CONTRACTING FOR ARBITRATION IN CUSTODY DISPUTES: PARENTAL AUTONOMY VS. STATE RESPONSIBILITY

Christina Fox*

INTRODUCTION

New York and New Jersey are so close in location, but so far apart in their respective policies toward binding arbitration in child custody matters. Even though most family law matters now involve forms of alternative dispute resolution (“ADR”), courts are deeply divided on whether binding arbitration should be allowed in child custody disputes, and over which standard to adopt in reviewing custody arbitration awards. While New York has repeatedly disallowed binding arbitration in child custody,1 New Jersey has recently joined other states in approving binding arbitration and enforcing a parent’s contractual determination of his child’s welfare.2 The question is whether binding arbitration in child custody disputes is a “positive step forward for domestic relations dispute resolution or a step further away from protecting the needs of the most important people involved—the children.”3 The purpose of this Note is to argue the latter position.

Part I of this Note looks at the statutory and common law differences in child custody law between New York and New Jersey. These differences evince legislative intentions that may shed light on the states’ conflicting arbitration policies. Part II explores the historical background of arbitration and its use in child custody dis-

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* Editor-in-Chief, Cardozo Journal of Conflict Resolution; Juris Doctor Candidate, Benjamin N. Cardozo School of Law, Yeshiva University, 2011.


putes, including the divergent approaches of New York and New Jersey in enforcing or rejecting binding arbitration relating to child custody determinations. Part III argues that child custody is distinct from other areas of law deemed arbitrable, and that various problems inherent in arbitrating child custody disputes outweigh the potential benefits of arbitration as an ADR method. Part IV then explores the broader constitutional issues underlying the differences between New York and New Jersey, namely, the tension between the fundamental right of parental autonomy\(^4\) and the states’ duty in protecting the welfare of a child.\(^5\)

Finally, Part V explores the use of private judging. Private judging, which is statutorily provided for in New York, but restricted in matrimonial cases,\(^6\) incorporates some of the traditional benefits of arbitration without subjecting children to arbitration’s inherent risks.\(^7\) This Note ultimately proposes that New York expand its private judging scheme to provide a meaningful alternative to traditional litigation in child custody cases.

I. BACKGROUND OF CHILD CUSTODY: NEW YORK VERSUS NEW JERSEY

A. New York’s Modern Custody System

Courts in New York are authorized to make custody determinations regarding minor\(^8\) children, including parents’ custodial and visitation rights, pursuant to Domestic Relations Law (“DRL”) Sections 70 and 240.\(^9\) It is well established that in the child custody context, courts follow a “best interests” standard; in fact, “best interests of the child” is repeated throughout New York’s statute.


\(^5\) See E. Gary Spitko, Reclaiming the “Creatures of the State”: Contracting for Child Custody Decisionmaking in the Best Interests of the Family, 57 Wash. & Lee L. Rev. 1139, 1183–84 (2000); see also Prince v. Massachusetts, 321 U.S. 158, 165–70 (1994) (finding in favor of state intervention because although parental autonomy is a fundamental right, the state needs to ensure that children are adequately protected).

\(^6\) N.Y. C.P.L.R. § 4301 (McKinney 2010).


\(^8\) A minor is a person under the age of eighteen. A parent may not obtain custody over a child who is approaching or is eighteen years of age or older. See N.Y. Dom. Rel. § 2 (McKinney 2010).

\(^9\) See N.Y. Dom. Rel. § 240 (McKinney 2010); N.Y. Dom. Rel. § 70(a) (McKinney 2010).
For example, DRL Section 240 provides that “[the court] shall enter orders for custody and support as, in the court’s discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child.”

DRL Section 70(a) states that the court “shall determine solely what is for the best interests of the child and what will best promote its welfare and happiness, and make [an] award accordingly.”

The best interests concept was first articulated in Finlay v. Finlay and has continued to be the guiding principle in the custody landscape. Under the best interests analysis:

- Each recommendation, each decision made, considers the individual child’s developmental and psychological needs. Rather than focusing on parental demands, societal stereotypes, cultural tradition, or legal precedent, the best interests standard asks the decision makers to consider what this child needs at this point in time, given this family and its changed structure.

The best interests analysis is an entirely individualized determination, made independently of parental demands or agendas and is based on a judicial examination of facts and circumstances.

The different factors evaluated and considered under this standard are not explicitly set forth in the statute, but instead have evolved through the common law on a case-by-case basis. Best interests factors include: the care and affection shown by the parents, the

10 N.Y. Dom. Rel. § 240.
11 N.Y. Dom. Rel. § 70(a).
12 Finlay v. Finlay, 240 N.Y. 429, 433–34 (1925) (“The chancellor in exercising his jurisdiction upon petition . . . acts as parens patriae to do what is best for the interest of the child. He is to put himself in the position of a ‘wise, affectionate and careful parent,’ and make provision for the child accordingly . . . [h]e is not determining rights ‘as between a parent and a child’ or between one parent and another. He ‘interferes for the protection of infants.’”) Id. Parens patriae refers to the state’s role as “provider of protection to those unable to care for themselves.” See Black’s Law Dictionary 520 (3d Pocket Ed. 2006). See also Christine Albano, Binding Arbitration: A Proper Forum for Child Custody?, 14 J. Am. Acad. Matrim. L. 419, 428 (1997). For a discussion of the historical development of the parens patriae doctrine, see Aaron E. Zurek, All the King’s Horses and All the King’s Men: The American Family After Troxel, the Parens Patriae of the State, A Mere Eggshell Against the Fundamental Right of Parents to Arbitrate Custody Disputes, 27 Hamline J. Pub. L. & Pol’y 357, 377–83 (2006).
14 Id.
stability of the respective parents, the atmosphere of the homes, the ability (both mental and physical) and availability of the parents, and the child’s age and the child’s special needs (although this list is by no means exhaustive). While not dispositive, a New York court may also consider the child’s preference, depending on factors such as the child’s age, maturity, and potential for influence; however, the court can disregard the child’s preference if the court independently determines that the stated preference is not in the child’s best interests, again emphasizing the court’s ultimate duty to make an independent resolution. Finally, because the welfare of a child is involved, a custody award is always modifiable. Pursuant to DRL Section 240, both Family Court and Supreme Court have jurisdiction to modify or annul custody and visitation orders.

