Excerpts from:

"Why Arbitrate Family Law Matters?" by Joan F. Kessler, Allan R. Koritzinsky, and Stephen W. Schlissel, *Journal of the American Academy of Matrimonial Lawyers*, Vol. 14, 1997, pages 333-351.

In pre-divorce matrimonial arbitration, the parties have an opportunity to agree on a specific person as Arbitrator, known or reputed to be the type and quality of person that the parties both desire to decide the specific disputed issues that have arisen between them. The Arbitrator can conduct the hearing in a confidential, private setting and at a time and place convenient to all parties.

The arbitration is generally conducted informally and with relaxed rules of evidence. The Arbitrator renders a decision called an "arbitration decision" or "award," which is submitted to the court for confirmation. The parties and attorneys may agree that the arbitration award is final and binding, subject to very limited judicial review by the trial court, and with the limited rights of appeal provided in the arbitration statute in their particular state.[1]

....

The choice of one's judge is an important part of the process of "private ordering," where people are best able to structure their future relationships and create their own problem solving techniques.

....

Matrimonial arbitration permits the parties to select someone who has chosen to be intensely involved in the field of divorce and has developed both an interest and expertise in that area.

....

Another frequently cited factor in favor of arbitration is the speed of the process.... Not only can the parties virtually choose their date, but they can also get a full-day (or more) without interruptions by other court matters. Because a matter submitted to arbitration usually results in a quick hearing and award, the costs of the decision-making process are greatly reduced. The swiftness of the process may also reduce the time in which children are victims of the stress and tension occasioned by lack of certainty as to the outcome.

Perhaps the most significant benefit of arbitration is that it tends to be far less formal than the traditional adjudicatory process. The entire concept of arbitration permits greater self-determination of the process by the participants.... Five people sitting around a conference table compares quite favorably to the … formality of a courtroom.

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Pre-arbitration conferences between counsel and the Arbitrator can also be an effective tool. Judges often do not get involved themselves (other than through their clerks) until significantly more than one-half of the war arsenal has already been deployed.

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[1] See HRS Section 658A

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The arbitration process does not eliminate the need for effective advocacy by lawyers. Lawyers with years of litigation skills honed in the courtroom can utilize many of those same skills quite effectively in an arbitration. Succinct opening statements and persuasive cross-examination are as crucial in an arbitration as a trial.

....

The parties can agree that an Arbitrator *will* be bound by the substantive law of the state.... No Arbitrator with a willful ignorance of the law will be asked to decide future cases. Likewise the most scholarly lawyer in town will not be asked to arbitrate if that person is viewed as capricious and unpredictable in personal matters.

....

In those jurisdictions which have adopted the Uniform Arbitration Act[1], the making of an arbitration agreement initiates court involvement. The remedies for enforcement, contempt and the like *are* available. They reside in the court which, after confirming the arbitration award making it a judgment of the court, can take any necessary enforcement action as it would with any other judgment.

....

Awards by Arbitrators of spousal support, maintenance and/or alimony are almost always final and binding because they, too, are contracts to determine an adult property right.

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Generally, courts have not been willing to allow absolutely final and binding arbitration in child support cases. The advent of child support guidelines, however, may change this since there is less "discretion" if the Arbitrator properly applies the guidelines, which may dispense with the need for review.

Arbitration awards of visitation and custody matters are rarely final and binding, and specifically are subject to a special review and/or trial *de novo*, if the court concludes the award is adverse to the child's best interest. The authors believe, however, that pre-divorce custody and visitation issues should be subject to final and binding arbitration, with an extremely limited ability of a court to vacate the award, *i.e.*, only if the award is clearly contrary to the best interest of the child.[2]

....

Arbitration conducted in a less formal atmosphere, often in a shorter time span than a trial, and always with a fact-finder of the parties' own choosing, is often far less antagonistic and nasty than typical litigation.

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[1] See HRS Section 658A

[2] Since this 1997 article was written, this has become a developing trend.

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Custody litigation is very costly from the perspective of both the court and the divorcing or separating couple. Matrimonial cases occupy a great deal of scarce judicial time and money.

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Bitterly contested cases often produce court orders which are resented and violated, leading to repeated rounds of litigation.

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The question can be stated simply: If Dick and Jane can privately agree as to their child's custody (subject only to limited judicial review), why can't they agree an Arbitrator will make the initial determination of custody and that they will be completely bound by any decision the Arbitrator makes?

....

We have found only one case, *Dick v. Dick*, 534 N.E.2d 185 (Mich. Ct. App. 1995), which touches on this idea. The court in *Dick* specifically balances case law, the Michigan Child Custody Act and the Uniform Arbitration Act, as well as giving significant weight to the *parties'* decision, stating: "If the parties agree to binding arbitration, they effectively remove the dispute to a different forum."

In *Faherty v. Faherty*, 477 A.2d 1257 (N.J. 1984), a child support case, a New Jersey court indicated that a reviewing court would have to conduct a *de novo* review of an Arbitrator's award of child support "unless it is clear on the face of the award that the award would not adversely affect the substantial best interests of the child." This suggests that a carefully reasoned award is more likely to be enforced while sloppy analysis may abort the whole process.

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In *Miller v. Miller*, 620 A.2d 1161 (Pa. App. Div. 1993), an appellate court in Pennsylvania and in *Kelm v. Kelm,* 680 Ohio St. 3d 26 (Sup. Ct. 1993), the Supreme Court in Ohio, each held that a parental agreement calling for binding arbitration to determine custody and child support is not void as against public policy, but the arbitration award *is* subject to review upon a challenge that it is adverse to the best interests of the child.

....

In *Dick v. Dick*, *supra*, the Michigan Court of Appeals affirmed a circuit judge's adoption of an Arbitrator's child custody determination. That court relied not only on statutory authority, but also on case law and court rules, in concluding that there was no clear prohibition against the use of binding arbitration to resolve custody disputes.

VI. CONCLUSION

Courts will jealously guard their supervisory powers over custody disputes. The real issues are *why* should the courts find an Arbitrator's award to be "reviewable" at all (except upon appeal

from a judgment confirming such an award), and if it is "reviewable", *what* the standard for that review should be.

The few cases which have addressed these issues seem to permit or even require some limited judicial review of an Arbitrator's award of custody. It appears that, at the least, courts are preserving for themselves a role as a fail-safe mechanism in case of clearly erroneous awards.... If the court has the power to refuse to confirm an award that is contrary to public policy where an error by the Arbitrator is "so gross" as to shock its conscience, that should supply a satisfactory safety net.

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The authors suspect that part of the judicial reluctance to give approval to final and binding arbitration of family law matters rests, at least in part, on the prior failure to have a group of well-trained and highly competent family law Arbitrators. We hope that the recent development of such a group...will lead to a realization that there are appropriately trained and experienced family law Arbitrators whom the courts can trust.