Comprehensive Arbitration of Domestic Relations Cases in Georgia

by Barry Edwards

In an average year, there are more than 150,000 domestic relations cases filed in Georgia's superior courts. There are more domestic relations cases filed each year than felony prosecutions, and domestic relations cases outnumber general civil cases in the superior courts.[1] Contested domestic relations cases in this area are also fact-intensive. The sheer number of these cases and the time and effort that it takes to bring contested actions to a conclusion inevitably consume a great deal of judicial resources.

Moreover, litigating domestic relations cases often exacts a tremendous emotional and economic toll on the individuals involved. Improving the means of resolving these cases in an efficient and fair manner would make a substantial contribution to the legal system in Georgia. Recent legislation in Georgia that authorizes binding arbitration of child custody and other matters affecting children offers such an improvement in the domestic relations area by allowing for the increased use of alternative dispute resolution.

Status of Domestic Relations Arbitration in Other States

Arbitration has been routinely used by various states to help resolve domestic relations cases. These states differ dramatically as to whether arbitration is available in domestic relations matters involving children.

North Carolina,[2] Michigan,[3] Texas,[4] Colorado,[5] Missouri[6] and New Hampshire,[7] for example, have enacted specific legislation to authorize binding arbitration of issues affecting children. Additionally, in the absence of specific legislation, courts in Pennsylvania,[8] the District of Columbia,[9] Maryland,[10] New Jersey,[11] Massachusetts[12] and Wisconsin[13] have concluded that agreements to arbitrate matters affecting children are enforceable and not contrary to public policy.[14]

On the other hand, appellate courts in Indiana[15] and Ohio[16] have held that agreements to arbitrate matters involving children are unenforceable as contrary to pub-

lic policies that favor protecting the best interests of children. Binding arbitration of matters affecting children is explicitly prohibited by statute in Florida[17] and by rule in California.[18]

Connecticut appellate courts have employed a middle-of-the-road approach, allowing minor parenting matters to be subject to binding arbitration but reserving fundamental issues impacting children for the trial courts.[19] The enforceability of agreements to arbitrate domestic relations matters affecting children has divided appellate courts in New York.[20]

