator was biased against her and engaged in misconduct.[105] The New Jersey Court of Appeals vacated the award.[106] The court reasoned that the arbitrator exceeded his powers and "had acted outside of his decision-making role on at least two occasions, and in a manner that endeavored to persuade [the wife] to relinquish her position."[107] Although evident partiality is a ground for vacatur under the Federal Arbitration Act, the Uniform Arbitration Act, and the Revised Uniform Arbitration Act,[108] the burden of proving evident partiality is high.[109] Therefore, parties to the arbitration are directly compensating a third-party "neutral" with little assurance that the arbitrator is actually neutral, and little availability to challenge the neutrality of the arbitrator.

C. Preserving Judicial Review vs. the Attraction of Arbitration Being Inexpensive, Private, and Expeditious

Generally, an arbitral record is atypical for arbitration due to it's binding and inexpensive nature.[110] However, under the UFLAA, the arbitrator is mandated to maintain a record of the arbitral proceeding.[111] Therefore, with child custody arbitration, parties are required to incur costs which they would have acquired had they instead first litigated the action. Additional costs can include "arbitrator fees and expenses, expert witnesses and translators; attorney fees and expenses, and fees and expenses of an institution supervising an arbitration; sanctions arbitrators or a court awards, including those provided by pleading or discovery rules in civil litigation; etc."[112]

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104. *See* N.L. v. V.M., No. A-1043-11T2, 2013 WL 6096373, at *2 (N.J. Super. Ct. App. Div. Nov. 21, 2013).

105. *See id.* at *3.

106. *See id.* at *13.

107. *Id.* at *12.

108. *See* 9 U.S.C. § 10 (2002); UNIF. ARBITRATION ACT § 12 (UNIF. L. COMMISSION 1956); UNIF. ARBITRATION ACT § 23 (UNIF. L. COMMISSION 2000).

109. *See* GEORGE L. BLUM & ERIC C. SURETTE, 4 AM. JUR. 2D *Alternative Dispute Resolution* § 221, Westlaw (database updated Aug. 2021) (requiring a party seeking vacatur to prove evident partiality by clear and convincing evidence).

110. *See* OEHMKE, *supra* note 16, at § 55.

111. UNIF. FAMILY LAW ARBITRATION ACT § 14.

112. George K. Walker, *Arbitrating Family Law Cases by Agreement*, 18 J. AM. ACAD. MATRIM. L. 429, 486 (2003).

Although parties may wish to keep sensitive issues out of a courtroom, they are unable to do so due to the requirement of maintaining a record and de novo review.[113] Because of this, the parties deviate from the agreed upon privacy and what was once a private dispute becomes public; all aspects of the record are then reviewed by the presiding court.[114] An additional issue that accompanies privacy in the arbitral proceeding is that third parties are generally unable to attend the proceeding.[115] Therefore, in cases in which neither parent is a proper guardian and instead a third party is deemed the best custodian for the child, "the arbitrator is likely to lack the power to award custody or visitation rights to a third party who is not a party to the arbitration agreement entered into by the parents."[116] Because the standard is the "best interest of the child," there is little assurance that arbitrators will or are even able to obtain such a standard. Many grandparents are raising their grandchildren.[117] If grandparents are not a party to the arbitration agreement, they may lose custody once an award is enforced. Alternatively to the argument of retaining the expectation of privacy, those disputes that do remain private, hinder the development of family law.[118]

As discussed above, as a response to backlogged court dockets, arbitration of family-related disputes was promoted. One of the main attractions of arbitration, an expeditious result, is wholly improper with respect to child custody disputes. Although arbitration of disputes may be characterized as "inexpensive, expeditious, and informal adjudication, [these attributes are] not always synonymous with fair and just adjudication."[119] A quick decision may be justifiable for a dispute between commercial entities; however, child custody affects, often-times, committed parents, and children who have unbreakable bonds that may be relegated to hasty decisions.

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113. *See* Linda D. Elrod, *The Need for Confidentiality in Evaluative Processes: Arbitration and Med/arb in Family Law Cases*, 58 FAM. CT. REV. 26, 31 (2020) (noting that "[f]amily law cases almost always contain private sensitive information about parenting, family finances, the parties' sex life, and issues involving their children.").

114. *See* ELROD, *supra* note 13 (stating that review goes beyond legal error).

115. *See* OEHMKE, *supra* note 16, at § 10.

116. E. Gary Spitko, *Reclaiming the "Creatures of the State': Contracting for Child Custody Decisionmaking in the Best Interests of the Family*, 57 WASH. & LEE L. REV. 1139, 1174 (2000) (citing Stewart E. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 500 (1981)).

117. *See* Kent Allen, *Grandparents Report Success in Raising Grandchildren*, AARP (Nov. 6, 2018), https://www.aarp.org/home-family/friends-family/info-2018/grandparents-raising-kids.html (noting that in 2018 an estimated three million grandparents were raising their grandchildren).

118. *See* Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 679 (1986).

119. *Id.*

V. CONCLUSION

Child custody arbitration, in essence, is revocable, invalid, and unenforceable without court involvement. As discussed before, common law arbitration during the colonial period was non-binding.[120] Today, with the advent of child custody arbitration, there is a reversion back to common law, non-binding arbitration, justifiably defeating the primary purpose of modern arbitration—finality. Despite Americans' distrust in the judicial process and disdain towards litigious proceedings, arbitration does not provide an effective alternative in determining child custody issues. The advantages of typical arbitration one may be aware of are not attainable with child custody arbitration. Instead, parties incur costs, both financially and temporally with respect to not only the arbitration but the costs of judicial review as well. Additionally, the principal party affected, the child, has no opportunity to be heard. In closing, courts should retain exclusive jurisidiction over child custody matters.

120. *See* Dunham, *supra* note 3, at 202-203.