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LAW AND THE FAMILY

## **ARBITRATION OF CUSTODY AND VISITATION DISPUTES**

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THROUGH CAREFUL ANALYSIS and thorough review the Court of Appeals has told the people of this state that a provision in a matrimonial agreement to arbitrate disputes concerning the amount of maintenance or child support is valid and enforceable. [FN1]

The Court has not made clear, however, whether those seeking to arbitrate custody and visitation disputes through agreement will prevail.

Last week Supreme Court Justice Lewis R. Friedman, in *Stanley G. v. Eileen G.* [FN2] held that a provision in a divorce judgment, which incorporated and merged a stipulation of settlement and arbitration award of a Jewish religious court, a Beth Din, providing that the Supreme Court's jurisdiction to enforce or modify the judgment was contingent on "the consent in writing of said religious court," was inappropriate and unenforceable with regard to matters of custody and visitation. In so doing the court rejected the long-standing rule of the First Department and adopted the reasoning of the Second Department.

Parental agreements covering the custody and visitation of their children are written in sand. Under the *parens patriae* power and responsibility of the court, [FN3] the existence of an agreement is at most only a single factor for the court to use in determining custody and visitation. There is no finality to a contract between parents regarding custody, because the *parens patriae* power of courts over the custody of children transcends any such agreement. Where the best interests of the child require an award of custody, contrary to that set forth in an agreement, the provisions will be disregarded.

Children Not Parties to Agreements

Notably, children are not parties to parental agreements. Domestic Relations Law (DRL) s240 imposes on courts the responsibility of awarding custody and visitation as "justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child." That responsibility requires that in many, if not most, instances, there be an evidentiary hearing on the issue of custody and visitation, even when custody is uncontested. [FN4]

Earlier lower court cases rejected arbitration clauses and agreements enforceable in controlling custody and visitation issues.

Not surprising is the decision of the First Department in *Sheets v. Sheets*, [FN5] which is dedicated to letting parties control their own futures by establishing the rule that arbitration provisions are not against public policy and are enforceable, subject naturally to a court's authority check to assure all is well and the results are in the best interests of the child.

In *Sheets*, in granting the wife's divorce, the Florida court sanctioned the parties' 1962 separation agreement, which provided in Paragraph 3 that the wife would have custody of the children, with visitation to the husband; for consultation by the wife with the husband on all matters of importance relating to the children's health, welfare and education; for notification to the husband in the event of serious injury or illness to any child; and for the encouragement of respect and love for both parents. The agreement provided that "[i]f the parties cannot reach an agreement as to any matter within the scope of Paragraph 3 \*\*\* the dispute shall be settled by arbitration in accordance with the Rules of the American Arbitration Association."

The husband served a demand for arbitration seeking, among other things, damages for violation of the agreement with respect to visitation, with respect to the secular and religious education of the children and as to a claimed alienation of the children's affection for their father. He appealed from an order staying arbitration of such demands.

The First Department, a proponent of arbitration, concluded that there seemed to be "no clear and valid reason for denying the arbitration process in the area of custody and the incidents thereto, i.e., choice of schools, summer camps, medical and surgical expenses, trips and vacations." It noted that the American Arbitration Association was equipped to arbitrate marital disputes arising from separation agreements and set out to define, in its lengthy opinion, albeit in dicta, "the proper position to be taken by courts as to arbitration provisions in agreements which affect custody and visitation of children."

#### Best Interests of Child

It established a two-stage process, stating:

Courts will, as a general rule, enforce an agreement between a husband and wife regarding custody of children so long as the agreement is in the best interests and welfare of the children. The inherent power of the courts to safeguard the welfare of children would not, however, be dissipated by a separation agreement that provided for settlement of custody disputes and related matters by some arbitration tribunal. Necessarily, an award rendered on a voluntary submission of any such disputes to arbitration would still be subject, in a direct proceeding affecting the child alone, to the supervisory power of the court in its capacity as *parens patriae* to the child.

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To the extent that such an award conflicted with the best interests of the child, courts would treat it as a nullity insofar as the child is concerned, irrespective of what binding effect it may have on the parents. An arbitration award under such circumstances could no more infringe the paternal duty of the court to guard the child's welfare, than a foreign decree of a court rendered before the child became subject to our courts' jurisdiction. The controlling factor would be, as always, what was for the best interests of the child; and the provisions of any award could be challenged in court on that basis at the instance of a parent, a grandparent, an interested relative, or the child himself by a friend. 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.

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Hence, on any showing that a provision of an award might be adverse to the best interests of a child, the court could take such action that was necessary for the best interest of the child. Once the court's paternal jurisdiction is invoked, it would examine into the matter, *de novo*, and in doing so could utilize the proof adduced before the arbitration tribunal, could call for new proof, or could employ a combination of both. The court could then determine what was necessary for the best interest of the child.

With these caveats, the court stated that "submission of disputes in custody and visitation matters to voluntary arbitration need no longer receive general interdiction, and such procedure should be encouraged as a sound and practical method for resolving such disputes."

That decision, while generally accepted, does not sit very well every where, particularly in the Second Department, which has outright deviated from the proposition. In *Nestel v. Nestel* [FN6] the Second Department found that a general agreement to arbitrate custody matters was inappropriate, citing its opinion in *Agur v. Agur*. [FN7] In *Nestel*, it disapproved "the policy of some courts to enforce arbitration of less weighty aspects of custody, such as visitation, choice of schools, summer camps and the like," citing *Sheets v. Sheets*. It stated:

Such a procedure, subject to the check of de novo review by the courts if it appears that the award may be adverse to the best interests of the child, is certain to be wasteful of time and expense and result in a duplication of effort. In short, a two-stage procedure as proposed in Sheets is bound to frustrate the very purpose of submitting disputes to arbitration in the first place, i.e., an expeditious determination.

