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FAMILY LAW

Supreme Court Sends The Signal: CDR Is Here to Stay

A strong desire to remove family law cases from the system is emphasized

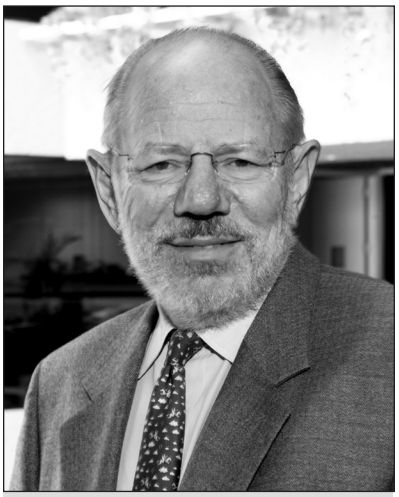
By Edward S. Snyder

When the Supreme Court enacted Rule 1:40 in 1992, it stated that Complementary Dispute Resolution Programs (CDR) "constitute an integral part of the judicial process, intended to enhance its quality and efficacy." The rule further admonished that attorneys had a "responsibility" to become familiar with available CDR programs.

CDR programs were established and Superior Court and Municipal Court judges were given the authority to require parties to attend mediation sessions.

Rule 5:3-5 (a) (10) provides that retainer agreements in family actions must set forth the availability of CDR programs, including but not limited to, mediation and arbitration. Rule 5:4-2 (h) requires that initial pleadings of each party contain a certification or affidavit that the litigant has been informed of the availability of CDR alternatives and that the litigant has received descriptive material regarding such CDR attachments.

Rule 1:40-5 (a) (1) sets forth the procedure in the family part wherein genuine and substantial custody or parenting time issues are referred to mediation, and Rule 1:40-5 (b) provides that each vicinage shall include a post-Matrimonial Early Settlement Panel program for the mediation of economic aspects of divorce or for the conduct of a post-MESP CDR event.



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If the above cited rules have not sufficiently indicated the dedication of the Supreme Court as to CDR, the single family decision of the Court this past year should resolve any doubt that the Court desires to remove from litigation within the system as many family-connected matters as possible.

In *Fawzy v. Fawzy*, 199 N.J. 456 (2009), the Court took *Faherty v. Faherty*, 97 N.J. 99 (1984), one step further. *Faherty* involved the issue as to whether an arbitration provision in a Property Settlement Agreement incorporated into the parties' divorce Judgment was enforceable. The former husband had originally requested the arbitration of his wife's claim to resolve issues of past due alimony and child support and to compel discovery of his business records and his cross-application as to future payments based upon his alleged reduced circumstances.

After an extensive arbitration proceeding lasting several months, the arbitrator, without making any written findings, fixed the alimony and child support arrearages and denied the former husband's request for a reduction of his future alimony and child support obligations.

After the Chancery Division confirmed the arbitration award, the former husband, who had originally sought the arbitration, appealed the confirmation of the award contending for the first time in the Appellate Division that the arbitration of domestic disputes between former spouses as to alimony and child support should not, as a matter of public policy, be permitted to be settled outside of the Courts. The Appellate Division affirmed the confirmation of the arbitration award ruling that all of the former husband's issues were "clearly without merit."

Justice Garibaldi, a strong proponent of CDR speaking for the Court, indicated that in New Jersey, as in most American jurisdictions, arbitration is a favored remedy in that "it permits parties to agree to resolve disputes outside of the Court system."

After ruling that parties may bind themselves in Separation Agreements to arbitrate disputes over alimony, the Court discusses that some commentators have

suggested that arbitration is unsatisfactory to resolve disputes regarding child support or custody due to the Court's traditional role as parens patriae. The Court, in holding that arbitration of child support is permitted, states that whenever the validity of such an award is questioned on the grounds that it does not provide adequate protection for the child, the trial court should conduct a special review of the award.

Justice Garabaldi goes on to state, "We do not reach the question of whether arbitration of child custody and visitation rights is enforceable since that issue is not before us."

In *Fawzy*, the issue of the ability to agree to arbitrate child custody and parenting time in a binding procedure was clearly and directly before the Court.

The facts of *Fawzy* are as follows below.

The parties were married on September 28, 1991, and the two children of the marriage were born in 1996 and 1997. A divorce complaint was filed by the wife on September 13, 2005.

On January 22, 2007, the day of trial, the parties advised the Court that they had agreed to arbitrate rather than proceeding to trial. The parties further agreed that Leonard R. Busch, the Court-appointed guardian ad litem for the children would be the "binding arbitrator."

The parties were thereafter sworn in and the agreement to arbitrate was placed on the record. The judge stated that "arbitration is unappealable."

A Judgment of Divorce was entered on March 6, 2007, which included reference to the agreement to arbitrate, and an interim arbitration order was signed by the attorneys on March 14, 2007, which stated that "[t]he parties agreed to enter into Binding Arbitration pursuant to N.J.S.A. 2A:24-1 et. seq."

While the arbitrator was taking testimony, Mr. Fawzy filed an Order to Show Cause seeking to restrain the arbitrator from issuing a custody or parenting time award ,alleging that as a matter of law these issues cannot be the subject of arbitration, and in addition, he claimed that he was rushed and pressured into agreeing to the arbitration. The application was denied and the judge indicated that contrary to Mr. Fawzy's characterization of the arbitration as unreviewable, this was inaccurate because the award could in fact be modified based upon changed circumstances and an award could be vacated under N.J.S.A. 2A:24-8 (d), now N.J.S.A. 2A:23B-1 to 32 if the arbitrator exceeded his powers or if he executed them imperfectly.

