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PERSPECTIVE

Prejudging the Arbitration of Custody

BY PETER J. GALASSO

BEFORE ALL HOPE of arbitrating custody and visitation is lost in the popular discourse of "public policy', "parens patriae", and a "child's best interests," the pragmatic voices of the parents affected thereby, and who are constitutionally empowered to make the day-to-day decisions involving their children, must be heard.[1]

Paradoxically, in an age when the court's stalled and costly engines are being replaced by the far more affordable and compact alternative dispute resolution centers (ADR), divorce practitioners find themselves senselessly relegated to a judicial system that in many cases is the worst forum for a client's dispute. Indeed, by endorsing the wholesale condemnation of arbitration in custody and visitation cases, the courts have inadvertently frustrated a parent's right to a strategic use of arbitration in an area of law that cries for its adoption.

The U.S. Supreme Court has repeatedly held that in the absence of an overriding state interest, parents have a constitutional right to rear their children, free of governmental interference.[2] Recognized as the best arbiters of their children's best interests, parents may agree to a custody arrangement in an uncontested matrimonial action and the court does little more than add its signature to the bottom of the Judgment of Divorce. However, when a dispute arises, even as in a minor variation of a previously ordered visitation schedule. In the name of public policy, the court robotically assumes its role as parens patriae (i.e. superparent) and injects itself into that dispute. Arbitraton is not available.

FOR THOSE WHO practice in Family Court, the ultimate resolution of such disputes may entail the assignment of a law guardian, the intervention of the probation department, a study by a forensic psychologist and an elongated hearing. The cost that parties must bear often leaves them emotionally exhausted far more antagonistic and a good deal poorer.

In *Glauber v. Glauber*[3] the Second Department summarized its reservations against arbitration of custody by noting that "the arbitral process has been, in large measure, insulated from judicial review . . . [because an award] will not be invalidated unless it is totally irrational, violates strong public policy, or exceeds a specific limitation on the arbitrator's power . . . [4]"

In light of that limited review, the court went on to hold: [I]f 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 interest of children cannot yield to the expectation of finality of arbitration awards.[5]

Hence, while parents are free to determine the issue of custody between themselves, they are not free to plan against future contingencies by designating an arbitrator to address those disputes.

Missing from the Second Department's blanket prohibition of this use of arbitration, however, is a recognition of the safeguards that may be placed into an arbitration agreement to confront its concerns. For example, to ameliorate the rule that allows for a reversal of an arbitrator's award only upon showing that the award is "totally irrational"[6] carefully drafted paragraphs are frequently inserted into such agreements which mandate judicial review of the arbitrator's decision based upon the same standards employed in the appellate review of a Supreme Court decision. If the Appellate Division adheres to that direction, the arbitrator's powers can be appropriately checked.

In 1964, when ADR was hardly a household acronym, the First Department held that under the right circumstances: "[S]ubmission of disputes in custody and visitation matters to voluntary arbitration need no longer receive general interdiction and such procedure, should be encouraged as a sound and practical method for resolving such disputes"[7]

Yet despite the advancements in ADR and the current congestion in our courts the wave of judicial thought suggests that the First Department dicta in *Sheets v. Sheets*, may have limited vitality. In defying precedent, Justice L. Freidman in *Stanley G. V. Eileen G.*[8] recently adopted the Second Department's holding that agreements to arbitrate the issues of custody are unenforceable, and that the First Department's contrary dicta in *Sheets* should no longer be followed:

> This court agrees with the comment of the Second Department (in *Glauber*) 'It is now a matter of some doubt that the First Department would follow its own holding in *Sheets v. Sheets*. This court concludes that the logic of *Sheets*, which has long been under attack (See Matter of *Fence v. Fence*), has been undercut and there is no sound reason to follow its dictum[9].

While this goal of protecting children against the alleged imprudent decisions of their parents may be laudable, abandoning the thrust of *Sheets* may be ill-conceived.

SIGNIFICANTLY, in its recent decisions of *Rentschler v. Rentschler*[10] and *Matter of Renne B.*[11], the First Department rejected the trial judges custody determinations, adopting in their stead the contrary opinions of court-appointed psychiatrists. In reversing in each case the trial courts award of custody to the mother. After *Rentschler* and *Renee B*, it may be incongruous for the First Department to reverse itself and hold that parties cannot arbitrate custody. Indeed, if the First Department can rest its decision on the testimony of a psychiatrist, how would the parents' designation of that same psychiatrist (or the child's treating psychologist) as the arbiter of future custody disputes be inimical to a child's best interests?

The public policies that favor arbitration are multifarious.