While the best interests standard has been criticized as “indeterminate and unpredictable,” the vagueness of “best interests” allows the court to be unconstrained. Given that the statute remains silent on the types of custody arrangements that the court may devise, New York courts have complete freedom in deciding what is best in the situation, whether it be a sole custody arrangement or a shared parenting arrangement, such as joint custody. Unlike many other jurisdictions, including New Jersey, discussed infra, New York does not have a statutory presumption for joint custody. To the extent that DRL Section 240 is silent on the issue of joint custody, DRL section 70(a) explicitly states that there is no prima facie right to custody of either parent. The prevailing policy in New York with respect to joint custody, set forth in Braiman

16 See, e.g., Eschbach v. Eschbach, 56 N.Y.2d 167, 171 (1982) ("[T]here are no absolutes in making these determinations; rather these are policies not designed to bind the courts, but to guide them in determining what is in the best interests of the child."); see also 264 Elena Karabatos, Understanding Child Custody and Support 7 (1998).


18 Id.; see also Fox v. Fox, 177 A.D.2d 209, 211 (N.Y. App. Div. 1992) (holding that a ten-year old child was not of sufficient maturity to weigh essential factors in making a custody decision).

19 See N.Y. Dom. Rel. § 240 (McKinney 2010).


21 Elrod & Dale, supra note 13, at 392.

22 Sobie, supra note 17.


24 N.Y. Dom. Rel. § 70(a) (McKinney 2010).
v. Braiman, is that the court will not impose joint custody awards upon “already embattled and embittered parents,” which “can only enhance familial chaos.”25 The court will, however, respect a joint custody arrangement when parents have amicably agreed upon it, provided that there is no objection or request for an evidentiary hearing.26

An examination of the legislative history shows New York’s resistance to amending its custody statute to provide for a joint custody presumption. There has been proposed legislation in both the New York State Assembly and New York State Senate advocating a “statutory presumption of joint custody for all minor children whose parents are no longer married, so that both parents can continue to share in the responsibilities and duties of the children’s upbringing.”27 At the very least, this new legislation would: (a) set forth legislative intent; (b) require the court to award joint custody in the absence of allegation of harm; and (c) create a definition of shared parenting.28

These amendments would be a limit on the court’s unbridled discretion by establishing a preference for a specific parenting arrangement. Nevertheless, the proposed legislation has not been enacted by the New York legislature. It is clear from the legislative history that although there have been various sponsors who want the domestic relations law amended, the legislative intent remains that the court make custody determinations on a case-by-case basis. Consistently, New York courts have themselves rejected binding arbitration in the child custody context, another process that would restrict their duties to determine “best interests” in every situation.

B. New Jersey’s Modern Custody System

While the New Jersey child custody statute is also guided by best interests, mandating courts to create “[a]ny... custody ar-

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27 See, e.g., NEW YORK STATE ASSEMBLY MEMORANDUM IN SUPPORT OF LEGISLATION, N.Y. A.B. 330 (N.Y. 2005); NEW YORK STATE ASSEMBLY MEMORANDUM IN SUPPORT OF LEGISLATION, N.Y. A.B. 3181 (N.Y. 2009); NEW YORK STATE SENATE INTRODUCER’S MEMORANDUM IN SUPPORT, N.Y. S.B. 6969 (N.Y. 2009).
28 Id.
rangement as the court may determine to be in the best interests of the child,” 29 the statute is different from New York’s in crucial ways that might explain the states’ diverging attitudes toward arbitration in child custody. New Jersey custody law provides that the “court may make such order . . . as to the care, custody, education and maintenance of the children, or any of them, as the circumstances of the parties and nature of the case shall render fit, reasonable and just. . . .” 30 These statutory provisions, like New York’s, provide the court with “broad authorization” in making custody determinations, underscoring legislative intent to grant courts the ability to “fashion creative remedies in matrimonial custody cases.” 31

There are differences, however, between the states’ custodial laws. First, unlike New York, New Jersey’s statute sets forth explicit factors for the court to consider when making a custody award, including: the parents’ ability to agree, communicate and cooperate in matters relating to the child; the parents’ willingness to accept custody; the interaction and relationship of the child with his parents and siblings; any history of domestic violence; the safety of the child; the preference of the child; the needs of the child; the stability of the home; the environment offered; the fitness of the parents; and the parents’ employment responsibilities. 32 In comparison, New York’s statute does not specify what factors the court must evaluate; instead, “[i]t has been left to the courts to formulate the factors which need to be considered by them in making a determination of the ‘child’s best interests.’” 33

Yet another, more significant difference is that in New Jersey, the rights of both parents are explicitly “equal” 34 in contested custody matters—“equal rights and equal responsibilities regarding the care, nurture, education and welfare of their children.” 35 Furthermore, the New Jersey statute states that joint custody is the preferred custody arrangement: “[I]t is in the public policy of [New Jersey] to assure minor children of frequent and continuing contact with both parents . . . it is in the public interest to encourage parents to share the rights and responsibilities of child rearing in order

29 N.J. STAT. ANN. § 9-2-4(c) (West 2010).
30 N.J. STAT. ANN. § 2A:34-23 (West 2010).
34 N.J. STAT. ANN. § 9-2-4 (West 2010).
35 Beck, 86 N.J. at 485.
to effect this policy.” As discussed supra, the New York legislature has rejected any amendment that would mirror New Jersey’s legislative presumption for joint custody. Furthermore, unlike New York courts, New Jersey courts will order any custody arrangement agreed to by the parents unless they find such arrangement to be contrary to the best interests of the child.

Statutory differences between New York and New Jersey evidence divergent legislative intents that might shed some light on the states’ different arbitration policies. While New Jersey focuses more on parental rights and involvement with its explicit preference for joint custody, New York’s sole focus is the best interests of the child, as evidenced by the state’s reiteration of the “best interests of the child” throughout the statute and its rejection of joint custody legislation.