The arbitrator then issued a custody and parenting award on April 4, 2007, granting joint legal custody to the parties with primary physical custody to Mrs. Fawzy, who was designated the Parent of Primary Residence, with Mr. Fawzy granted weekday, weekend, vacation, and holiday parenting time.

Thereafter, a second Order to Show Cause was filed on May 14, 2007, by Mr. Fawzy to vacate the arbitration award and to disqualify Mr. Busch from any further participation in the case, and in the alternative, he requested that the Court review the award de novo or stay the award pending appeal. He certified that he did not understand the rights he was waiving when he agreed to arbitration, and that he had not been involved in the process that led to the granting of the interim order. This application was also denied by the trial judge after a hearing, and an Amended Judgment of Divorce was entered on May 14, 2007, confirming the award and ordering Mr. and Mrs. Fawzy to comply with its terms.

Mr. Fawzy thereafter filed an appeal, contending that parties cannot submit custody issues to binding arbitration since doing so deprives the court of its parens patriae obligation to assure the best interests of the child. The Appellate Division reversed the trial court, noting that it was troubled by Mr. Fawzy's failure to establish that the award would harm the children, but they ultimately held that matrimonial litigants cannot submit custody issues to final, binding, non-appealable arbitration. They remanded the matter for a Plenary Hearing on the custody and parenting time.

Mrs. Fawzy then filed a Petition for Certification and Mr. Fawzy filed a cross-petition on the issue of whether an arbitrator in a child-custody proceeding may also serve as a guardian ad litem in that proceeding. The Supreme Court granted both the petition and cross-petition at 196 N.J. 595 (2008).

Speaking for the Court, Justice Long stated:

> We hold that within the constitutionally protected sphere of parental autonomy is the right of parents to choose the form in which their disputes over child custody and rearing will be resolved, including arbitration. Deference to the parties' choice of form requires certainty regarding that choice; an agreement to arbitrate must be in writing or otherwise recorded and must clearly establish that the parties are aware of their rights to a judicial determination and have knowingly and voluntarily waive them. Once arbitrated, the matter is subject to review under the narrow provisions of New Jersey's version of the Uniform Arbitration Act ("Arbitration Act"), N.J.S.A. 2A:23b-1 to -32. The only exception is the case in which a party establishes that the arbitrator's award threatens harm to the child. Best interests are not the standard for judicial review of an arbitration award. Only a threat of harm will justify judicial infringement on the fundamental right of parents to decide how to resolve disputes over their children's upbringing.

Justice Long went on to indicate that such an arbitration should be conducted in accordance with the principles set forth in the Arbitration Act, but since the Act does not require the recording of testimony or a statement of findings and conclusions by the arbitrator, the court was departing from the Act and mandated that a record of all documentary evidence produced during the arbitration proceeding be kept, that testimony be recorded, and that the arbitrator issue findings of fact and conclusions of law in respect of the award of custody

and parenting time so that courts would be in a position to evaluate a challenge to the award.

Justice Long quotes from Justice Garabaldi's opinion in *Faherty,* where the Court after ruling affirmatively on the ability to arbitrate child support stated "accordingly the policy reasons for our holding today with respect to child support may be equally applicable to child custody and visitation cases." Justice Long points out how since the deciding by the Court of *Faherty,* when few if any jurisdictions allowed arbitration of child-custody disputes, the majority of states that have addressed the issue have now concluded that parents are empowered to submit child-custody and parenting-time issues to arbitration in the exercise of their parental autonomy. She then indicates that the case is really about the intersection between parents' fundamental liberty interest in the care, custody and control of their children, and the state's interest in the protection of those children.

In discussing the standard of review of a child-custody arbitration award, the Court reaffirmed the *Faherty* standard and indicates that 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. In the absence of a claim of harm, the parties are limited to the remedies provided in the Arbitration Act. Where, however, harm is claimed and a prima facie showing is made, the Court must determine the harm issue. If no finding of harm ensues, the award will only be subject to review under the Arbitration Act standard. If there is a finding of harm, the presumption in favor of the parents' choice of arbitration will be overcome and it will fall to the court to decide what is in the child's best interests.

Justice Long goes on to indicate that mere disagreement with the arbitrator's decision will not satisfy the harm standard and that the threat of harm is a significantly higher burden than a best interest analysis.

In pointing out that at a minimum an agreement to arbitrate custody issues must be in writing or recorded in accordance with the statute, the Court indicated that the agreement must state in clear and unmistakable language that the parties understand their right to a judicial adjudication and are willing to waive that right, that they are aware of the limited circumstances under which a challenge to the arbitration award may be advanced and agree to those limitations, that they have had sufficient time to consider the implications of their decision to arbitrate and that the parties have entered into the Arbitration Agreement freely and voluntarily after due consideration of the consequences of doing so.

The Court also points out that the parties are not bound to arbitrate on an "all-or-nothing basis," but may choose to submit discrete issues to the arbitrator. They may also agree to a broader review than provided for by the default provisions of the arbitration statute.

The Court ultimately ruled that there was no written Arbitration Agreement despite the parties having testified affirmatively to questions regarding their agreement on the record, and the trial court did not fully explain the parties' statutorily limited ability to challenge the award without a change in circumstances nor did the trial court allude to the particular standards under which modification or vacation would be allowed.

The Court thus indicated the arbitration award could not stand since there was a lack of proof from which it could conclude that the parties understood what they were relinquishing by opting for arbitration. The Court further determined that it was inappropriate for the guardian ad litem to also serve as the arbitrator.

The big question asked by many members of the matrimonial bar is where do we go from here? What is the next step on the CDR road? The arbitrator granting the divorce? Direct appeal to the Appellate Division? Perhaps private judging (euphemistically referred to as "Rent-a Judge") as is common in California? Has the Court made a policy decision to remove matrimonial cases from the court system? So many questions. Stay tuned. ■