

MEDIATION-ARBITRATION: A PROPOSAL FOR PRIVATE RESOLUTION OF DISPUTES BETWEEN DIVORCED OR SEPARATED PARENTS

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When a husband and wife with children decide to terminate their marriage,¹ they are confronted with the necessity not only of arranging their own affairs, but also of establishing a new life plan for themselves as parents. Although the precise effects of marital breakdown on children may be subject to dispute,² no one would suggest that such effects are predominantly positive. The primary objective of the parties involved, therefore, should be to minimize the adverse impact which the situation will have upon the children.

Under existing law, when a marriage is terminated, the state, acting through its courts, assumes the role of *parens patriae*³ and determines who shall have custody of the children and on what conditions.⁴

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1. Nearly one out of every two marriages in the United States ends in divorce, and one million children are thrust into single-parent homes each year. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, CURRENT POPULATION REPORTS SERIES P-20, No. 287, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1975, at 2-5 (1975); Keniston, *The Emptying Family*, N.Y. Times, Feb. 18, 1976, at 37, col. 2. It is estimated that due to the increasing incidence of divorce, two out of every five children born in the 1970s will live with only one parent for at least part of their childhoods. *Id.*

2. For extensive reviews of the literature from the behavioral sciences, see Bradbrook, *The Relevance of Psychological and Psychiatric Studies to the Future Development of the Laws Governing the Settlement of Inter-Parental Child Custody Disputes*, 11 J. FAM. L. 557 (1971); Ellsworth & Levy, *Legislative Reform of Child Custody Adjudication: An Effort to Rely on Social Science Data in Formulating Legal Policies*, 4 L. & SOC'Y REV. 167 (1969). See also J. DESPERT, CHILDREN OF DIVORCE (1953).

3. For a discussion of the historical development of the court's role as *parens patriae*, see Foster & Freed, *Child Custody* (pt. 1), 39 N.Y.U.L. REV. 423, 423-25 (1964); Note, 33 FORDHAM L. REV. 726, 727-28 (1965).

4. See, e.g., CAL. CIV. CODE § 4351 (West Supp. 1975); FLA. STAT. ANN. § 61.13 (Supp. 1975); ILL. ANN. STAT. ch. 40, § 19 (Smith-Hurd Supp. 1975); MICH. COMP. LAWS ANN. § 552.16 (1967); N.Y. DOM. REL. LAW § 240 (McKinney 1964); PA. STAT.

Where the divorce involves such bitterness between the former marital partners that even a minimal level of cooperation is precluded, intervention by the state in the interest of the child is unquestionably justified. Where, however, as is often the case, there exists a residue of goodwill and trust between husband and wife on matters affecting their children, or at least a prevailing determination to make their own decisions about such matters, the necessity for state paternalism is less clear. In such situations the parents will often have executed a separation agreement providing for custody, visitation, and support, and establishing the ground rules for the resolution of future disputes.⁵ In spite of the benefit such a contract may provide to the child of the broken home, the courts are generally free to affirm or ignore any separation agreement as they determine the appropriate legal framework for the child's post-divorce existence.⁶

It is the purpose of this Article to propose a new mechanism for determining and protecting the interests of the child of divorce. The proposal involves three basic elements: the use of a family counseling specialist to assist in drafting a separation agreement, the participation of the same specialist in a required mediation process when disputes arise under the agreement, and the submission to arbitration of matters which cannot be resolved through the mediation process. This proposal is predicated on the assumption that it is the parents, irrespective of the failure of their own relationship, who have the primary responsibility for bringing up their child. Therefore, the interests of the child should be viewed from the perspective of the parents as far as is reasonably possible. A necessary implication of this view is that state participation in the decision-making process should be minimal; specifically,

ANN. tit. 23, § 15 (Supp. 1975); WASH. REV. CODE ANN. § 26.09.050 (Supp. 1975). The child must reside within the state in order for the court to have jurisdiction to determine custody. *May v. Anderson*, 345 U.S. 528, 535 (1953) (Frankfurter, J., concurring); *Bachman v. Mejias*, 1 N.Y.2d 575, 136 N.E.2d 866, 154 N.Y.S.2d 903 (1956). *But see* UNIFORM CHILD CUSTODY JURISDICTION ACT, Commissioners' Prefatory Note. *See also* *People ex rel. Robert C. MM v. Ann Jeanette NN*, 50 App. Div. 2d 1033, 376 N.Y.S.2d 951 (1975) (mem.) (court in child's new state of residence can overturn initial custody determination).

5. *See* H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 16.10 (1968).

6. *Daily v. Daily*, 175 Ark. 161, 164, 298 S.W. 1012, 1013 (1927); *Carson v. Carson*, 120 Ind. App. 1, 8-9, 89 N.E.2d 555, 559 (1950); *Van Dyke v. Van Dyke*, 278 App. Div. 446, 448, 106 N.Y.S.2d 237, 240 (1951); *Commonwealth ex rel. Traeger v. Ritting*, 32 Pa. D. & C.2d 515, 517, *aff'd*, 206 Pa. Super. 446, 213 A.2d 681 (1965). If accepted by the court granting the divorce, the separation agreement may merge into the divorce decree, or it may continue to subsist as a separate contract between the parties. *See McMains v. McMains*, 15 N.Y.2d 283, 206 N.E.2d 185, 258 N.Y.S.2d 93 (1965).

it will be argued that courts must begin to accord far greater respect to the wishes of parents as expressed in separation agreements.

It is to be emphasized that the suggestions made herein do not rest upon any sociological or psychological theory that parents, by virtue of that status, are better able than anyone else to make decisions affecting their children. On the contrary, it is recognized that freedom to decide entails freedom to decide wrongly. The premise of this Article is that this is a risk run by all parents and that the occurrence of divorce neither negates the obligations of parenthood nor justifies the imposition of an "objective" notion of the child's best interests by the state.⁷ As background to the presentation of the mediation-arbitration proposal, the introductory portions of the Article will discuss the nature and sources of post-marital disputes, attempt to identify the values which the optimal method of resolving such disputes should preserve, and evaluate the two most prevalent means of dispute settlement in terms of those values.

SOURCES OF DISPUTES INVOLVING CHILDREN ARISING UNDER SEPARATION AGREEMENTS

Since the separation agreement forms the basis of a new life plan for the children of divorced parents, its provisions are normally compre-

7. The proposal presented here has a theoretical basis in the work of Dr. Lawrence Kubie. Kubie has recommended that disagreements regarding post-separation arrangements be subject to committee resolution. Specifically, he has proposed that

[U]pon separation or divorce the parents agree that the child's interests are paramount, and that neither of them shall have an exclusive right to custody. They accept the responsibility to attempt to decide together by mutual agreement every question that has a bearing on the welfare of their child or children, e.g., where the child shall live and with whom and for how long, where the child shall go to school and the kind of school, what kind of medical or psychological help the child may have if needed, what kind of vacations to spend where and with whom, etc.

If and whenever the parents cannot reach an agreement on any matter of concern to the child, they agree to submit the issue to a committee which they themselves choose at the time they make the agreement, and to accept unconditionally the committee's decisions, and to be guided by it. The committee will act at the instance of either parent, and the failure of the other to present his side when given the opportunity does not make the committee's decision ineffective. Kubie, *Provisions for the Care of Children of Divorced Parents: A New Legal Instrument*, 73 YALE L.J. 1197, 1198 (1964).

Dr. Kubie's proposals are discussed in detail in Note, *Committee Decision of Child Custody Disputes and the Judicial Test of "Best Interests,"* 73 YALE L.J. 1201 (1964).

This Article, while drawing on Dr. Kubie's ideas, seeks to provide a measure of procedural certainty, the lack of which has largely prevented practical implementation of his suggestions. One commentator, for example, has suggested that Dr. Kubie's proposal has not been widely adopted because his "method is so complicated and expensive in terms of professional time that it appears applicable only to the very wealthy." Derdeyn, *Child Custody Consultation*, 45 AM. J. ORTHOPSYCHIATRY 791, 794 (1975). At least one court, however, has considered Dr. Kubie's suggestion in granting limited rec-

hensive. The fundamental issue to be dealt with, of course, is that of custody. In addition, most separation agreements provide for visitation rights for the noncustodial parent, education and religious training, health care, vacations, residential restrictions, and other special considerations such as notice and visitation in the event of illness.⁸ The document should also specify the amount of child support to be paid and provide for supplemental payments for major expenditures (medical costs or college tuition, for example) and emergencies.⁹

Regardless of the comprehensiveness of the agreement, disputes are virtually inevitable, given both the nature of the agreement and the nature of the situation. Certain disputes can be anticipated. For example, the agreement may provide that new visitation arrangements will be made when the child reaches a designated age. Anticipating that they may be unable to reach an agreement at that time, the parties may make advance provision for some mechanism for fixing the terms of the new arrangement.¹⁰

The frequency of unanticipated disputes is likely to vary with the degree of specificity with which the separation agreement is drawn. Broad language open to varied interpretations is a source of particular difficulty. An examination of suggested provisions in a widely used form book illustrates the problem. One form, for example, provides that the husband have "every reasonable opportunity to visit the children"; that he give "proper notice" to the custodian prior to each visit; that such visits "shall not interfere with previous plans made by

ognition to arbitration awards affecting children. See *Sheets v. Sheets*, 22 App. Div. 2d 176, 177, 254 N.Y.S.2d 320, 323 (1964) (discussed at notes 64-70 *infra* and accompanying text).

8. 1 A. LINDEY, *SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS* xix (2d rev. ed. 1967); see *DeFreitas v. DeFreitas*, 133 Cal. 2d 769, 285 P.2d 111 (1955) (custody); *Jackson v. Jackson*, 181 Kan. 1, 309 P.2d 705 (1957) (religious training); *Van Horn v. Van Horn*, 196 App. Div. 472, 188 N.Y.S. 98 (1921) (education); *McDonald v. McDonald*, 197 Ore. 272, 253 P.2d 249 (1953) (visitation rights).

