# Arbitration or Litigation... The Choice May Be Up to You

By: Elliot D. Samuelson, Editor

Any client who has gone through a custody proceeding knows regardless of the outcome, that if there was another option to litigation, it certainly should have been considered if not chosen because of calendar delays, a shortage of judges to hear these difficult cases and increases in legal and expert fees. In a fully litigated matter, replete with a lengthy trial, expert witnesses who must also be paid for their testimony with its concomitant increase in hours to complete the entire case which may include appeals, it is not unusual for the total cost to the monied spouse, who may also be responsible for the counsel fees of the other spouse, to exceed $100,000 or more. Most litigants have trouble meeting these expenses and must go into debt, invade savings or pension plans and incur loans, to cope with such substantial financial burdens.

The alternative to litigation is arbitration, which will provide a major decrease in the time and cost to complete. Although both New York and New Jersey have statutes that permit arbitration in almost all areas of the law, case law has made it clear in New Jersey arbitration is permissible, while in New York, it cannot be utilized in custody or visitation disputes.[1] In the court's view, they are charged with determining what would be in the best interests of the children since they sit as *parens patrae*, and this principle trumps parental autonomy to decide such matters. As such, they reason, that this duty cannot be delegated to an arbitrator who may not be bound by existing case law, and in their view should not be undertaken by an alternate dispute panel.[2] This is not the rule in New Jersey where its high court decided that there is no logical reason to prohibit arbitration in custody matters.[3] In several other jurisdictions, alternate dispute resolutions may also be considered to resolve custodial disputes concerning children. These include Pennsylvania, Michigan and Colorado.

It is to be noted that there generally is no right to an appeal of an arbitrator's award, except where it can be shown that the arbitrator was not impartial, guilty of fraud or other impropriety. The sole other exception is where it appears that *prima facie* the arbitrator's award would cause harm to the child. In either event, this safeguard will permit the appellate court to review and decide the case based upon the "best interests" standard.

In litigation, after almost every custody decision from a trial court which permits an appeal as of right, the losing party will do so. This can consume another year or more from beginning to end since every appellant is permitted six months to perfect an appeal. With adjournments adding further delays, and the time to render a decision tacks on several more weeks if not a month or more, a one year prognostication is indeed conservative.

Following the appeal in the appellate division, a motion to either the appellate division or the Court of Appeals for leave to appeal to the Court of Appeals, or both will certainly be filed, and this will add still further delay of a month or more with its attendant expenses.

Contrast these delays and added expenses with the speed of arbitration and lesser costs, and it will clearly lead to one conclusion. Avoid litigation! Consider the following benefits of arbitration. There is no formal motion practice as such. Requests can be made by telephone or in person to the designated arbitrator who will quickly determine the parameters and he will permit and set a brief time to comply with his decision. There are no formal rules of evidence to restrict information from being considered by the arbitrator, and he will solely determine the weight to be given the proof, but questions that are clearly irrelevant can be disallowed. Each party can request documents or reports which will be treated similarly. The production and preservation of electronic evidence can be supervised immediately at the commencement of the request for discovery, eliminating the threat that such evidence can be lost, deleted, or compromised. By contrast, weeks or months can be lost in the courthouse by temporary injunction motions, motions to produce, and the appointment of experts to oversee such production, and conduct a forensic investigation to retrieve necessary documents or information.

Once pre hearing matters have been speedily completed, and the case is set down for hearing, you can expect that the trial will proceed from day to day until completed. The arbitrator, unlike the judge, will not be interrupted by request from other litigants for rulings, motions that require his immediate attention, or adjournment during trial for one reason or the other. Most courts today do not try a case from beginning to end from day to day. Normally, there will be segments of from one to two weeks, and then adjournments of a week or more in order to accommodate the court's calendar and to allow for settlement discussions during these delays. Arbitrators can complete a trial in several days, that could take a court several weeks, if not months, to do so.

It certainly cannot be in the best interest of the children to have their lives emotionally disrupted by warring parents, while they continue to litigate through lengthy trials and fruitless appeals, not knowing where they will ultimately live and with which parent. If you consult with any healthcare professional they are sure to advise you that such condition may well cause emotional damage to the infants, and can have a lifetime deleterious effect on their psyche. If the cost of litigation can be reduced, and the option for arbitration is adopted in New York, similar to the New Jersey rules, both wealthy and clients of modest means will be given equal protection under the law and access to some form of third party interventions. If a client of modest means must accept the most meager terms offered during settlement negotiations, because they cannot afford to retain experienced but costly counsel and litigate in the courts, justice cannot reasonably be served, let alone the best interests of the children. The option for arbitration can remove such coercion.

In New York if the case is litigated and a party appeals to the Appellate Division and is unsuccessful, the Court of Appeals may accept the matter for additional review either by motion or if there are two dissenting opinions in the appellate division. The Court of Appeals might very well reverse the holding and remand the case back to the trial court for further proceedings which are not inconsistent with its decision. Such a result would take on tragic proportions for a child. A case that took over a year to complete may very well take another year to go through the appellate process. If reversed and a new trial ordered, it would be necessary to obtain the entire transcript of the trial, all exhibits that were submitted and prepare the case for an additional trial. Not only would there be an enormous loss of time, but an enormous additional expenditure of legal fees to see the case through to an end.

Beside these obvious benefits of arbitration that have been discussed, there is also the ability to choose the arbitrator, rather than be at the mercy of a computer that will assign a judge. Arbitration will shorten the entire discovery process, and since there is no right of appeal except as previously discussed, the process is over when the arbitration ends.

Under the *Fawzy*[4] case in New Jersey, in order to appeal an arbitrator's custody determination other than for corruption or fraud, there must be shown *prima facie* that a threat of harm will befall the children. This threshold requirement

could be adopted in New York and yet another argument to permit arbitration since this safeguard can ensure that the children's best interest will ultimately be considered by the courts in the event of an abuse by the arbitrator.

These long delays in litigation which cause doubts in the minds of children as to where they will continue to reside, whether they lose their friends, have to change schools or other similar considerations would appear to me to pose a grave psychological danger to the children.

The views of the respective states whether to permit arbitration really boils down to a constitutional determination. The question really posed is whether parental autonomy with its fundamental liberty to the care, custody and control of their children and the state's interest in the protection of those children should control.

The Court of Appeals in *Finlay v. Finlay*[5] set the *parens patriae* standard, which is to act as a "wise, affectionate and careful parent" and make provision for the child accordingly. Accordingly, the court interferes on behalf of the state's interest to protect the child. Isn't that what parents do? Shouldn't the parents have the paramount right to do so?

Unless *Finlay*[6] is modified or the arbitration statute is amended to specifically include the right to elect arbitration in order to resolve custody matters, no change will be made. Most parents would certainly welcome this right which will dramatically reduce the costs and eliminate unnecessary delays.

In the end, one must determine whether the courts should have the paramount right to act as the parents, or the natural parents given priority to do so. The New York view not to permit arbitration should be changed especially with safeguards for the best interest of the children if there is any abuse in the arbitration process.

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[1] *See Glauber v. Glauber,* 192 A.D.2d 94 (2d Dept. 1993).
[2] *See also Schechter v. Schechter,* 63 A.D.3d 817 (3d Dept. 2009) and *Lipsius v. Lipsius,* 673 N.Y.S. 2d 458 (N.J. Sup. Ct. 2009).
[3] *See Fawzy v. Fawzy,* 199 N.J. 456, 456 (N.J. Sup. Ct. 2009).

[4] *Id.*
[5] 240 N.Y. 429 (1925).
[6] *Id.*