II. Adoption of Binding Arbitration in Child Custody Disputes

Arbitration is “a creature of contract.” In binding arbitration, a neutral third party, the arbitrator, makes a decision that is binding upon the parties. The parties are able to choose with whom they want to arbitrate their matter, whether it is an expert in the field or any other person with whom the parties feel comfortable. When the parties voluntarily agree to arbitrate, they waive access to the court, and any decision rendered will be binding and subject to review only under limited circumstances, as described infra.

37 See supra note 27.
38 See N.J. STAT. ANN. § 9:2-4(d) (West 2010).
39 Id.
40 N.Y. DOM. REL. § 240 (2010); supra note 27.
42 See Albano, supra note 12, at 423.
43 Id.

- typically includes an initiation stage; the appointment of an arbitrator; a discussion of appropriate process and timetable; one party’s statement of claim and the other’s response; a listing by each party of relevant documents in their control (discovery), and their inspection; a handing over of an agreed upon selection of documents to the arbitrator; a hearing including oral statements, questioning of witnesses and clarifica-
New York and New Jersey have adopted their own respective arbitration statutes, each modeled after the Uniform Arbitration Act ("UAA"). Each statute sets forth procedural details and legal standards for vacating or modifying arbitration awards. Neither New York nor New Jersey’s arbitration statutes contains an express approval or disapproval of child custody arbitration. In fact, each of the respective statutes broadly declares that a written agreement to arbitrate is valid and enforceable.

Despite the statute’s silence on the issue, New York courts have repeatedly held that a child custody arbitration agreement between parents is not enforceable. Judicial treatment of arbitration agreements and awards for child custody and visitation has been classified into three distinct categories: the void approach, the voidable approach, and the minority approach. A void approach state, such as New York, will invalidate any contract or agreement that on its face submits the issue of child custody to arbitration. Under the voidable approach, the court will treat an arbitrator’s award as “voidable” if the award does not serve the best interests of the child. Lastly, under the minority view, a state court will respect and enforce a child custody arbitration agreement.

New Jersey, in its recent decision in Fawzy v. Fawzy, has recently en-

47 See id. See also Sophie K. Kennedy, A Proposal to Return Custody Decisions to Where they Belong, 2 J. Am. Arb. 101, 103 (2003) (noting that the UAA also does not address whether parties may submit a custody dispute to arbitration).
48 See id.
50 Spitko, supra note 5, at 1159–64.
51 Id. at 1154.
52 Id. at 1158; see, e.g., Sheets v. Sheets, 254 N.Y.S.2d 320, 323 (N.Y. App. Div. 1964) (noting that to the extent that an arbitration award conflicts with the best interests of the child, courts would treat it as a nullity regardless of the binding effect on the parents). This approach is also followed in Pennsylvania. See Miller v. Miller, 620 A.2d 1161, 1163–64 (Pa. Super. Ct. 1995).
53 Spitko, supra note 5, at 1164; see also Fawzy v. Fawzy, 199 N.J. 456, 456 (2009).
dorsed a hybrid of the voidable and minority approaches, as discussed infra.\textsuperscript{54}

A. New York’s Rejection of Arbitration in Child Custody Matters

New York’s arbitration statute does not overtly exempt child custody from arbitration.\textsuperscript{55} Based on the text of the statute, New York courts will presumably enforce valid arbitration agreements regardless of the area of law to which they pertain, including child custody. The statute explicitly says “any controversy.”\textsuperscript{56} Nevertheless, despite this broad language, New York courts have repeatedly held that they will not enforce arbitration agreements as they relate to custody decisions.\textsuperscript{57}

First, New York has decided that child custody is one area that is “so interlaced with strong public policy considerations that [it has] been placed beyond the reach of the arbitrators’ discretion.”\textsuperscript{58} Second, New York’s rejection of child custody arbitration is also rooted in the court’s adherence to its role as \textit{parens patrie} under statutory and common law.\textsuperscript{59}

\textit{Glauber v. Glauber}, the New York
Court of Appeals rejected arbitration as an alternative method of dispute resolution in contested child custody cases, based on the prevailing policy that it is the court’s duty to review the circumstances independently and determine the best interests of a child.60 The court held that “the responsibility of the courts always supersedes whatever bargain has been struck . . . a court cannot be bound by an agreement as to custody . . . and simultaneously act as par

ents patriae on behalf of the child.”61 This decision clearly emphasizes judicial resolution over contract and highlights the court’s reliance on DRL Section 240, which gives the court sole responsibility in making custody decisions based upon a case-by-case resolution of the best interests of the child.62 Glauber also reiterated the strong public policy grounds underlying its rejection of binding arbitration.63

Glauber epitomizes the void approach that finds invalid all child custody arbitration contracts and awards.64 In dicta, the Glauber court also rejected the voidable approach, which had been suggested as a viable solution in an earlier New York case,65 in which the court opined the possibility that an arbitrator could issue an award that would then be examined by the court de novo under a best interests analysis.66 The court in Glauber rejected this approach:

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.67

60 Glauber, 192 A.D.2d at 97.
61 Id. at 97–98.
63 Glauber, 192 A.D.2d at 97 (“[I]t has become increasingly important to identify at the threshold those subjects which should not be arbitrated—those exceptions which have been recognized ‘as so interlaced with strong public policy considerations that they have been placed beyond the reach of the arbitrators’ decision.’”). Other examples of non-arbitrable issues in New York due to public policy concerns include the right to inspect teacher personnel files, enforcement of state antitrust laws, and usury claims asserted by borrowers. Id.
64 Spitko, supra note 5, at 1159; Kennedy, supra note 47, at 107.
65 See Sheets v. Sheets, 22 A.D.2d 176, 178 (N.Y. App. Div. 1964); see also Spitko, supra note 5, at 1161.
66 See Sheets, 22 A.D.2d at 178.
B. New Jersey’s Adoption of Binding Arbitration in Child Custody Matters

In New Jersey, agreements to arbitrate made on or after January 1, 2003 are governed by the Revised New Jersey Arbitration Act. Like New York’s, New Jersey’s arbitration statute does not exempt child custody from arbitration. Section 2A:23B-6 provides: “(a) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.”