9. 1 A. LINDEY, *supra* note 8, at xx; see *Jackson v. Jackson*, 290 N.Y. 512, 516, 49 N.E.2d 988, 990 (1943) (where husband and wife have fixed an amount for child support in the separation agreement, the court will treat that amount as the proper measure of support). Lindey also suggests that consideration be given to such questions as whether the husband's (or wife's) obligation will survive his death and be binding on the estate and whether the husband should agree to leave a specified sum in his will or part of his net estate to his children (or wife). 1 A. LINDEY, *supra* note 8, at xx-xxi; see *Sonnicksen v. Sonnicksen*, 45 Cal. App. 2d 46, 52, 113 P.2d 495, 499 (1941) (enforcing a separation agreement under which husband and wife agreed that upon the death of one, all property of deceased would go to survivor, and upon death of survivor to their children).

10. See, e.g., 1 A. LINDEY, *supra* note 8, § 14, at 21 (suggesting the use of arbitration for the settlement of anticipated disputes).

the wife for the child's benefit"; and that where "circumstances" make it "impossible or impractical" for the non-custodial spouse to visit, he shall have the right to have the child visit him.¹¹ The potential for further confusing an inherently complex and delicate situation is self-evident.

Such language is found as well in the provisions dealing with the payment of money, which normally provoke the greatest number of disagreements.¹² For example, a spouse may be obligated to pay the children directly for their support and maintenance and to provide them with a "regular and suitable allowance."¹³ The parties may be obligated to agree on a summer camp, private school or college and, further, on the amount of expense for such facility to be absorbed by the non-custodial spouse.¹⁴ The non-custodial spouse may undertake to pay "the cost of sending the children to college" and define costs as consisting of "tuition fees, plus a *reasonable* living allowance to be agreed upon between the parties."¹⁵ Moreover, even those provisions which appear to be wholly unambiguous can often give rise to disputes. There may be disagreement, for example, as to whether psychiatric expenses, cosmetic surgery, orthodontia and the like were intended to be included within a clause requiring one spouse to pay the child's "medical, dental, surgical, nursing and hospital expenses."¹⁶

It should be obvious that the smooth operation of a separation agreement containing such indefinite terms requires considerable good

11. *Id.* at 13-14 (Form 14.08).

12. The authors have personally reviewed all the marital arbitration records on file with the New York Regional Office of the American Arbitration Association for the years 1973 and 1974 [hereinafter cited as 1973-74 Survey]. The standard records included in the file contain the names of the parties, a copy of the demand served on the respondent by the party seeking arbitration, lists of the arbitrators submitted for the parties' approval, a copy of the separation agreement, and a copy of the award. Correspondence among the American Arbitration Association, the arbitrator and the parties, notes made by the arbitrator, and briefs prepared by a party are occasionally found in the files. The process of determining the specific facts of a case is therefore an uncertain one, dependent largely on inference and deduction.

The files are not available for public inspection. Special access is sometimes granted to persons who, like the authors, wish to use the material for scholarly research and agree to preserve the anonymity of the parties.

Of the 39 cases considered during those years, 21 raised questions of child support (sometimes in conjunction with other matters). The majority of these were claims for non-payment; in eleven of these non-payment cases, however, demands for upward or downward modification of support payments were also made.

13. 1 A. LINDEY, *supra* note 8, § 15, at 15-40.

14. *See, e.g., id.* § 15, at 15-17 to 15-18 (Form 15.10), 15-63 (Form 15.36).

15. *Id.* § 15, at 15-17 to 15-18 (Form 15.10) (emphasis added).

16. *Id.*

faith on the part of the parents. A slight unforeseen turn of events may destroy the delicate balance of interests between the parties, rendering agreed-upon provisions inequitable or unworkable. It is essential, therefore, that the means of resolving disputes arising under these agreements be designed to prevent the exacerbation of the misunderstanding or ill feeling which led to the dispute.

JUDICIAL RESOLUTION OF DISPUTES ARISING UNDER SEPARATION AGREEMENTS

So long as the nuclear family remains intact, the state ordinarily refrains from interfering in parental decision-making unless the conduct of the parents falls below some minimal level of societal acceptability.¹⁷ As mentioned earlier, however, any disputes with regard to family matters arising after a divorce or separation are normally resolved by a court.¹⁸ In these proceedings, the statutes of most states provide that the predominant criterion to be considered is "the best interests" of the child.¹⁹ Unfortunately, the courts have experienced considerable difficulty in determining the relevant factors to be weighed in applying this ostensibly objective test²⁰ and have tended to

17. For example, the Georgia Code gives the juvenile courts jurisdiction over a "deprived" child, defined as a child who is "without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental or emotional health, or morals" GA. CODE ANN. §§ 24A-301(a)(1)(C); 24A-401(h)(1) (Cum. Supp. 1975). *But see* Alsager v. District Court, 406 F. Supp. 10 (S.D. Iowa 1975), in which the court struck down portions of an Iowa statute allowing for termination of parental rights on the grounds that the standards for termination were too vague to give fair warning of what parental conduct was proscribed, permitted arbitrary and discriminatory terminations, and inhibited exercise of parents' fundamental right to family integrity.

18. See notes 3-4 *supra* and accompanying text.

19. See, e.g., UNIFORM MARRIAGE AND DIVORCE ACT § 402 (1970); ALASKA STAT. § 09.55.205 (1973); CONN. GEN. STAT. ANN. § 46-42 (Supp. 1976); FLA. STAT. ANN. § 61.13 (Supp. 1976); MINN. STAT. ANN. § 518.17 (Supp. 1976); MO. ANN. STAT. § 452.375 (Vernon 1976); NEB. REV. STAT. § 42-364 (1974); N.Y. DOM. REL. LAW § 240 (McKinney 1964); N.C. GEN. STAT. § 50-13.2 (Cum. Supp. 1975); OHIO REV. CODE ANN. § 3109.04 (Page Supp. 1975); S.C. CODE ANN. § 20-115 (1962); WASH. REV. CODE ANN. § 26.09.190 (Supp. 1975). See also ALA. CODE tit. 34, § 35 (1959) (as their safety and well-being may require); ARK. STAT. ANN. § 34-1211 (1962) (as from the circumstances of the parties and the nature of the case shall be reasonable); IDAHO CODE § 32-705 (1963) (as may seem necessary or proper); MISS. CODE ANN. § 93-5-23 (1972) (as may seem equitable and just); N.H. REV. STAT. ANN. § 458:17 (1968) (as shall be most conducive to their benefit); N.D. CENT. CODE § 14-05-22 (1971) (as may seem necessary or proper); S.D. COMP. LAWS § 25-4-45 (1967) (as may seem necessary or proper); VA. CODE ANN. § 20-107 (1975) (as court shall deem expedient).

20. For a general discussion of the factors considered in awarding custody, see Clark, *supra* note 5, § 17.4; Foster & Freed, *supra* note 3, at 438-43.

rely instead on a variety of presumptions.²¹ These rules have been criticized by social scientists²² and are indicative of the difficulty courts have in obtaining and assimilating the information necessary to make reasoned judgments.²³ Yet, only minimal modifications—such as *in camera* interviews with the child²⁴ or special investigations²⁵—have been made to facilitate the court's paternal function.

21. See, e.g., *Vanden Heuvel v. Vanden Heuvel*, 254 Iowa 1391, 1398-99, 121 N.W.2d 216, 220 (1963); *Mullen v. Mullen*, 188 Va. 259, 270-71, 49 S.E.2d 349, 354 (1948) (children of tender years should be awarded to the mother); *Beck v. Beck*, 175 Neb. 108, 111-12, 120 N.W.2d 585, 589 (1963) (a wife found guilty of adultery is an unfit custodian as matter of law). One commentator has argued that, in order to promote uniformity, the presumptions which may legitimately be indulged should be set forth in a statute. Ellsworth & Levy, *supra* note 2, at 202-03.

22. See, e.g., Fain, *Our Child Custody Laws and Policies—Are They in Need of Revision or Change?*, ABA FAMILY LAW SECTION, PROCEEDINGS 29 (1963), quoted in Ellsworth & Levy, *supra* note 2, at 218 n.31:

Too often these so-called generalizations or clichés are used by lawyers and judges with basically no real investigation or thought given to what is to be the best interests of the child. Moreover, there are often honest differences of opinion concerning a fit custodial parent or the best interests of children. When one considers the fact that our divorce judges have a wide and almost uncontrolled discretion in these matters, the problem is compounded. The exercise of this discretion cannot be considered simply as a legal function, no matter how learned in the law a judge may be. We must recognize that the discretion exercised by a trial judge is far less a product of his learning than of his personality and temperament, his background and interests, his biases and prejudices, conscious or unconscious. Hence, it is both necessary and practicable to attempt to give more definite substance to the generalizations that creep onto our laws and into our cases.

See generally J. DESPERT, *supra* note 2, at 192-94.

23. See Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROB. 226, 257-58 (1975); Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 62 (1969).

24. See, e.g., *Ex parte Leu*, 240 Mich. 240, 248-49, 215 N.W. 384, 386 (1927); *Lincoln v. Lincoln*, 24 N.Y.2d 270, 272, 247 N.E.2d 659, 661, 299 N.Y.S.2d 842, 844 (1969). See also *Krieger v. Krieger*, 59 Idaho 301, 305-06, 81 P.2d 1081, 1083 (1938) (any examination of the child to determine his parental preference should take place out of the presence and hearing of the parents); *Douglas v. Sheffner*, 79 Wyo. 172, 184, 331 P.2d 840, 845 (1958) (trial judge who interviews child must state in his decision the child's expressed preference and the extent to which the child's statement was taken into consideration). *Contra*, *Raper v. Berrier*, 246 N.C. 193, 195, 97 S.E.2d 782, 784 (1957) (court may privately question child only with consent of the parties). Interestingly, one court has denied a panel of arbitrators the authority to conduct a confidential interview with a child whose custody they were to determine. *Nestel v. Nestel*, 38 App. Div. 2d 942, 943, 331 N.Y.S.2d 241, 243 (1972).