> Arbitration is designed to achieve a just determination of the matter's in dispute and finally, to dispose of them in a rapid and inexpensive manner, thus avoiding litigation between the parties . . . the policy of the state favors and even encourages arbitration as a means of preserving time and resources.[12]

Moreover, the flexibility and informality associated with arbitration may tend to de-escalate a heated matrimonial, which is a recognized haven for anxiety. Notwithstanding, because visitation falls under the

same umbrella as custody, de minimis matters such as the timing of summer visitation can only be determined by a judge rather than through the more practical alternative of arbitration.

In spite of the public outcry over excessive fees and the interminable delay endured in obtaining a custody or visitation decision from the courts, the lower courts are now threatening to further limit the ability to refer other divorce related issues to ADR. In a recent case in which I was involved, Justice Edward McCarty III of the Supreme Court, Nassau County, speculated that based upon his reading of the Child Support Standards Act and the *Glauber* decision, the prohibition against arbitration may now extend even to the issue of child support:

> Given the adoption of the Child Support Standards Act (DRL§240), I question whether the advantage of finality attributed to arbitration outweighs the clear public policy in favor of court involvement in child support determinations. The *Glauber* court noted the interrelationship between visitation and custody but there exists a similar nexus between custody and child support determinations and the court acts as parens patriae with respect to each. However, for the present, this is an academic exercise.[13]

Custody battles are so combustible that the connection between such litigation and the public's dissatisfaction has never been more pronounced. In light of the recently promulgated rules that now govern attorney conduct in matrimonials,[14] divorce lawyers have been called upon to develop methods to police themselves. In his article about value billing, Christopher McDonough nicely summarized the "practitioner's dilemna":[15]

> Matrimonial lawyers are in an especially tricky position due to the nature of matrimonial proceedings. The wrath and acrimony inherent therein often result in a client unwilling to act reasonably. A potential Catch-22 may ensure the lawyer representing the less financially able client in that she may be unable to collect her fees from the other side without proving that the fees are reasonable and the decision to proceed was made within the bounds of the potential cost/ benefit relationship.

Because parties are free to reject their attorney's advice to settle, and instead may choose to litigate even over minutiae, an affordable forum must be available to address their disputes. The court system is no longer the best forum. It can virtually bankrupt the parties. Permitting them to arbitrate custody and visitation, undeniably the most costly component of divorce litigation, will effectively give the parties their day in court and save them enough on the emotional and financial side to ensure a better tomorrow.

Pragmatically, prohibiting arbitration of custody and visitation merely substitutes the court, for the parties and their hand-picked health care provider, as the gatekeeper of a child's best interests. Public policy certainly should not compel parties to rely on an unknown jurist, as contrasted with their agreed upon therapist-arbitrator, to make decisions in their children's best interests. With that in mind, one can only hope that Chief Judge Judith S. Kaye's State Court ADR project, established by her to examine the expanded menu of ADR options to complement court procedures, and recently convened to conduct public hearings on that subject, devotes attention toward encouraging the use of arbitration options for custody and visitation disputes. It is time to extend to parents the right to make a choice.

(1) See Brandes and Weldman, "Arbitration of Custody and Visitation Disputes: *NYLJ* Oct. 25, 1994, p. 3 col. 1.

(2) See e.g. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); U.S. Constitution 14th Amendment; New York Constitution Art 1 6.

(3) *Glauber v. Glauber* 192 AD2d 94, 600 NYS2d 740 (2nd Dept. 1993).

(4) *Id* at 741-2.

(5) *Id* at 743.

(6) *Silverman v. Benmor Conts, Inc.* 61 NY2d 299, 308 (1984).

(7) *Sheets v. Sheets* 22 A.D.2d 176; 254 NYS2d 320 (1st Dept. 1964)

(8) *NYLJ* Oct. 13, 1994, p. 22 col. 6.

(9) *NYLJ* Oct. 13, 1994, p. 23 col. 1.

(10) 611 N.YS2d 831 (1st Dept. 1994).

(11) 611 NYS2d 831 (1st Dept. 1994).

(12) *Ferber v. Schultz*, 104 Misc.2d 1009, 429 NYS2d 861, 863 (Civ. Ct. King's County 1990).

(13) *Anonynous v. Anonymous* slip opinion (See Ct. Nassau Co. 1994).

(14) 22 N.Y.C .R.R. 14003

(15) McDonough, : "Value Billing and the Reasonableness Requirement" *NYLJ* May 11, 1993 p. 1 column 1.

Peter J. Galasso *is a partner at Galasso, Langione & Goidell in New York*