The New Jersey Supreme Court recently held that parents could arbitrate custody disputes without the court’s interference, thus including child custody within the scope of New Jersey’s arbitration statute and distinguishing the state from New York. In the seminal case, *Fawzy v. Fawzy*, two parents voluntarily agreed to submit custody issues to arbitration pursuant to N.J.S.A. Section 2A:23B. After the arbitrator issued a custody award in favor of Mrs. Fawzy, Mr. Fawzy moved to vacate the award, or, alternatively, have the court review the award. He argued that custody issues could not be arbitrated because it “deprive[d] the court of its *parens patriae* obligation to assure the best interests of the child.”

While the Appellate Division found in favor of Mr. Fawzy, holding that custody issues cannot be submitted to binding arbitration, a unanimous Supreme Court overturned its decision, finding that “within the constitutionally protected sphere of parental autonomy is the right of parents to choose the forum in which their disputes over child custody and rearing will be resolved, including arbitration.”

In the same decision, the Supreme Court also articulated a different standard of review for an arbitration award in the custody context, other than the traditional best interests analysis. Once the dispute has been arbitrated, the matter is subject to a narrow

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70 Id.
72 Id.
73 Id.
74 Id. at 466.
75 Id. at 461.
76 Id.
558 CARDOZO J. OF CONFLICT RESOLUTION [Vol. 12:547

scope of judicial review under New Jersey’s Arbitration Act. The only exception is where a party can demonstrate that the arbitrator’s award “threatens harm to the child.” If there is no proof of such threat, then the Arbitration Act standards apply to the parties’ ability to vacate or modify an arbitration award. On the other hand, if a party to the arbitration agreement presents prima facie evidence that there is a threat of harm and the court subsequently makes a finding of harm, the court will then undertake a best interests analysis. In sum, the court reasoned, “where no harm to the child is threatened, there is no justification for the infringement on the parents’ choice to be bound by the arbitrator’s decision.

New York and New Jersey’s different approaches toward child custody and arbitration become manifest when we compare Glauher and Fawzy. In adopting binding arbitration in child custody disputes, New Jersey emphasizes the constitutional right of the parents to control the upbringing of their children, which is now inclusive of the right to arbitrate without state interference (unless a particular level of harm is shown). Conversely, New York’s rejection of arbitration underscores the duty and power of the court to protect the child’s welfare and best interests.

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78 Fawzy, 199 N.J. at 480.
79 N.J. Stat. Ann. § 2A:23B-23(a) (West 2010). The grounds for vacating an arbitration award under the Act are narrow. A court will vacate an arbitration award only if:
   (1) the award was procured by corruption, fraud or other undue means; (2) the court
finds evident partiality by an arbitrator; corruption by an arbitrator; or misconduct
by an arbitrator prejudicing the rights of a party to the arbitration proceeding; (3) an
arbitrator refused to postpone the hearing upon showing of sufficient cause for the
postponement, refused to consider evidence material to the controversy. . .; (4) an
arbitrator exceeded the arbitrator’s powers; (5) there was no agreement to arbitrate. . .; or (6) the arbitration was conducted without proper notice of the initiation
of an arbitration. . .
Id. See also N.J. Stat. Ann. § 2A:23B-24(a). A modification of the award may be ordered by the court if: “(1) there was an evident mathematical miscalculation or an evident mistake in the
description of a person, thing, or property referred to in the award; (2) the arbitrator made
an award on a claim not submitted to the arbitrator; or (3) the award is imperfect in a matter of
form not affecting the merits of the decision on the claims submitted.” Id.
80 Fawzy, 199 N.J. at 478–79 (the court indicated in its decision that a record of all documentary
evidence shall be kept, testimony shall be recorded verbatim, and the Arbitrator shall
render an opinion in writing or otherwise record findings of fact and conclusions of law with a
focus toward best interest).
81 Id.
83 See generally N.Y. Dom. Rel. §240 (2010); Glauber v. Glauber, 192 A.D.2d 94, 98 (N.Y.
III. TRADITIONAL ARGUMENTS IN FAVOR OF ARBITRATION ARE OUTWEIGHED

Proponents of alternative methods of custody dispute resolution argue that the traditional, adversarial legal process is inadequate for contested custody cases. Some reasons advanced for this view include the following: that the adversarial legal process is time-consuming and expensive, that high-conflict parents keep children and themselves in constant instability, and that judges are “ill-prepared to make future predictions about parents and their children” when deciding the best interests of the child. Alternative methods of conflict resolution, on the other hand, allow parties to reach a quicker and less expensive resolution. The benefits of arbitration include: “(1) the parties are able to choose the decision-maker; (2) the parties may choose a convenient, mutually agreed on forum for the hearing; (3) there is a large degree of procedural flexibility; (4) the process is speedy and less costly; and (5) because the process is final and binding, there will be no ongoing trial, appeals, or delays.”

While these articulated benefits of ADR may be appealing in other contexts where the focus is primarily on the contracting parties, the traditional arguments in favor of arbitration as a conflict resolution method are not as persuasive in relation to child custody disputes. Why is custody different? The court in Agur v. Agur expressed the difference:

[A]rbitration is useful when the mundane matter of the amount of support is the issue[,] [but] [i]t is less so when the delicate balancing of the factors composing the best interests of a child is the matter at hand. At least, the amount of support . . . does involve . . . consideration of fairly precise terms. The welfare of

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84 See Elrod & Dale, supra note 13, at 384.
85 Id.
86 For a fuller discussion of benefits to arbitrating child custody, see Albano, supra note 12, at 420, 432 (“Arbitration provides a binding decision maker who is trusted by the parties; who will abide by rules set by the parties; who will act as formal as the parties desire; and who will hear the case and make a decision within a time frame set by the parties.”). For a discussion of other benefits of child custody arbitration, see Spitko, supra note 5, at 1168.
88 Id.
89 Kennedy, supra note 47, at 109.
a child, presenting a congeries of many immeasurable and intangible elements, often of a highly individualized character, cannot be so easily comprehended.\(^90\)