25. Generally, the court may order an independent investigation in any domestic relations case. However, unless the parties stipulate otherwise, the report of the special investigator can be considered by the court only if it is entered into evidence and the investigator is available to the parties as a witness. *Fewel v. Fewel*, 23 Cal. 2d 431, 435-36, 144 P.2d 592, 595 (1943); *Kesseler v. Kesseler*, 10 N.Y.2d 445, 455, 180 N.E.2d 402, 407, 225 N.Y.S.2d 1, 8, *remittitur amended*, 11 N.Y.2d 716, 181 N.E.2d 220, 225 N.Y.S.2d 996 (1962); see Leavell, *Custody Disputes and the Proposed Model*, 2 GA. L. REV. 162, 185-87 (1968). The inability of the courts to seek useful outside help

In addition to this substantive uncertainty, it is felt that the judicial procedure is inherently ill-equipped to deal with post-marital matters. In particular, judicial resolution of child-related disputes fails to incorporate three important "value preferences" which an optimal mechanism should be designed to preserve. The first of these is family autonomy. Parents have, and should have, the primary responsibility for raising their children. Judges as a group possess no qualities that make them inherently more capable than parents of making intelligent decisions as to a child's best interests after the termination of a marriage. On the contrary, because they brought the child into the world, have far more knowledge of the child's needs and desires, and carry the financial and emotional burden of raising the child, the parents ought to enjoy a presumption in favor of their judgment.²⁶ Moreover, this is a pluralistic society. Except in the most extreme cases, the state ought not to impose its own (or an individual judge's) set of parental values in preference to those of the natural parents. To do so is to ignore the legitimate ethnic, religious and cultural differences among individuals which this society has traditionally fostered.²⁷

Despite the breakdown in the marital relationship, the preservation of family autonomy demands that parents retain the right to make decisions affecting the upbringing of their children. To the extent that parents, even after a good faith effort, cannot agree between themselves on what is best for their children, they should at least have the

without the consent of the parties would restrict the effectiveness of a court-appointed child development consultant such as that proposed in *Derdeyn*, *supra* note 7. In addition, as one commentator has observed, "there appears to be a spirit of hostility [in the courts] towards these [experts'] reports as such and a failure to appreciate that the insights of staff and professional people may be of real service in arriving at what actually is to the best interests of the child whose custody is at issue." 2 H. FOSTER & D. FREED, *LAW AND THE FAMILY—NEW YORK* § 29:30 (1966).

26. The courts have generally held that the parents of a child, if they are found to be fit, are preferred as custodians over non-parents. See, e.g., *In re Guardianship of Smith*, 42 Cal. 2d 91, 92, 265 P.2d 888, 889 (1954). In one study advocating general codification of the judicial presumptions invoked in custody cases, it was suggested that the absence of reliable alternative standards made it particularly urgent that the presumption in favor of parental custody be given statutory status. Ellsworth & Levy, *supra* note 2, at 204-07.

27. The judicial resolution of a particular child-related conflict may constitute not only the imposition of an external set of values, but also a means of punishing a parent whose values the judge does not share. For an example of such interference, see *Painter v. Bannister*, 258 Iowa 1390, 140 N.W.2d 152, *cert. denied*, 385 U.S. 949 (1966), in which the child was placed in the home of his grandparents rather than in his father's "unstable, unconventional, arty, Bohemian, and probably intellectually stimulating . . ." household. *Id.* at 1396, 140 N.W.2d at 156. See also *Shelley v. Westbrook*, 37 Eng. Rep. 850 (Ch. 1817), the celebrated English case in which Lord Eldon refused to grant the poet Shelley custody of his children because of his atheistic beliefs.

right to choose the decision-maker and should not be compelled to accept an individual or committee chosen by the state whose values may significantly differ from their own. The only limitation on this parental right should be that imposed upon all parents, namely, that their conduct not constitute neglect.²⁸

Further, resolution of domestic disputes should be accomplished privately. Insuring privacy helps quell feelings of embarrassment and inadequacy on the part of parents and reduces the negative impact of familial disputes upon children. As used here, the concept of privacy goes beyond merely closing the courtroom doors to the public. It means not having one's domestic problems made a matter of public record and not having one's future depend upon governmental fiat.²⁹ Perhaps most important, it assumes removal of the dispute from a forum traditionally associated with an adversary proceeding, thus avoiding the inference that there is a winner and a loser, that one partner has been "right" and one has been "wrong."

Finally, dispute resolution should be accomplished quickly. The value preference for speed is particularly important from the child's point of view. For him, uncertainty and delay can be the most difficult aspect of the entire divorce process.³⁰ Concern for his welfare demands that decisions be made as rapidly as possible, consistent with reasoned judgment. Unfortunately, rapid decision-making is not a common attribute of modern overworked judicial systems, with their elaborate procedural machinery and opportunities for multiple appellate reviews. Those same time-consuming procedures which have come to be viewed as essential to the protection of litigants' rights may work to deprive an affected child of the stability which is his most basic need.

The failure of the judicial system to satisfy these basic value preferences would seem to demand that an alternative vehicle for domestic dispute resolution be made available. The most obvious substitute, arbitration, is already in limited use. As will be discussed below, however, this form of dispute resolution has been less than en-

28. See note 17 *supra* and accompanying text.

29. See note 79 *infra* and accompanying text.

30. See J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 42 (1973):

The child's-sense-of-time guideline would require decisionmakers to act with "all deliberate speed" to maximize each child's opportunity either to restore stability to an existing relationship or to facilitate the establishment of new relationships to "replace" old ones. Procedural and substantive decisions should never exceed the time that the child-to-be-placed can endure loss and uncertainty.

thusiastically received by the courts, and it also suffers from disabilities which prevent adequate satisfaction of the above-mentioned value preferences.

THE CURRENT ALTERNATIVE: ARBITRATION

Although there has been no broad survey of the extent to which arbitration clauses have been utilized,³¹ there is some indirect evidence that such clauses are far from unusual in separation agreements.³² Nevertheless, the arbitrability of certain critical matters facing divorced parents is as yet unsettled.³³ In order to understand better the judicial

31. There were thirty-nine domestic relations arbitrations at the New York Regional Office of the American Arbitration Association during 1973 and 1974. 1973-74 Survey, *supra* note 12. Of the thirty-nine cases, twenty-four involved children, while the other fifteen involved questions of wife support, property settlements and the like. Of the twenty-four cases involving children, two were withdrawn, four were settled (one after hearing), two resulted in consent awards (after hearing), one was stayed by a court order, and one was held in abeyance by agreement of the parties pending the outcome of a court proceeding brought by the claimant in the arbitration for joint custody. Of the fifteen cases not involving children, two were withdrawn (one after hearing), one was settled (after hearing) and one was discontinued with prejudice by stipulation (after a two-day hearing). As has been noted, see note 12 *supra*, twenty-one of the twenty-four child-related cases concerned child support. The other three cases, none of which resulted in an arbitral award, involved difficulties typical of those plaguing the arbitration of child custody disputes. In one case, the agreement provided for joint custody with the child in boarding school. The claimant-mother sought to have the child reside at home. The father answered by pointing out that the arbitration clause was limited to the selection of a private boarding school and that the case involved custody and schooling which could only be determined by the state supreme court. The matter was withdrawn. In another case, the court stayed arbitration on the ground that there was no agreement to arbitrate the claims (although the agreement contained a broad arbitration clause) where the husband claimed the wife had violated the agreement by failing to consult on the children's education, by moving to a distant city and by failing to inform him of the children's health. The husband was seeking the return of payments made under protest for expenses incurred for the children's education without his consultation, the establishment of an escrow fund for the children's education to be expended after consultation, an accounting by the wife, and disclosure of information respecting the health, welfare and education of the children. In the third case, the parties agreed to hold the arbitration, initiated by the father, in abeyance pending the outcome of a related matter in the supreme court. Here the parents were disputing the meaning of the term "reasonable" under a clause permitting the father visitation "at reasonable times" and "with reasonable frequency." See note 11 *supra* and accompanying text. The father had also applied to the supreme court for, *inter alia*, joint custody and an order directing the wife to comply with visitation requirements.

32. The major form book in the area generally favors arbitration as a means of resolving both anticipated and unanticipated disputes arising under separation agreements and provides a variety of examples of such clauses. Indeed, the author points out that the inclusion of an arbitration clause encourages the parties to settle their disputes themselves, thereby providing a positive psychological bonus. 1 A. LINDEY, *supra* note 8, § 29, at 29-3.

33. See notes 55-73 *infra* and accompanying text.

reluctance to endorse the arbitration of post-marital disputes, a brief description of the arbitration process is necessary. Since the American Arbitration Association³⁴ is the most active arbitration agency in the country and has frequently undertaken the resolution of domestic relations matters, its procedure will be used as a model.

The Arbitration Process

Arbitration is a voluntary consensual process, one which is premised on the idea that the arbitrator derives his authority from the agreement and may not exceed the scope of that authority.³⁵ The parties, therefore, can limit arbitration to disputes arising only under certain terms of the agreement.³⁶ In addition, the arbitrator must decide the issue in the context of the agreement from which he derives his authority, and not on the basis of extra-contractual considerations. For example, in deciding the issue of whether a father is obligated to pay for psychiatric care under a clause obligating him to pay medical expenses, the arbitrator might properly consider the agreement itself, what the parties contemplated when they entered into the agreement, and what parties usually mean when they use this kind of language. It would be incorrect for the arbitrator to conclude that, regardless of what the parties had agreed, this child needed psychiatric care, that the

34. The American Arbitration Association is a non-profit independent agency which administers arbitrations throughout the United States. It is undoubtedly the most important agency of its kind. It maintains panels of arbitrators qualified to hear labor and commercial disputes as well as disputes arising under separation agreements.