Recently, in *Glauber v. Glauber*, [FN8] the Appellate Division, Second Department, again held that agreements to arbitrate custody of children should not be enforced by New York State Courts. The parties' 1985 stipulation of settlement survived a divorce judgment granted that year, and the court retained jurisdiction for purposes of enforcing the provisions contained in the stipulation "to the extent permitted by law." The stipulation provided, among other things, for child support, visitation and custody of the parties minor child. It also provided that any disputes shall be brought before a named Rabbi, whose decision shall be final. If he were unable to decide the matter, then it was to be brought before another named Rabbi. If he too, was unable to conclude the matter, each party was to pick a Dayan (judge) in accordance with Jewish law. The two Dayans were then to pick a third Dayan and the three judges were to decide the matter, with their decision to be final.

Under the terms of the stipulation, the wife was to have custody until the child reached the "age of education," no later than six years old. Custody was then to revert to the husband. A few days following the child's sixth birthday, the wife refused the husband's written custody demand because she believed that her child's well-being would be jeopardized if she acceded to the husband's demand. She ultimately moved in the Supreme Court for permanent custody. The husband cross-moved for arbitration pursuant to Civil Practice Law and Rules Article 75, pursuant to the arbitration clause of the agreement.

Not for Arbitrator

The Supreme Court directed the parties to proceed to arbitration. Temporary custody remained with the wife. The matter was remitted to Supreme Court, by the Appellate Division, for a determination of the issues of custody and visitation. It stated that, absent a threshold infirmity, the broad arbitration clause contained in the parties' agreement would subject custody to arbitration and that the order of the Supreme Court should be affirmed unless strong public policy dictated that custody determinations should not be left to an arbitrator.

The court went further to state that custody and visitation of children should not be decided by an arbitrator because these subjects are so interlaced with strong public policy considerations that they are beyond the reach of the arbitrator's discretion and this subject, on its face, is inappropriate for resolution by arbitration.

The court noted that DRL s70 and DRL s240 impose the responsibility on the courts to make custody and visitation orders based on the best interests of the child. Notwithstanding that custody agreements are, in the usual case, to be given priority, the responsibility of the courts always supersedes whatever bargain has been struck. The court must always make its own independent review and findings and may award custody to one parent in the face of an agreement granting custody to the other if the best interests of the child require it.

Concluding that a court cannot be bound by an agreement as to custody or visitation and simultaneously act as *parens patriae* on behalf of the child, it held that enforcing arbitration provisions such as those at bar would be contrary to the foregoing authority because an agreement to arbitrate the issue of custody is indistinguishable from an agreement to give custody and the court's traditional power to protect the interests of children cannot yield to the expectation of finality of arbitration awards.

In its decision the Second Department recognized that arbitration of custody and visitation disputes had been referenced to with approval, in dicta, in *Sheets*, and that it expressly disagreed with this approach in *Nestel* and in *Agur*. It concluded in its decision that "It is now a matter of some doubt that *Sheets* would be followed by the Appellate Division, First Department," citing as authority for this proposition *Harris v. Iannaccone*, [FN9] which cited *Nestel*, in dicta, for the proposition that "child custody is an area found to be nonarbitrable."

In the end of the rule that has emerged is that while New York public policy encourages arbitration, in custody as well as other disputes, the ultimate issue of the child's best interests is not subject to arbitration and will be determined by the court, either before or after an arbitration proceeding.

FN1. *Schneider v. Schneider* (1966) 17 NY2d 123, 269 NYS2d 107, 216 NE2d 318. See also *Egol v. Egol* (1986) 68 NY2d 893, 508 NYS2d

935, 501 NE2d 584; *Matter of Robinson*, 296 N. Y. 778; *Matter of Luttinger*, 294 N. Y. 855.

FN2. *New York Law Journal*, 10-13-94, P.22, Col.6, Sup. Ct., NY Co.

FN3. See *Finlay v. Finlay* 240 NY 429.

FN4. See *Araujo v. Araujo* (1971, 1st Dept.) 38 App Div 2d 537, 327 NYS2d 217.

FN5. *Sheets v. Sheets* (1964, 1st Dept.) 22 App Div 2d 176, 254 NYS2d 320, 18 ALR3d 1257. See *Perles*, "The Effect of the 'Sheets' Case on Agreements to Arbitrate Problems Involving Children," *NYLJ*, Jan. 25, 1965, p. 1, cols. 4-5, p. 4, cols. 5-7.

FN6. 1972, 2d Dept., 38 AppDiv2d 942, 331 NYS2d 241.

FN7. Agur v. Agur (1969, 2d Dept.) 32 AppDiv2d 16, 298 NYS2d 772, app dismd 27 NY2d 643, 313 NYS2d 866, 261 NE2d 903 and app dismd 32 NY2d 703, 343 NYS2d 607, 296 NE2d 458.

FN8. 192 AD2d 94, 600 NYS2d 740 (2d Dept., 1993). See also Cohen v. Cohen, 195 AD2d 586, 600 NYS2d 996 (2d Dept., 1993), where the Second Department held that disputes over custody and visitation are not subject to arbitration.

FN9. 107 AD2d 429, 487 NYS2d 562, aff'd 66 NY2d 728, 496 NYS2d 998, 487 NE2d 908.

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