In fee disputes, ADR is ideal because “[s]uch cases are fact-intensive and generally involve settled law; what is needed is an efficient and fair dispute resolution system.”\(^91\) Traditional arguments in favor of arbitration, which may benefit these more quantifiable aspects of family law, such as maintenance payments, are less forceful when deciding a child’s custody arrangement. A crucial difference is the function of the courts in publishing decisions that interpret the law and guide future conduct—the courts’ “law-giving function.”\(^92\) ADR is “ill-suited” to deal with constitutional issues, which need judicial interpretation in order to set the law for lower courts to follow and to guide private actions\(^93\):

The existence of a private judiciary with different operative principles might impair the legitimacy of the public courts and their role in society. From a young age, we are taught to revere the judiciary for its fairness and wisdom. We invest the courts with an almost ecclesiastic authority to interpret constitutional and community values.\(^94\)

Furthermore, ADR produces “compromises in results,”\(^95\) which could be detrimental when a child’s welfare is at stake. For example, although joint custody may not be the optimal custody arrangement, an arbitrator might be inclined to favor this outcome as a compromise.\(^96\) Arbitrators faced with parents who have conflicting positions about how to handle custody\(^97\) often “tend to ‘split the baby’ in trying to give something to all parties.”\(^98\)

Two often-cited concerns with binding arbitration are that: (1) an arbitrator is not bound by applicable law; and (2) review of an arbitration award is extremely limited. These issues become magnified in the custody context. First, while an arbitrator does not


\(^{92}\) Id.

\(^{93}\) Id. at 121.


\(^{95}\) Chemerinsky, supra note 91, at 122.

\(^{96}\) Pedone, supra note 87, at 72.


\(^{98}\) Id. at 405; Pedone, supra note 87, at 72.
need to follow applicable law, judges are under statutory mandate to put a child’s interests first. Even though it has been argued that an arbitrator must be an expert in family law in order for the best interests of the child to be served, because the parties have complete discretion to choose whomever they would like, an arbitrator could lack the necessary experience and skills. It has been suggested that whether or not a child’s interests can be protected in arbitration depends on how closely the arbitrator follows the law when rendering a decision.

For example, even though a child is not considered a party to a custody dispute, under the traditional judicial process, judges will take into account a child’s preferences as one factor under a best interests analysis. However, an arbitrator need not consider the concerns of the child, especially since he or she has been retained by and for the parents and may be focused solely on their wants and needs instead.

One of the main critiques of arbitration in the child custody context is that a child is not a party to the arbitration agreement but will be bound by the contract. This is even more troubling if an arbitrator disregards a child’s preferences. For these reasons, courts must remain involved until further developments in arbitra-

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99 See Spitko, supra note 5, at 1156 (“Private arbitration provides no assurance that the arbitrators chosen by the parents will have a specialized competence to adjudicate a custody dispute. Moreover, even a competent arbitrator may choose to disregard the jurisdiction’s legal standards . . . absent direction in the arbitration contract to apply such standards.”); see also Kennedy, supra note 47, at 112 (AAA rules do not require an arbitrator to use the best interest of the child standard).

100 See N.Y. DOM. REL. § 240 (2010).

101 Albano, supra note 12, at 441.

102 Id.; see also Agur v. Agur, 32 A.D.2d 16, 20 (N.Y. App. Div. 1969) (noting problems inherent in arbitration, such as no assurance that arbitrators are qualified and no necessity that the nominated person’s background would result in a provident decision).

103 Albano, supra note 12, at 441.

104 See Elrod & Dale, supra note 13, at 404.

105 See id. (citing Barbara B. Atwood, The Child’s Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform, 45 ARIZ. L. REV. 629, 634–35 (2003)) (indicating that eighty percent of judges consider the preferences of teenagers to be important, forty percent give weight to eleven and thirteen year olds, but thirty-three percent gave no significance to preferences of children under age ten).


107 Wilson, supra note 3, at 232–33 (citing Stewart E. Sterk, Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense, 2 CARDOZO L. REV. 481 (1981)) (“[i]t is the inability to represent properly the interests of the child, who, of course, never consented to arbitration in the first place, that makes arbitration an inappropriate forum for resolution of custody disputes.”).
tion procedure are created to more adequately ensure the protection of the child’s interests.\textsuperscript{108}

A second commonly asserted objection to binding arbitration is that review of an arbitration award is limited. In \textit{Glauber v. Glauber}, the court expressed concern that the court’s traditional role in protecting a child is inconsistent with the finality of arbitration awards.\textsuperscript{109} When parties agree to arbitrate, they agree to waive the right to have their dispute adjudicated and the right to appeal the arbitration award, except under limited circumstances.\textsuperscript{110} As discussed above, an arbitrator is not bound by substantive law and thus does not need to use the best interests standard.\textsuperscript{111}

Another issue tied to waiver is the standard of review for arbitration awards. Outside of the custody context, the statutory grounds for vacating an arbitrator’s award are narrow and appeal is limited to instances where, for example, there is corruption or fraud, partiality of an arbitrator, and/or prejudice to the rights of the parties.\textsuperscript{112} Within the context of custody, different courts have adopted varying standards of review for arbitration agreements.\textsuperscript{113} Under the \textit{Fawzy v. Fawzy} precedent, in order to appeal an arbitrator’s custody determination in New Jersey, a party must show prima facie that there is a threat of harm.\textsuperscript{114} The court will under-

\textsuperscript{108} Wilson, \textit{supra} note 3, at 233.


\textsuperscript{110} \textit{See Fawzy v. Fawzy}, 199 N.J. 456, 482 (2009). The court in \textit{Fawzy} outlined the necessary steps to assure that the parties’ decision to waive certain rights was clear and informed. The court stated that an agreement to arbitrate child custody matters must be in writing and state in clear language: (1) that the parties understand their entitlement to a judicial adjudication of their dispute and are willing to waive that right; (2) that the parties are aware of the limited circumstances under which a challenge to the arbitration award may be advanced and agree to those limitations; (3) that the parties have had sufficient time to consider the implications of their decision to arbitrate; and (4) that the parties have entered into the arbitration agreement freely and voluntarily, after due consideration of the consequences of doing so. \textit{Id.} \textit{See also} Kennedy, \textit{supra} note 47, at 111 (parties “lose the vast selection of resources that a court has available in making a custody determination.”).

\textsuperscript{111} Spitko, \textit{supra} note 5, at 1156.