35. An arbitral award may be vacated on the ground that the arbitrator exceeded his authority. *See, e.g.,* Local 1078, UAW v. Anaconda Am. Brass Co., 149 Conn. 687, 183 A.2d 623 (1962); N.Y. CIV. PRAC. LAW § 7511(b)(iii) (McKinney 1963).

36. The process cannot get underway without an initial agreement to submit a particular dispute to arbitration. *Doughboy Industries v. Pantasote Co.*, 17 App. Div. 2d 216, 233 N.Y.S.2d 488 (1962) (labor case). Where there is disagreement as to whether a particular issue is arbitrable, the question is normally resolved by a court. *Uddo v. Toarmina*, 21 App. Div. 2d 402, 405, 250 N.Y.S.2d 645, 647 (1964) (stating the "axiomatic proposition" that "one can only be compelled to arbitrate when one has agreed to do so," but that "whether one has so agreed is a question for the court"). *But cf. Exercycle Corp. v. Maratta*, 9 N.Y.2d 329, 174 N.E.2d 463, 214 N.Y.S.2d 353 (1961) (court is precluded from declaring an agreement unenforceable where parties have provided for arbitration of all disputes arising under the agreement).

In order to avoid such problems, the American Arbitration Association recommends that the following "broad clause" be included in separation agreements.

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any Court having jurisdiction thereof. AMERICAN ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES 2 (1973) [hereinafter cited as AAA RULES].

father was in a better position to pay for it than the mother, and that he should therefore do so.

Once an arbitrable dispute has arisen, one spouse may invoke arbitration by serving the other with a demand for arbitration. The demand is not a formal document; it must, however, state the names of the parties, the nature of the dispute, the relief sought, and the authorizing arbitration clause.³⁷ If the parties have provided for arbitration "pursuant to the rules of the American Arbitration Association," the demand must be filed with the Association.³⁸

The parties may select their own arbitrators³⁹ or, where no agreement is possible, request a court to appoint one.⁴⁰ The AAA selection process is designed to minimize the possibility of disagreement. On receipt of a demand for arbitration, the AAA sends each party a list of possible arbitrators drawn from its domestic relations panel,⁴¹ along with an abbreviated description of each arbitrator's background.⁴² Each party then excises the names of those individuals deemed un-

37. M. DOMKE, *THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION* § 14.01 (Supp. 1975); *see, e.g.*, N.Y. CIV. PRAC. LAW § 7503(c) (McKinney 1963); AAA RULES § 7.

38. AAA RULES § 7.

39. The agreement may call for a single arbitrator or a three-member panel. In the latter case, the agreement may require each party to name an arbitrator with the two party-appointed arbitrators naming the third, or it may provide for three neutral arbitrators. *See* 1 A. LINDEY, *supra* note 8, § 29, at 29-1 to 29-2.

40. *See, e.g.*, CAL. CIV. PRO. CODE § 1281.6 (West 1972); N.Y. CIV. PRAC. LAW § 7504 (McKinney 1963).

41. The AAA maintains a list of arbitrators who have some degree of expertise in the domestic relations field. These arbitrators serve without compensation, although in cases running over two days of hearing the AAA requests the parties to agree to pay a nominal fee. Placement on the panel of arbitrators is apparently thought of as desirable, and there is no dearth of persons wishing to serve. Most of the panelists are lawyers. Although members of other disciplines, such as ministers, psychologists, and social workers are represented in limited numbers, the AAA has evidently not made a concerted effort to enlist such persons, perhaps as a result of the relatively low utilization of arbitration in this area.

Until 1975, it was the practice in the New York Region to list only lawyer arbitrators unless another discipline was requested. It is the current practice to include on the list one or possibly two representatives from other disciplines, perhaps a social worker if visitation rights are involved or an accountant if financial matters are the issue. In the approximately ten domestic relations cases initiated in New York since this practice was invoked, a non-lawyer has been chosen only once. Conversation with Ellen Maltz-Brown, Supervisor of the Commercial Tribunal, N.Y. Region, American Arbitration Association.

42. For example, the list may appear as follows:

John Jones, Esq.—Familiar with corp. law and matrimonial law

Ted Smith, Esq.—Matrimonial law

Tom Brown, Esq.—Corporate law, matrimonial, Brown & Doe, Esqs.

1973-74 Survey, *supra* note 12.

satisfactory and numbers the others in order of preference. The arbitrator with the lowest combined number is the one selected.⁴³

Meaningful information about a proposed arbitrator who is unknown to the parties is not presently available to them as a matter of course. In this respect, there is a significant distinction between domestic relations arbitration and labor arbitration. In the latter field, arbitrators are seasoned, paid professionals who have developed reputations as to their judiciousness, impartiality, competence, and knowledge of the field.⁴⁴ The parties to a domestic relations arbitration, by contrast, can rely only upon the individual's legal competence and his general reputation in the community.⁴⁵

Presumably, if the biographical information supplied is too sketchy, a party or his lawyer could try to make further inquiries as to the individual's qualifications, predilections, values, etc. from other lawyers or from the AAA.

In one case in the 1973-74 Survey, *supra* note 12, one party did so and a list containing more detailed biographical data, including the arbitrator's educational background, was sent out. If requested to do so the AAA will send a copy of the proposed arbitrator's panel card. This card gives his educational background, present and former positions, professional associations and qualifications (*e.g.*, the percentage of time spent in the domestic relations area). No one has ever requested or been given information of a more personal nature regarding the arbitrator's values or religious or other beliefs.

43. AAA RULES § 12. If no arbitrator is found to be acceptable by both parties, a second list may be submitted. The parties may, at this point, express their requirements more specifically. For example, in one case in the 1973-74 Survey, *supra* note 12, the first list was completely rejected by one side as containing "unknowns" or lawyers whose biographies showed "some" marital law experience. The second list contained the names of well-known members of the marital bar. If the parties are unable to agree, the AAA will appoint an arbitrator pursuant to its authority under AAA RULES § 12.

44. Information about a labor arbitrator's education, experience, general reputation, and competence can generally be obtained from the appointing agency and from lawyers, business executives, and union officers. In addition, business associations such as the Chamber of Commerce often compile information about arbitration involving a member firm. Finally, the Bureau of National Affairs and Preutice-Hall, Inc. publish biographical sketches of the arbitrators in reported cases and index these cases by arbitrator. M. TROTTE, LABOR ARBITRATION 77-78 (1961).

45. Of course, the AAA will monitor the arbitrator's activities to some extent and may remove those who prove inadequate from a panel. In addition, the selected arbitrator is obligated to disclose any information which could reflect on his impartiality. AAA RULES § 19; *Milliken Woolens, Inc. v. Weber Knit Sportswear, Inc.*, 11 App. Div. 2d 166, 169-70, 202 N.Y.S.2d 431, 434-35 (1960) (arbitrator's association with the same law firm as the trial counsel to one of the parties to the dispute, without disclosure to the other party, caused arbitrator's disqualification. Another arbitrator was disqualified because of his failure to disclose the fact that he had bought textiles for his employer from a company that was a party to the dispute); *see Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968) (nondisclosure of a business connection between one of three arbitrators and one of the parties to the dispute constitutes grounds for vacation of arbitrators' award, under § 10 of the United States Arbitration Act, 9 U.S.C. § 10 (1970)). In the 1973-74 Survey, disclosure of rather remote

The goal of the AAA is to encourage final resolution of a dispute within three months. To this end, the parties are required to select their arbitrator quickly⁴⁶ and to schedule a hearing within two months of the initial demand.⁴⁷ The arbitrator is empowered to fix the time of the hearing if necessary and, where appropriate, to permit postponements.⁴⁸ At the hearing, the arbitrator is not bound by the rules of evidence. Rather, he is instructed to sift out evidence which is probative and reliable and to give it appropriate weight.⁴⁹ The AAA has, however, imposed certain rules designed to protect the integrity of the arbitral process. For example, the arbitrator may not examine witnesses *in camera*⁵⁰ nor consult outside specialists without the consent of the parties.⁵¹ He does have the authority to request and, in most states, to subpoena additional evidence.⁵² In keeping with the AAA's emphasis on expediting the resolution of disputes, the arbitrator is required to make his award within thirty days of the hearing.⁵³

associations with the law firm of one of the parties resulted, in two cases, in a request for disqualification by the other party.

46. The parties must return the list of possible arbitrators, stating their preferences, within seven days after receiving the list from the AAA. This period may be extended in the event of extenuating circumstances. AAA RULES § 12. The 1973-74 Survey indicates that such extensions, of short duration, are not infrequent.

47. Should one party not appear at a scheduled hearing after having been served with proper notice, the arbitrator can proceed *ex parte* where there is no local law to the contrary. AAA RULES § 29; see N.Y. CIV. PRAC. LAW § 7506(b) (McKinney 1963). See also M. DOMKE, *supra* note 37, § 18.04; cf. UNIFORM ARBITRATION ACT § 5(a) (1955).

48. AAA RULES § 20, 25. See also N.Y. CIV. PRAC. LAW § 7506(b) (McKinney 1963). The arbitrator can use his control over the time and place of a hearing to prevent undue delay and to avoid an unfair disadvantage to one party. For example, in one 1973 case, the father had obtained two postponements of a hearing because he was working on a project in another town. His third request for a continuance was also granted, but only after the arbitrator set a firm date for the hearing. In another 1973 case, one spouse requested a Saturday hearing because he had recently been on jury duty and was reluctant to miss another workday. In spite of the other spouse's objection, the arbitrator granted the request in the interest of fairness. 1973-74 Survey, *supra* note 12.

49. AAA RULES § 30; see M. DOMKE, *supra* note 37, § 24.02.

50. "All evidence shall be taken in the presence . . . of all the parties." AAA RULES § 30. See generally M. DOMKE, *supra* note 37, § 24.02, at 237. This rule denies the arbitrator the opportunity to probe in private the child's true feelings and desires—something which a family court judge is permitted to do in certain states. See note 24 *supra* and accompanying text.

51. Even if consent is given, the arbitrator retains responsibility for the ultimate award, giving such studies only the weight he deems appropriate. See M. DOMKE, *supra* note 37, § 24.05, at 248-49. See generally AAA RULES § 30 (1973); N.Y. CIV. PRAC. LAW § 7505 (McKinney 1963).

52. See M. DOMKE, *supra* note 37, § 24.03; AAA RULES § 30.

53. AAA RULES § 40. Of the arbitrations which went to final award in the 1973-74 Survey, *supra* note 12, eight were completed in three to four months. Another ten,

Judicial Review of Arbitration Awards

Where both parties wish to proceed with the arbitration of their dispute and are prepared to abide by the arbitrator's award, there is no difficulty in utilizing this process. Problems arise when one party objects and the other seeks judicial enforcement of the agreement to arbitrate or of an award. Despite the prevalence of statutes which appear to mandate such enforcement,⁵⁴ the courts have been reluctant to relinquish their *parens patriae* responsibilities. In general, the courts have simply refused to be bound by consensual arrangements regarding child custody and related matters.⁵⁵

In New York there has been some judicial reconsideration of this attitude. An examination of the case law development in that state is instructive. Though there appears to have been early judicial hostility to arbitration of any domestic relations matter,⁵⁶ the New York Court of Appeals has recognized for some time that spousal support

however, took five to six months, eight required eight to nine months and one, a property settlement arising out of a stipulation in a divorce, took eleven months.

An arbitration lasting more than three months may sometimes be justifiable. Occasionally the case requires more than one hearing date or the parties wish to submit briefs. Often, however, there are postponements. Indeed, the study indicated that awards follow quickly upon the completion of hearings, and the clear inference is that delay in completing the process results primarily from delay occurring before the hearing.

54. Over 30 states now have modern arbitration statutes. See M. DOMKE, *supra* note 37, § 4.01 & n.1. See also U.S. Arbitration Act, 9 U.S.C. §§ 2-4 (1970). Under such statutes, arbitral awards may be vacated only on very limited grounds. See, e.g., N.Y. CIV. PRAC. LAW § 7511 (McKinney 1963) ((1) corruption, fraud or misconduct; (2) partiality of the arbitrator; (3) arbitrator exceeded his power; (4) procedural defects).

55. See, e.g., *Wertlake v. Wertlake*, 127 N.J. Super. 595, 599, 318 A.2d 446, 448 (Ch. 1974) ("Since the State is *parens patriae* to children, and since the support, education and welfare of children is the exclusive concern of the courts so that parties can make no permanent binding contract with respect to those matters, child support is not arbitrable"). Although no other state (except New York) has considered the enforceability of an agreement to arbitrate a dispute involving child custody, the proposition that a court will not cede *parens patriae* jurisdiction notwithstanding an agreement of the parties is generally accepted. See, e.g., *Emrich v. McNeil*, 126 F.2d 841, 844 (D.C. Cir. 1942); *Hendricks v. Hendricks*, 69 Idaho 341, 346, 206 P.2d 523, 526 (1949); *Gafford v. Phelps*, 235 N.C. 218, 222, 69 S.E.2d 313, 316 (1952); *Bastian v. Bastian*, 81 Ohio L. Abs. 408, 410, 160 N.E.2d 133, 136 (Ct. App. 1959); *Buchanan v. Buchanan*, 170 Va. 458, 477, 197 S.E. 426, 434 (1938). See note 3 *supra*. In the few other reported decisions outside New York, the arbitration of matters relating to the welfare of children seems to have been either approved or accepted without question. See *duPont v. duPont*, 40 Del. Ch. 290, 181 A.2d 95 (1962); *Eaton v. Burns*, 31 Ind. 390 (1869); *Masterson v. Masterson*, 22 Ky. L. Rptr. 1193, 60 S.W. 301 (Ct. App. 1901); *Kutz v. Kutz*, 341 N.E.2d 682 (Mass. 1976).

56. See, e.g., *Application of Stern*, 285 N.Y. 239, 33 N.E.2d 689 (1941) (amount of support a husband should pay to his wife not arbitrable).

is a proper subject for arbitration.⁵⁷ Until 1960, however, the courts had clearly rejected the arbitration of matters pertaining to the children of the divorced couple. In *Hill v. Hill*,⁵⁸ for example, the Supreme Court denied a wife's motion to compel arbitration of custody pursuant to a separation agreement. Similarly, in *Michelman v. Michelman*,⁵⁹ the court refused to enforce a separation agreement provision requiring arbitration of visitation disputes, stating that: "The well-being of this child as it will or may be affected by visitation rights can only be determined on a [judicial] hearing."⁶⁰

The first retreat from this absolute judicial position appeared in *Freidberg v. Freidberg*,⁶¹ in which the court compelled arbitration of a dispute concerning the education of the parties' son. The court distinguished this case from *Michelman* on the grounds that here only selection of a school and the payment of tuition, not custody or visitation, were involved.⁶² Despite the purported distinction, *Freidberg* represented a clear departure from the traditionally rigid view of the non-arbitrability of matters concerning children.⁶³

In 1964, the Appellate Division (First Department) utilized a less than ideal factual situation as a vehicle for suggesting that all post-separation disputes, including those involving child custody, should be viewed as arbitrable. In *Sheets v. Sheets*,⁶⁴ the parties had entered into a separation agreement which was subsequently incorporated into a Florida divorce decree. The agreement granted custody of the children to the wife, subject to the husband's rights to visit the children and to be consulted on matters relating to their health, welfare and education. Disputes arising under these provisions were to be "settled by arbitration in accordance with the Rules of the American Arbitration Association."⁶⁵ Pursuant to this provision, the husband served the wife with a demand for arbitration, alleging violations of his visitation rights,

57. See, e.g., *Robinson v. Robinson*, 296 N.Y. 778, 71 N.E.2d 214 (1947) (mem.) (affirming order directing husband to arbitrate amount of support for both wife and child); *Luttinger v. Luttinger*, 294 N.Y. 855, 62 N.E.2d 487 (mem.), *aff'g* 268 App. Div. 1025, 52 N.Y.S.2d 931 (1945) (mem.). See also *Lasek v. Lasek*, 13 App. Div. 2d 242, 215 N.Y.S.2d 983 (1961) (granting stay of wife's action for breach of separation agreement pending arbitration); *Zuckerman v. Zuckerman*, 96 N.Y.S.2d 190 (Sup. Ct. 1950) (upholding validity of an arbitration provision in a separation agreement).

58. 199 Misc. 1035, 104 N.Y.S.2d 755 (Sup. Ct. 1951).

59. 5 Misc. 2d 570, 135 N.Y.S.2d 608 (Sup. Ct. 1954).

60. *Id.*, 135 N.Y.S.2d at 609.

61. 23 Misc. 2d 196, 201 N.Y.S.2d 606 (Sup. Ct. 1960).

62. *Id.* at 197, 201 N.Y.S.2d at 607.

63. See Note, *supra* note 3, at 730.

64. 22 App. Div. 2d 176, 254 N.Y.S.2d 320 (1964).

65. *Id.* at 177, 254 N.Y.S.2d at 322.

failure to provide adequately for the children's education, and alienation of the children's affection. The demand sought punitive damages for these claimed violations of the agreement, such damages to be set off against the husband's obligation to pay alimony. The Appellate Division affirmed the trial court's order staying arbitration on the ground that the separation agreement could not "reasonably be construed as obligating either party to submit to arbitration the matter of assessment of punitive damages for a violation of any of [its] provisions."⁶⁶ Preliminary to announcing its narrow disposition of the case, however, the court, in extended dicta, discussed generally the arbitrability of disputes concerning the beneficial interests of the children of a broken marriage. Rejecting the holdings of *Hill* and *Michelman*, the court declared that "there seems to be no clear and valid reason why the arbitration process should not be made available in the area of custody and the incidents thereto, *i.e.*, choice of schools, summer camps, medical and surgical expenses, trips and vacations."⁶⁷

In contrast to its stand in favor of the general practice of arbitration of child-related disputes, however, the *Sheets* court expressly reserved the right to review arbitration awards. The court emphasized that the use of arbitration would not undermine "the inherent power of the courts to safeguard the welfare of children," since any award could be challenged by an interested party⁶⁸ on the ground that it conflicted with the best interests of the child.⁶⁹ If such a conflict were

66. *Id.* at 180, 254 N.Y.S.2d at 325.

67. *Id.* at 177, 254 N.Y.S.2d at 323.

68. [T]he provisions of any [arbitration] award could be challenged in court . . . at the instance of a parent, a grandparent, an interested relative, or the child himself by a friend The challenge might take the form of opposition to confirmation of the award, of a cross-application invoking the court's paternal jurisdiction, or an independent summary proceeding.

Once the Court's *paternal jurisdiction* is invoked, it would examine into the matter, *de novo* *Id.* at 178, 254 N.Y.S.2d at 323-24 (emphasis added).