\textsuperscript{112} For grounds for vacating an arbitrator’s award in New York and New Jersey, respectively, see N.Y. C.P.L.R. § 7511 (2010) and N.J. STAT. ANN. § 2A:23B-23 (2010). In New Jersey, parties can expand the scope of judicial review of an arbitration award by expressly providing for expanded review in their agreements. \textit{See N.J. STAT. ANN. § 2A:23B-4(c) (2011); see also} Reuben, \textit{supra} note 45, at 1152.

\textsuperscript{113} For example, Pennsylvania follows the voidable approach whereby agreements entered into between parties are binding as between the parties but any award rendered by an arbitration panel is subject to the supervisory power of the court to determine the best interests of the child. \textit{See Miller v. Miller, 62 A.D.2d 1161 (1993).}

\textsuperscript{114} \textit{See Fawzy}, 199 N.J. at 478–79.
take an independent best interests determination only if the court makes a finding of harm.\textsuperscript{115} Although the court in \textit{Fawzy} speculates about what could be defined as harm, such as “a party’s claim that the arbitrator granted custody to a parent with serious substance abuse issues or a debilitating mental illness,”\textsuperscript{116} the court gives no definitive notice to parties on how to satisfy the burden of showing this. As Mr. Fawzy himself argued, the court should, at the very least, “not impose an affirmative obligation to demonstrate a risk of harm to the children in order to submit arbitrated custody issues to appellate review, and . . . parties should be afforded automatic review unless it is clear on the face of the award that it will not harm the child’s best interests.”\textsuperscript{117}

Because the court does not elaborate on what the threat of harm standard means or entails, it is unclear how significant this burden really is, or what a parent will need to prove to get judicial review. What is a threat? What is harm? What are the elements of a prima facie case for a threat of harm? This standard seems too uncertain for deciding the welfare and future of a child. For example, in \textit{Mehaffy v. Mehaffy}, a mother with custody of her daughter allowed her boyfriend, an unemployed alcoholic with a history of domestic violence and mental health problems, to come live with them.\textsuperscript{118} The court found this a valid reason to modify the custody arrangement.\textsuperscript{119} It is unclear, however, whether this would be a sufficient “threat of harm”\textsuperscript{120} to warrant review by a New Jersey court if the custody agreement had been decided through binding arbitration.

Thus, while ADR might be useful in situations where efficient, quick and fair resolution is needed (such as in a fee dispute case), these benefits may not be enough in settings where the court’s involvement is especially necessary.\textsuperscript{121} New York’s reliance on the court’s independent determination with its focus on the best interests of the child minimizes the risks associated with arbitration in this field.

\textsuperscript{115} \textit{Id.}
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Id.} at 467–68.
\textsuperscript{119} \textit{Id.}
\textsuperscript{120} \textit{Fawzy}, 199 N.J. at 479.
\textsuperscript{121} \textit{Id.}
IV. Constitutional Issues Underlying the Debate

The Supreme Court has held that certain aspects of family autonomy, such as the right to marry, the right to custody of one’s children, and the right to control the upbringing of one’s children, are fundamental rights.\(^{122}\) A state’s reluctance to interfere with the parent-child relationship arises out of respect for the privacy right of parents to raise their own children.\(^{123}\)

In *Troxel v. Granville*, the Supreme Court defined the “outer limits of state authority to interfere in the parent-child relationship.”\(^{124}\) The plurality opinion stated that:

> so long as a parent adequately cares for his or her children . . .
> there will normally be no reason for the State to inject itself into
> the private realm of the family to further question the ability of
> that parent to make the best decisions concerning the rearing of
> that parent’s children.\(^{125}\)

The Supreme Court in *Troxel* found that the Washington statute at issue, as applied to the facts of that specific case, unconstitutionally infringed on a parent’s fundamental right to make decisions concerning the care and custody of his child.\(^{126}\) However, the Supreme Court has indicated in other cases that parental autonomy interests must be balanced with the state’s *parens patriae* duties to protect the welfare of a child.\(^{127}\) In fact, the balance usually tips in favor of the state when considering the ability to contract for custody.\(^{128}\)

One of the biggest issues underlying the different attitudes of New York and New Jersey toward binding arbitration is a constitutional one—the states’ respective views toward parental autonomy. In *Fawzy*, the court framed the issue as a constitutional one: the “intersection between parents’ fundamental liberty interest in the care, custody, and control of their children, and the state’s interest

\(^{122}\) See Chemerinsky, *supra* note 4, at 798.

\(^{123}\) Spitko, *supra* note 5, at 1181.

\(^{124}\) Id. at 1185; see generally *Troxel v. Granville*, 120 S.Ct. 2054 (2000).

\(^{125}\) Spitko, *supra* note 5, at 1187.

\(^{126}\) Id. at 1185; see also Chemerinsky, *supra* note 4, at 811–13.

\(^{127}\) See Prince v. Massachusetts, 321 U.S. 158, 165 (1944) (finding in favor of state intervention because although parental autonomy is a principal value, the state remains free to act to ensure that children be safeguarded); see also Spitko, *supra* note 5, at 1183–84; Chemerinsky, *supra* note 4, at 809.

\(^{128}\) Zurek, *supra* note 12, at 364 (“[M]ost jurisdictions view the parental right as more limited when considering the parents’ ability to contract for child custody arbitration.”).
in the protection of those children.” While New York courts favor the state interest, New Jersey favors parental autonomy:

Deference to parental autonomy means that the State does not second-guess parental decision-making or interfere with the shared opinion of parents regarding how a child should be raised. Nor does it impose its own notion of a child’s best interests on a family. Rather, the State permits to stand unchallenged parental judgments that it might not have made or that could be characterized as unwise. That is because parental autonomy includes the ‘freedom to decide wrongly.’

In Fawzy, the New Jersey Supreme Court included the right to arbitrate child custody within the fundamental right to control the upbringing of one’s own children, as protected by the Due Process Clause of the 14th Amendment. For the court, “the bundle of rights that the notion of parental autonomy sweeps in includes the right to . . . submit their dispute to an arbitrator whom they have chosen.”