69. The court added, however, that there is a difference between an arbitral award which merely affects a child's interests and one which adversely affects his interests:

However, 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. Thus, for example, an award might provide (1) that a father have visitation rights on one particular day of the week instead of another day; (2) that the child wear clothes purchased from some high-priced tailoring establishment rather than another in a lower-price range; (3) that the child should be accompanied to school by a parent or governess; (4) that the child should have no, or a particular, religious training; or (5) that the child go to a summer camp in the mountains rather than one located at sea level. For our purpose, these examples, which could be multiplied indefinitely, will suffice to clarify the distinction sought to be drawn.

All of the above situations present determinations which affect the child; yet the only one which could be deemed to have an adverse effect is the one

found, the "courts would treat [the award] as a nullity insofar as the child is concerned, irrespective of what binding effect it may have on the parents."⁷⁰

Subsequently, the New York Court of Appeals apparently approved the *Sheets* approach, citing its "thorough and convincing opinion" in upholding an arbitrator's award of child support.⁷¹ Nevertheless, the arbitrability in New York of non-financial matters pertaining to the child remains unsettled. In the later case of *Agur v. Agur*,⁷² for example, the Appellate Division (Second Department) refused to compel arbitration of a custody dispute. Its actual holding was predicated upon the narrow ground that the separation agreement had improperly restricted the arbitrators' consideration to only one relevant factor—the effect of Jewish religious law—and restricted the choice of arbitrators to those versed in such law. But the court expressed severe reservations about the workability of the system of arbitration followed by judicial review which had been endorsed in *Sheets*:

We harbor grave doubt whether such a two-stage procedure could have wide application. Of necessity, the second stage of the suggested course of action takes precedence over the first—to such an extent that duplication 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.⁷³

This disagreement among the New York courts⁷⁴ is of course only reflective of the general uncertainty as to the most efficient method of

dealing with religious training. It might be that the provision regarding the proper camp to attend would also fall into the category of adverse effects if it were shown that a summer camp at a high altitude would be inimical to the child's health. An arbitration award which purported to adjudicate the latter two items could successfully be attacked in court, as hereinabove indicated, by opposition to a motion to confirm the award or by an independent proceeding. However, as to the other examples, a court could confirm the award upon the theory that while they affected the child they could not reasonably be deemed to have any substantial effect on the child's best interest and welfare. *Id.* at 179, 254 N.Y.S.2d at 324-25.

70. *Id.* at 178, 254 N.Y.S.2d at 323.

71. *Schneider v. Schneider*, 17 N.Y.2d 123, 126, 216 N.E.2d 318, 319, 269 N.Y.S.2d 107, 109 (1966); *cf.* *Goldenberg v. Goldenberg*, 19 N.Y.2d 759, 226 N.E.2d 185, 279 N.Y.S.2d 359 (1967) (mem.); *Sperling v. Sperling*, 26 App. Div. 2d 827, 274 N.Y.S.2d 107 (1966) (mem.).

72. 32 App. Div. 2d 16, 298 N.Y.S.2d 772 (1969), *appeal dismissed mem.*, 27 N.Y.2d 643, 261 N.E.2d 903, 313 N.Y.S.2d 866 (1970), *motion for stay denied*, 29 N.Y.2d 649 (1971) (table), *appeal dismissed mem.*, 32 N.Y.2d 703, 296 N.E.2d 458, 343 N.Y.S.2d 607, *motion to vacate order dismissing appeal denied mem.*, 33 N.Y.2d 643, 301 N.E.2d 555, 347 N.Y.S.2d 588 (1973).

73. 32 App. Div. 2d at 21, 298 N.Y.S.2d at 778 (footnote omitted).

74. The departments of the Appellate Division which decided *Sheets* and *Agur* have reaffirmed their respective positions. *See Kleiner v. Sanjenis*, 46 App. Div. 2d 617,

promoting the welfare of the child. The intuitive hesitation of the courts to endorse completely the arbitration of disputes affecting children can be traced to the notion that the arbitrator's authority is delimited by the parents' agreement.⁷⁵ His decision, therefore, should reflect his interpretation of what the parties intended rather than his perception of the child's "best interests."

The arbitration process also has significant drawbacks from the parents' point of view. In particular, it falls short of satisfying the value preferences discussed earlier.⁷⁶ As will be recalled, the preference for family autonomy requires that the parents be able to choose a decision-maker whose values will most nearly parallel their own, so that the decision made will represent, to the extent possible, the one which the parents would have made had they still been a family unit. The basic machinery for such a choice exists; however, the lack of readily available information about the arbitrator deprives the parents of the opportunity to make an educated choice of their surrogate.⁷⁷ In addition, even assuming a proper choice could be made, the arbitrator cannot presently act as a parent surrogate since he lacks the ability to consider the interests of the child from the parents' point of view and to alter the arrangements in the original agreement where circumstances have changed.⁷⁸

Arbitration as presently practiced does fulfill the value preference for privacy. The sessions themselves are carried on in an atmosphere of complete privacy and are supervised by an individual in whose discretion the parties will have impliedly expressed confidence. Public access to arbitration records is also limited.⁷⁹ With respect to speed,

359 N.Y.S.2d 791 (1974) (mem.) (1st Dep't [*Sheets*]; provision in separation agreement that controversies arising between parties be submitted to Supreme Court for decisions pursuant to Simplified Procedure for Court Determination of Disputes is valid and enforceable); *Storch v. Storch*, 38 App. Div. 2d 904, 329 N.Y.S.2d 474 (1st Dep't 1972) (mem.); *Nestel v. Nestel*, 38 App. Div. 2d 942, 943, 331 N.Y.S.2d 241, 243 (1972) (mem.) (2d Dep't [*Agur*]; arbitration award with respect to custody vacated because of *in camera* questioning of children by arbitrators. "In our judgment, this case is illustrative of the inappropriateness in general of agreements to arbitrate custody of minor children").

The conflict between these courts appears to be causing some confusion in lower New York courts. See, e.g., *Fence v. Fence*, 64 Misc. 2d 480, 314 N.Y.S.2d 1016 (Family Ct. 1970).

75. See notes 35-36 *supra* and accompanying text.

76. See notes 26-29 *supra* and accompanying text.

77. See notes 44-45 *supra* and accompanying text.

78. See notes 35-36 *supra* and accompanying text.

79. See note 12 *supra*. In addition, no transcript will be made of an arbitration hearing unless requested by one of the parties. AAA RULES § 22.

however, this virtue of the arbitration process itself is undermined by the present state of the law affording a parent, unhappy with the award, a chance to relitigate certain or all matters decided by the arbitrator.

Arbitration, therefore, is sufficiently problematic to render it unattractive to many drafters of separation agreements and perhaps unworthy of zealous promotion before the courts. This should not, however, preclude the search for a workable mechanism which incorporates those values important to the parties. Moreover, the *Sheets*⁸⁰ line of cases in New York suggests that the courts may be receptive to a modified version of the arbitration process, particularly if elaborated in definite procedural form and articulated in terms of specific public policy goals to be achieved. The discussion which follows sets forth the authors' conception of such a mechanism.

A PROPOSED ALTERNATIVE: MEDIATION-ARBITRATION

Phase One: Drafting the Separation Agreement

Since this is the document which will largely direct the post-divorce relationship of the parents and their children, the care with which the separation agreement must be drafted cannot be overemphasized.⁸¹ Inasmuch as the document will govern extremely close interpersonal relationships, and not simply financial-legal ones, counsel should urge their clients to seek the assistance of a family counseling or mental health professional in the negotiation of the agreement. Such a professional would be neither an advocate for either of the parties nor a decision-maker. His function would be to open lines of communication within the family and to assist the parents in making mutually acceptable decisions which are rational and sensitive to the developmental needs of their children.⁸² He can help family members establish new relationship

80. See notes 64-71 *supra* and accompanying text.

81. One commentator has observed that most separation agreements are "mundane economic documents." Kohut, *Therapeutic Separation Agreements*, 51 A.B.A.J. 756, 757 (1965).

82. The essential function of the consultant is mediation, with the added element of responsibility for focusing the parents on the best interests of the child—the purpose, therefore, is clearly *not* the mere promotion of an agreement. We use the term "consultant" to distinguish the process chronologically from the mediation of subsequent disputes. The parties might consult the professional even where they can reach agreement without mediation to insure the merit of their agreement from the children's point of view.

While the consultant may be anyone with special counseling skills who is mutually acceptable to the parties, it would be preferable to have the process conducted under the auspices of a non-profit organization such as the American Arbitration Association, since it would simplify the mechanics of the subsequent mediation-arbitration procedures discussed below. See notes 84-99 *infra* and accompanying text.

patterns appropriate to their new life situations and advise them in identifying and realistically addressing long-term and contingency planning needs. It must be stressed, however, that the object of the consultation is to enable the parents to reach their own decisions and not to have the consultant impose his notions of the "best interests" of the children.

The lawyer's role at this stage is twofold. First, he will want to assure that his client's legal rights will be protected and that agreements reached in consultation will not have unforeseen legal ramifications. The lawyer should, however, cooperate with the consultant and not introduce unnecessary adversary elements into the process. Second, he must draft a separation agreement which clearly and precisely expresses the parties' decision on such matters as custody, visitation, support, and training so as to minimize the possibility of later disagreement. Problems unnoticed in the consultation stage may surface when the detailed work of drafting gets underway. If so, further resort to consultation may be called for.

In addition to the elaboration of particular items such as the amount of child support and the periods of visitation, it would be advisable to insert a more general statement of the parents' goals and objectives with respect to their children. Such a statement would insure that future decisions as to the children's welfare will be made in the context of the values deemed important by the parents. Finally, the separation agreement should provide for the resolution of future disputes by the use of the mediation-arbitration procedures discussed below.⁸³

Phase Two: Resolving Disputes Arising Under the Separation Agreement

Even if consultation has resulted in a satisfactory separation agreement, child-related disputes may arise subsequently as to the application or interpretation of the agreement. This may reflect the fact that certain problems were unanticipated at the time of drafting or that the particular resolution of problems which had been anticipated in a general sense was thought to be best deferred until a later date. A substantial change in the circumstances of one or both of the parties may also require modification of the agreement.

For a discussion of the utilization of counseling techniques and the training of "marital mediators" see Woodhead, *The Mediated Divorce: A New Way of Parting*, Atlanta Journal and Constitution, Nov. 23, 1975, Magazine, at 12.

83. This may be accomplished by describing the procedures in the agreement itself or by incorporating by reference the rules of an administering agency which describe the procedures.

Mediation. Since the basic adjustment of differences between parents on matters relating to their children will have been achieved with the help of consultation, it is reasonable to rely on a basically similar method to resolve these subsequent disputes.⁸⁴ In order to distinguish this phase of dispute settlement from the consultation discussed earlier, we shall call it mediation.

The practice of mediation developed in the labor relations field as a preferred alternative to arbitration and legal action. Unlike these more coercive forms of dispute resolution, the objective of mediation is to get the parties to compromise their positions and thereby to reach a voluntary agreement between themselves.⁸⁵ The process is premised on the notion that the presence of a disinterested third person, familiar with the issues involved in the dispute and skilled in promoting communication, will enable the parties to overcome their antagonism and to recognize their common interest in self-determination of the particular issue. As Professor Lon Fuller has stated, the "central quality of mediation" is

its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.⁸⁶

In a post-marital dispute,⁸⁷ therefore, the function of the mediator would be to mollify the interchange between the parents and to make them aware that, if the matter is settled "within the family," the decision will reflect their common values. In addition, because of his expertise, the mediator will be able to focus the attention of the parties on the interests of the child. This latter role does not represent an attempt to impose an external paternalistic force; rather, it reflects the assumption that the parents will want to reach a decision which will pro-

84. Even if consultation was not utilized in the original negotiation, the assistance of skilled mental health or family counseling professionals in helping the parents resolve their dispute at this stage is advisable.

85. See generally King, *Arbitration of Automobile Accident Claims*, 14 U. FLA. L. REV. 328, 333 (1963).

86. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971).

87. Professor Fuller went on to identify several characteristics of the labor-management relationship which make mediation a particularly appropriate mechanism in that context. Three of these traits are also found in post-marital problems: (1) a dyadic relationship in which (2) the parties must reach an agreement in order to preserve their control over their common actions and in which (3) the agreement reached by the parties will help to define their future interactions. *Id.* at 311. See also Marschall & Gatz, *The Custody Decision Process: Toward New Roles for Parents and the State*, 7 N.C.C.U.L.J. 50, 63 (1975).

mote the child's welfare. It must be recognized, however, that parents functioning in the emotionally charged atmosphere of a marital dispute may need assistance in distinguishing the child's best interests from their own natural possessory interest in the child.

The procedure to be used will largely be determined by the individual mediators.⁸⁸ In general, most mediators employ a combination of joint conferences and separate consultation, each step being designed to elicit certain information. For example, the mediator might initially schedule a joint conference in order to identify the elements and scope of the disagreement. He would also be able to observe and assess the relationship between the parties. Typically, however, the antagonism between the parties will preclude any meaningful conciliation, at least in the early meetings.⁸⁹ For this reason, the mediator might then conduct a series of private meetings with the individual parties. At these consultation sessions, he would try to ascertain the points on which each party may be willing to compromise, perhaps attempting to explain the position of the other side in a reasonable manner. Such meetings also give the mediator a chance to become acquainted with the disputants in a relaxed atmosphere.⁹⁰ Finally, the mediator may return to joint conferences in order to propose alternative settlements.⁹¹

88. A unique and essential characteristic of the conciliation process is its flexibility A conciliator cannot follow the same procedure in every case; he must adjust his approaches, strategy and techniques to the circumstances of each dispute. Probably for this reason, it has sometimes been said that conciliation is an art; the "conciliator is a solitary artist recognizing at most a few guiding stars and depending mainly on his personal power of divination." INTERNATIONAL LABOUR OFFICE, CONCILIATION IN INDUSTRIAL DISPUTES 4 (1973), quoting Meyer, *Function of the Mediator in Collective Bargaining*, 13 IND. & LABOR RELATIONS REV. 159 (1960).

The mediator enters the situation after the problem has arisen, and his effectiveness will depend upon his ability to establish a relationship of trust and confidence with the parties. It is suggested, therefore, that, where possible, the same mental health or family counseling professional who consulted on the separation agreement conduct the mediation.

89. INTERNATIONAL LABOUR OFFICE, *supra* note 88, at 48-49.

90. *Id.* at 49-50. See also Finnegan, *Federal Mediation: How It Works*, 9 DEPAUL L. REV. 1, 10-11 (1959); Marschall & Gatz, *supra* note 87, at 64. It is the availability of these informal, private discussions which most clearly distinguishes mediation from arbitration.

The procedures appropriate for mediation are those most likely to uncover that pattern of adjustment which will most nearly meet the interests of both parties. The procedures appropriate for arbitration are those which most securely guarantee each of the parties a meaningful chance to present arguments and proofs for a decision in his favor. Thus, private consultations with the parties, generally wholly improper on the part of the arbitrator, are an indispensable tool of mediation. Fuller, *Collective Bargaining and the Arbitrator*, NAT'L ACAD. OF ARBITRATORS, PROCEEDINGS 8, 29 (1962) reprinted in 1 ELLIOTT, MATERIALS AND CASES ON ARBITRATION 3 (1968).

91. See Finnegan, *supra* note 90, at 10; Marschall & Gatz, *supra* note 87, at 64.

If mediation proves successful in resolving the particular controversy, primary responsibility for the child's welfare will have been left in the hands of the parents. Moreover, because of the mediator's expertise and concern, the decision will have been reached with the best interests of the child kept in mind. The accommodations reached as a result of mediation should be incorporated into an amendment to the separation agreement. Future disputes will then be resolved in terms of the separation agreement as so modified.

Obviously, not all disputes will in fact be settled through mediation. Resort to third-party decision-making may occasionally become necessary. Even in these situations, however, the unsuccessful mediation should have narrowed and more sharply defined the issues to be resolved.

Arbitration. If mediation fails, the parties may proceed to arbitration. Selection of an arbitrator is of crucial significance since the object of this scheme is to come as close as possible to duplicating parental decision-making. Skill as a consultant-mediator does not qualify one as an arbitrator.⁹² The mediator's object is to help the parties communicate and to assist them in making their own decisions. The arbitrator, on the other hand, substitutes his judgment for that of the parents. It is of the utmost importance, therefore, that the parents select an arbitrator in whom they have confidence, who they feel views the needs and problems of their children from the same general perspective as themselves, whom, in short, they trust to make vital decisions affecting the lives of their children if they cannot make those decisions themselves. The selection may be accomplished in either of two ways: (1) the separation agreement can name, or the parties can at the time of arbitration jointly appoint, a particular friend, relation, clergyman or other person who is willing to act as arbitrator, or (2) the parties can agree to utilize the selection machinery provided by an organization such as the American Arbitration Association.⁹³ If this

92. In no event should the mediator ever serve as arbitrator, even if requested to do so by the parties. The possibility that the mediator might later become the arbitrator would tend to make the parties less open and candid during mediation. In addition, the arbitrator must be impartial. His activities as mediator in the same dispute may easily have an adverse effect on this necessary characteristic of the arbitration. For the same reasons, a mediator should never be callable as a witness, expert or otherwise, during an arbitration, nor should he submit a report of any kind to the arbitrator.

93. Whether it is best to name the persons who will arbitrate disputes or simply to specify the means of selection of such arbitrators is a difficult question. There are both advantages and disadvantages in naming a specific arbitrator in the agreement. Doing so assures the availability of a decision-maker in whom both parents have personal confidence and who, presumably, largely shares the values of the parents. On

second method is adopted it is essential that the biographical and background material on each potential arbitrator be sufficiently extensive to enable the parties to make a meaningful choice. Moreover, the availability of arbitrators with experience in all disciplines should be made known and the parties encouraged to specify, preferably before the proposed lists are compiled, the type of arbitrator preferred.⁹⁴ Only in this way can the parents reasonably be expected to make selections which substantially conform to their own values and which produce arbitrators who are representative parent surrogates.

One beneficial result of the increased use of arbitration in domestic relations matters may be the creation of a group of trained professionals who would be especially concerned with the integrity of the process.⁹⁵ As in labor arbitration, these individuals will need to be sensitive to the importance of preserving the ongoing relationship between the parties.⁹⁶ As time goes on, they will develop reputations for their judiciousness, integrity and competence which will aid the parties in the selection process.

The separation agreement or the procedural rules incorporated by reference therein should expressly confer certain extraordinary powers on the arbitrator, such as the right to call in neutral expert witnesses⁹⁷ and to interview the children *in camera* if he deems fit.⁹⁸ In addition,

the other hand, it may be difficult to persuade a friend or relation to assume arbitration responsibilities. Moreover, relationships tend to change after a divorce; a choice which appears wise at the time of entry into a separation agreement may be regretted later. The naming of a particular arbitrator may also be unduly restrictive in light of the range of disputes that can conceivably arise.

94. Such a stated preference would be honored by the AAA under current procedures. Conversation with Ellen Maltz-Brown, Supervisor of the Commercial Tribunal, N.Y. Region, American Arbitration Association.

95. Paid arbitrators would also arguably be better able to resist the temptation to rush the decision-making process. Moreover, compensation might attract into the field mental health personnel who would not be able to afford time off for *pro bono* arbitration. On the other hand, the maintenance of lower costs is a valid argument for perpetuating the present system of encouraging qualified persons to volunteer their time.

96. See notes 85-86 *supra* and accompanying text.

97. See note 25 *supra*.

98. By specifying this power in the separation agreement, the objection to *in camera* interviews expressed in *Nestel v. Nestel*, 38 App. Div. 2d 942, 331 N.Y.S.2d 241 (1972) (mem.), see note 24 *supra*, should be obviated.