There has been an “increasing resort by both state and federal courts to constitutional principles as the courts try to construct a new framework within which to understand and regulate family relationships,” resulting in two different categories of cases that impact family relations. One group of cases involves adults’ familial decisions (for example, decisions relating to reproduction, contraception, abortion, and divorce). These cases “unequivocally support[ ] the rights of family members . . . to make intimate familial choices without state interference.” The other group of cases centers on children and the parent-child relationship. These cases lack consistency. Troxel is one such case that “illustrates the confused state of the Court’s constitutional jurisprudence respecting children in families.”

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131 Fawzy, 199 N.J. at 473–74.
132 Id. at 476 (hence adopting the “threat of harm” standard that is utilized in parental autonomy cases); see Chemerinsky, supra note 4, at 798.
133 Fawzy, 199 N.J. at 477.
135 Id. at 363.
136 Id.
137 Id. at 365.
138 Id. See id. at 368 (noting that cases involving children are different and harder to decide since society has not accepted an understanding of children as autonomous individuals).
139 Id. at 369.
First, while Troxel reaffirms the fundamental right of parents to make decisions concerning the care, custody, and control of their children,\textsuperscript{140} it can be limited to its facts—whether a court can disregard a fit parent’s choice to limit grandparent visitation and thus substitute its own decision.\textsuperscript{141} Troxel reiterates the principle that “the Due Process clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a ‘better’ decision could be made.”\textsuperscript{142} Based on this statement, an argument can be made that after Troxel, a state court violates due process when it disregards a fit parent’s custody decision.\textsuperscript{143} Therefore, it would be unconstitutional for courts to render a parties’ custody arbitration agreement void or voidable.\textsuperscript{144} Yet, this argument presupposes that a parents’ agreement to arbitrate child custody is “itself a species of parental decision making” and thus should be respected by the court.\textsuperscript{145}

Even though Troxel reaffirms broad principles of parental autonomy, the decision does not say anything about whether this right includes the ability to contract for arbitration in child custody situations, given limited appellate review. Procedure must be distinguished from substance. The question of whether a state should enforce binding custody arbitration agreements, and thus depart from the traditional best interests judicial review in child custody matters, is not analogous to differences in opinion over how much grandparent visitation is best for the child (a purely substantive matter).\textsuperscript{146} A New York court that voids such arbitration agreements is presumably not doing so in order to substitute its own decision for that of the parents (seemingly prohibited after Troxel).\textsuperscript{147} Instead, the court is rejecting arbitration as inconsistent and inappropriate in light of the court’s statutory role in protecting the best interests of the child.\textsuperscript{148} A judge who denies arbitration as a \textit{method} (i.e., a procedural matter) in resolving child custody matters is not violating Troxel.\textsuperscript{149}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{140} Troxel v. Granville, 120 S.Ct. 2054, 2060 (2000).
\item\textsuperscript{141} \textit{Id}. at 2063.
\item\textsuperscript{142} See \textit{id}. at 2064; see also Spitko, supra note 5, at 1194.
\item\textsuperscript{143} Spitko, supra note 5, at 1189.
\item\textsuperscript{144} \textit{Id}. at 1189–90.
\item\textsuperscript{145} \textit{Id}.
\item\textsuperscript{146} Troxel, 120 S.Ct. at 2054.
\item\textsuperscript{147} Spitko, supra note 5, at 1190.
\item\textsuperscript{148} See Glauber v. Glauber, 192 A.D.2d 94, 97–98 (N.Y. App. Div. 1993); see also Spitko, supra note 5, at 1156.
\item\textsuperscript{149} Spitko, supra note 5, at 1189–90.
\end{enumerate}
\end{footnotesize}
New Jersey placed the arbitration issue within a constitutional framework, relying on cases that support parental autonomy in familial decisions. There are two problems with this reliance. First, as discussed supra, there is a difference between the jurisprudence on parental autonomy, which is clear and consistent, and the jurisprudence on the parent-child relationship, which is more undeveloped and unreliable. A case such as Fawzy, which centers around whether a parents’ custodial arbitration agreement should be binding upon the court, straddles the divide between these two groupings of cases. On the one hand, an arbitration agreement is an expression of parental autonomy and decision-making. On the other hand, the arbitration agreement determines the child-parent relationship now and going forward. However, in Fawzy, the court framed the issue purely as the former. Cases that revolve around the parent-child relationship should not rely on constitutional principles for resolution as “[c]onstitutional cases involving children do not rest on a coherent jurisprudential base.”

Secondly, the decisions in cases such as Troxel, and more recently in Fawzy, rely on the assumption that parents, even those who might be experiencing great turmoil and instability due to divorce, always know what is best for their children. “To the extent that presumption is unwarranted, constitutional jurisprudence leaves children unprotected.”

Finally, even if we were to accept arbitration as a valid method for child custody resolution, and even if the ability to contract for the care and custody of one’s children is subsumed within the constitutional sphere of parental authority, custody resolution is one area where a balance of parental authority and a state’s freedom to act is paramount. Although the New Jersey Supreme Court believes it appropriate to subject child custody arbitration awards to the threat of harm standard, parental rights need to be more limited when they are contracting for their child’s custody through arbitration. Even if we allow binding arbitration in child custody

152 Fawzy, 199 N.J. at 473–74, 476.
153 Dolgin, supra note 134, at 365, 370 (The Troxel opinions reflect “the inability of constitutional law to resolve most family disputes.”).
154 Dolgin, supra note 134, at 392.
155 Id. at 407.
157 Zureck, supra note 12, at 364.
matters, parties should be allowed appellate review under a traditional best interests analysis.