One of the most difficult questions in working out the mechanics of the arbitration procedure is whether the child is entitled to representation by counsel and elevation to full-party status. That the interests of the child are vitally affected by the process is beyond dispute. Yet the fact that, in the situation of the intact family, the child is normally without counsel in the parental decision-making process (a process which also vitally affects him) leads the authors to conclude by analogy that he should probably be denied counsel in the arbitration proceeding. Neither should a guardian *ad*

the arbitrator should be empowered to modify the agreement and fill in its gaps. Parents of intact families are always free to change their minds or adapt their child-rearing plans to new conditions. A similar flexibility ought to be accorded to the parent surrogate embodied in the arbitrator. This flexibility should not, however, become an excuse for ignoring the express terms of an agreement which the parties have labored so mightily to formulate. The arbitrator should be instructed that the agreement represents conscious value choices by the parties with respect to their children which should be upset only in response to substantially changed circumstances.⁹⁹ In every case, the arbitrator should be guided by the statement of the parents' objectives and values contained in the separation agreement.

Enforcement of the Arbitral Award. The proposed mechanism for the resolution of post-marital disputes has been designed to preserve to the extent practicable the autonomy of the family. Only where the parents are completely unable to resolve their differences, even with the aid of a qualified consultant, is the authority to decide matters concerning their child's welfare taken out of their hands. Even in these instances, however, the decision-maker will be someone who shares the parents' basic values. In addition, the mediation-arbitration procedure is relatively private and can be accomplished with reasonable speed.

If, however, in those situations requiring arbitration, the award made is subject to de novo review by the courts,¹⁰⁰ all of those attributes will be diminished.¹⁰¹ It is submitted, therefore, that an arbitral award made pursuant to the procedures outlined herein should be treated by the courts in the same fashion as an award made in commercial or labor arbitration: the arbitrator's decision should be conclusive absent

item be appointed, since that would be inconsistent with the premise that basic child-rearing decisions are the primary responsibility of the parents or, as in arbitration, their surrogate. This does not imply, however, that the arbitrator should not consider the wishes of the child, as good parents presumably would when making important decisions which affect him. *Cf. In re Gault*, 387 U.S. 1 (1967). See generally Burt, *Forcing Protection on Children and Their Parents: The Impact of Wyman v. James*, 69 MICH. L. REV. 1259 (1971).

99. This, of course, is the same rule which governs judicial modification of custody decrees. See Foster & Freed, *Child Custody* (pt. 2), 39 N.Y.U.L. REV. 613, 622-26 (1964).

100. See, e.g., *Sheets v. Sheets*, 22 App. Div. 2d 176, 179, 254 N.Y.S.2d 320, 324 (1964) (discussed at notes 64-70 *supra* and accompanying text) (an arbitrator's award, although entitled to substantial weight, will be vacated whenever it "adversely affects the welfare and best interests of the child"). The *Sheets* standard of review, of course, is preferable to the refusal of many jurisdictions even to consider an arbitral award in child-related matters. See notes 54-55 *supra* and accompanying text.

101. See notes 26-30 *supra* and accompanying text.

misconduct on his part or a breach of public policy.¹⁰² In child-related cases, public policy demands only that the award not constitute, or make possible, the neglect of the child. Application of only the current minimal neglect standard,¹⁰³ which must be met by all parents, divorced or not, would prevent the interference with family autonomy which under the present system is predicated solely on the breakdown of the marital relationship.

Unless the courts are willing to refrain from interfering in the model of dispute resolution proposed in this Article, the value of that model may be largely negated; parents will know that if they "lose" in arbitration they can still resort to the courts.¹⁰⁴ There are also reasons not directly related to the model for the courts to relinquish their parental role. In the first place, the state's prerogative to care for minors as *parens patriae* developed at a time when those seeking divorces were considered "sick" persons, misfits, [or] hopeless neurotics"¹⁰⁵ A diluted version of this attitude was reflected in this country by the enactment of statutes which permitted divorce only as a form of punishment for marital misconduct.¹⁰⁶ The modern trend, however, as evidenced by the proliferation of no-fault divorce laws,¹⁰⁷ is toward a recognition that most domestic difficulties are not the product of one spouse's "sickness" or wrongdoing and that state interference in such matters should be minimal.¹⁰⁸ In support of this posi-

102. See note 54 *supra*; see also M. DOMKE, *supra* note 37, at 312-13; UNIFORM ARBITRATION ACT § 12(a) (1955).

103. See note 17 *supra*.

104. See note 73 *supra* and accompanying text.

The courts' initially passive role in the adversary system gives rise to an interesting contradiction. Courts participate in the resolution of post-marital disputes only when their jurisdiction is invoked by one of the parents. If the parents choose not to litigate some provision of a custody agreement or arbitration award which has an adverse effect on the child, the court is powerless to act. Yet these same parties, who are presumptively trusted to bring these matters to the court's attention, are viewed with extreme distrust when they enter child custody agreements or submit themselves to arbitration based thereon. Courts insist on reviewing such matters *de novo*, and they readily set aside parental agreements or arbitral awards based on such agreements which they find to be contrary to the child's "best interest." See note 55 *supra* and accompanying text.

105. E. FISHER, *DIVORCE: THE NEW FREEDOM* 3 (1974). See note 2 *supra*.

106. See M. RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE, AND THE LAW* 34 (1972); Note, *The No Fault Concept: Is This the Final Stage in the Evolution of Divorce?*, 47 NOTRE DAME LAW. 959, 962-63 (1972).

107. See M. WHEELER, *NO-FAULT DIVORCE* 19-49 (1974); Note, *supra* note 106, at 962-63, 966-70.

108. Under Georgia's "no-fault" divorce statute, for example, GA. CODE ANN. § 30-102(13) (Supp. 1975), a trial judge must grant a divorce on the pleadings where one of the parties alleges that the marriage is "irretrievably broken." See *McCoy v. McCoy*, 236 Ga. 633, 225 S.E.2d 682 (1976).

tion, it has been further argued that "state paternalism is inconsistent with our historical and constitutional traditions,"¹⁰⁹ and that parents have a fundamental right to control their children's development.¹¹⁰

Finally, in areas involving relatively complex issues of fact, it is not unusual for adjudicatory power to be delegated to a more specialized tribunal, at least in the first instance. Many administrative agencies are empowered to try cases and hear appeals with judicial review being limited to determinations of whether the agency has acted within its authority.¹¹¹ While it is not suggested that the states establish regulatory agencies to deal with child custody and related questions,¹¹² it is submitted that, as in the administrative law context, such issues involve concepts with which trial judges are not normally familiar;¹¹³ and that courts therefore should give great weight to decisions reached by a specialized arbitrator.

Nevertheless, it may be unrealistic to expect the courts to surrender their traditional *parens patriae* jurisdiction. Since the procedures proposed herein assure an alternative system that will in fact protect the best interests of the child, it is suggested that legislatures amend their arbitration statutes to expressly include domestic disputes, thereby subjecting the awards made in such cases to the less stringent review given to the arbitration of commercial and labor matters.¹¹⁴

109. Mnookin, *supra* note 23, at 266.

110. *Id.* at 266-67; Marschall & Gatz, *supra* note 87, at 51.

111. See L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 263-66 (1965).

112. Although such an agency would undoubtedly develop sufficient expertise to handle domestic disputes competently, the preservation of family autonomy, see notes 26-28 *supra* and accompanying text, requires that the parents be permitted to select their own expert.

113. See Foster & Freed, *supra* note 3, at 438; Watson, *supra* note 23. In most states, custody determinations are made by courts of general jurisdiction. See, e.g., CAL. CIV. CODE § 4351 (West Supp. 1975); PA. STAT. ANN. tit. 23, § 15(1)(c) (Supp. 1976). But see N.Y. FAMILY CT. ACT § 115(b) (McKinney 1963) (granting jurisdiction over custody matters to a specialized domestic relations court in cases referred to it by the supreme court). Lacking any particular expertise in these matters, the trial judge is faced with a task which is "perhaps the most demanding which he must confront in the course of his judicial duties." *Lincoln v. Lincoln*, 24 N.Y.2d 270, 272, 247 N.E.2d 659, 660, 229 N.Y.S.2d 842, 843 (1969).

The domestic dispute arbitrator, on the other hand, will have considerable expertise in the field and will have demonstrated a particular interest in resolving custody-related disputes. See note 41 *supra*. In addition, under the model proposed here he will be called upon only after the parties have had the benefit of professional family counseling. See notes 84-91 *supra* and accompanying text. Finally, unlike the judge who is "selected" by the vagaries of docket scheduling, the arbitrator will have been chosen by mutual consent of the parents. See notes 93-94 *supra* and accompanying text.

114. See note 102 *supra* and accompanying text.

CONCLUSION

The currently accepted procedures for resolving child custody disputes are clearly inadequate. Vesting unlimited authority in the courts results in the making of sensitive social and psychological determinations by judges whose expertise and experience in the field may vary widely. Regardless of the judge's expertise, the important values of family autonomy, privacy and rapid resolution will inevitably be sacrificed to the structural imperatives of the judicial system.

While arbitration as it is currently practiced provides a far more attractive alternative, its usefulness may be limited by the courts' insistence on subjecting arbitral awards involving children to strict, *de novo* review. The mediation-arbitration proposal suggested here offers sufficient procedural certainty and substantive guarantees to enable innovative courts to reject the traditional view and expand upon those few cases which have encouraged parental retention of ultimate responsibility for decisions affecting their children. It is hoped, moreover, that the use of a mediation-arbitration procedure tailored specifically to the needs of separating parents will significantly reduce the incidence of dissatisfaction leading to court challenges of arbitration decisions.