V. PRIVATE JUDGING IN NEW YORK

Private judging is a hybrid of traditional litigation and ADR in which parties appoint a private decision-maker to hear the parties’ dispute and issue a binding opinion.158 This form of dispute resolution is defined as:

[A] court-annexed process available when statutes or local court rules permit court referral of cases to neutral third parties typically meaning: (i) a fairly formal case presentation as in a court trial commonly following traditional formalities and procedural and evidentiary rules; (ii) presented by counsel, witnesses, and documentary evidence essentially as in regular trial; (iii) to a privately selected and privately paid neutral, usually a retired judge, who presides over the proceedings as a judge, and who has the same powers as a trial judge; (iv) wherein a record of the proceedings is usually made by a privately retained court reporter; and (v) wherein the private judge reports his decision to the referring court and judgment is entered on the decision as if the action had been decided by a court. (vi) The parties’ rights to appellate review and enforcement of the decision are the same as if the judgment had been entered by a district court.159

While private judges are like public judges, with the same legal constraints and authority, and issue appealable decisions, they are also like arbitrators in that they “promise speedy, confidential decision-making.”160 “Private judges are seen to be useful in family law cases that require the knowledge, expertise and power of a traditional judge, but in which the parties seek the efficiency and immediacy of an arbitrator.”161 Furthermore, in addition to making litigation more efficient, resulting in parties being more satisfied and with judgments that are quicker and less costly, the “rent-a-

158 See Nagaraj, supra note 7, at 1615; see also Amy L. Litkovitz, Note & Comment, The Advantages of Using “Rent-a-Judge” System in Ohio, 10 OHIO ST. J. ON DISP. RESOL. 491, 491 (also referred to as a “rent-a-judge” system; instituted first in California, the system allows parties to hire a private judge to hear and resolve their dispute. The judge is given full authority to enter a judgment and the parties can appeal as they can in court).
159 Litkovitz, supra note 158, at 494–95 (citing Tom Arnold & Willem G. Schuurman, Alternative Dispute Resolution in Intellectual Property Cases, in PATENT LITIGATION, at 437, 506–07 (1991)).
160 Nagaraj, supra note 7, at 1615.
161 Id. at 1617.
judge system, with less restrictive rules and with the ability to choose a judge, will result in more general satisfaction with judgments and with the legal system in general."\textsuperscript{162}

Using a private judge to resolve a custody dispute allows the benefits of arbitration while still focusing on the child’s best interests. Private judging is an advantageous option because private judges apply substantive law,\textsuperscript{163} which means that a private judge in New York will use the best interests standard in his or her custody determinations. Another difference between a private judge and an arbitrator is that while parties may choose any arbitrator they wish, a private judge must be a lawyer and a member of the state bar.\textsuperscript{164} Furthermore, a private judge’s decision is directly appealable and fully reviewable by the state’s appellate courts.\textsuperscript{165} “[Private judging’s] hybrid nature bridges the gap between public adjudication and arbitration, offering a better forum for resolving family law disputes.”\textsuperscript{166}

Private judging is provided for by statute in New York, subject to important limitations. N.Y. C.P.L.R. Section 4301 states “[a] referee to determine an issue or to perform an act shall have all the powers of a court in performing a like function . . . .”\textsuperscript{167} Furthermore, “[t]he decision of a referee shall comply with the requirements for a decision by the court and shall stand as the decision of a court.”\textsuperscript{168} While C.P.L.R. Section 4301 allows parties the opportunity to appoint a referee themselves, Section 4312(2) limits the use of private judging in matrimonial actions—another example of New York’s high level of oversight in custody cases. In matrimonial actions, only a judicial hearing officer or a special referee appointed by the chief administrator of the courts may be designated to determine an issue.\textsuperscript{169} In other words, parties cannot choose a referee to decide their own custody issues.\textsuperscript{170}

New York should expand its private judging scheme to align closely with the scope of private judging in California. In Califor-
nia, parties may agree to appoint a referee, with no limit in custody cases,171 or in certain circumstances, the court may appoint a referee in the absence of consent.172 Furthermore, the parties are able to elect a referee of their choosing.173 If the parties have both consented to appointment of a referee, then the decision of the referee stands as if it were the decision of the court;174 however, if the court has appointed the referee or if the parties have not all consented, the referee’s decision is merely “advisory,” and the trial court retains discretion either to adopt or reject the referee’s findings and recommendations.175

In *Sy First Family Ltd. Partnership v. Andy Cheung*,176 the court articulated the sharp differences between the judicial reference process in California and a contractual arbitration. The following constitute the recognizable distinctions: (1) “[a] reference by the trial court involves the sending of a pending action or proceeding, or some issue raised therein, to a referee for hearing, determination and report back to the court;”177 (2) “[a] general reference occurs where the court, with the consent of the parties, directs a referee to try any or all of the issues in the action;”178 (3) “[t]he court appoints the referee, although the person chosen may be the result of the parties’ agreement;”179 (4) “[t]he hearing before a referee is conducted in the same manner as it would be before a court under the rules of evidence applicable to judicial proceedings;”180 and (5) “[i]n the case of a general reference, the referee must prepare a statement of decision which stands as the decision of the court and is reviewable in the same manner as if the court has rendered it.”181

If New York were to adopt a more comprehensive private judging system such as the one articulated in *Sy First Family Ltd. Partnership*, it could avoid the potential dangers of arbitration that

177 Id.
178 Id.
179 Id.
180 Id.
181 Id.
are heightened in child custody cases, while providing an alternative to traditional litigation for parents involved in a custody dispute. In addition, allowing parents to choose a referee to decide a custody matter will enhance parental autonomy consistent with constitutional law principles.

CONCLUSION

There is currently no consensus on whether binding arbitration should be utilized to resolve child custody disputes. New York and New Jersey anchor the different ends of the issue. Both states judicially adjudicate child custody disputes pursuant to a best interests analysis. Both states endorse arbitration generally as an alternative to litigation. However, while New York rejects binding arbitration in child custody, New Jersey will enforce and abide by a parents’ child custody arbitration agreement.

Arbitration is a “step further away from protecting the needs of the most important people involved—the children.” While arbitration is a beneficial ADR method in other contexts, it is an insufficient process when one considers the close judicial scrutiny and oversight necessary to protect children in custody determinations. Children are better protected in New York where a judge or a private referee (as ordered by the court) will make custody determinations based solely on the best interests of the children involved.

Whatever one’s view is toward arbitration or other alternative forms of dispute resolution, the reality is that “the balance is tipping away from open judicial resolution of disputes—and is tipping instead toward the creation of private processes law.” Private judging is a beneficial “private processes” alternative to litiga-
tion and arbitration. While New York currently endorses private judging, the state should broaden the scope of its private judging statute, which would allow parents to select a referee for their child custody decisions.