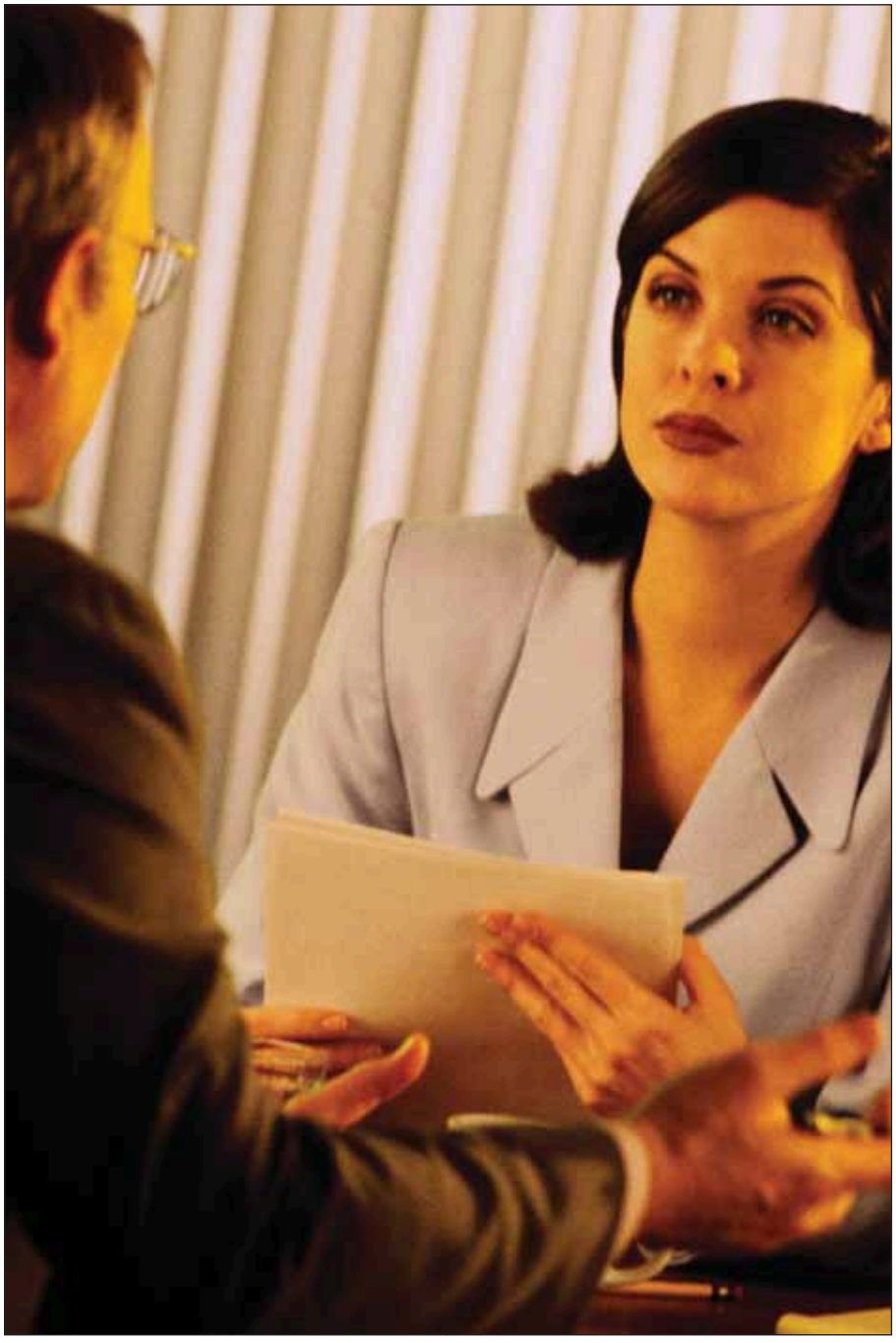
Comprehensive Domestic Relations Arbitration Now Permitted in Georgia

Arbitration, as a general matter, is a favored means of resolving disputes between litigants in Georgia.[21] In accord with this principle, arbitration has been routinely used to resolve domestic relations issues between adults, such as the division of marital property. The authority to decide issues involving children, such as custody, child support and visitation, through binding arbitration was unclear because Georgia courts have historically played a special role in protecting the best interests of children.[22] Thus, in the past, litigants in domestic relations cases involving mixed issues, some of which were arbitrable (e.g., division of marital property) and some of which were not (e.g., custody), likely looked to the courts to resolve all of their domestic relations issues in one proceeding rather than proceed in both arbitration and litigation. Recent legislation that increases an arbitrator's authority with regard to domestic relations issues involving children may make arbitration more attractive.

One provision of House Bill 369, signed into law last year, now specifically allows parents to agree to binding arbitration to resolve child custody, visitation and parenting plan issues. O.C.G.A. § 19-9-1.1, effective Jan. 1, 2008, provides:

> [I]t shall be expressly permissible for the parents of a child to agree to binding arbitration on the issue of child custody and matters relative to visitation, parenting time, and a parenting plan. The parents may select their arbiter and decide which issues will be resolved in binding arbitration. The arbiter's decisions shall be incorporated into a final decree awarding child custody unless the judge makes specific written factual findings that under the circumstances of the parents and the child the arbiter's award would not be in the best interests of the child. In its judgment, the judge may supplement the arbiter's decision on issues not covered by the binding arbitration.[23]

In light of this recent legislation, an agreement or order to arbitrate the issue of custody and related



matters cannot be held void as contrary to public policy.[24] Thus, arbitration is no longer a partial solution to domestic relations issues; a Georgia arbitrator may now craft a comprehensive solution in a domestic relations case.[25]

Applicable Georgia Arbitration Code Procedures

Because the Legislature did not enact a stand-alone domestic relations arbitration act, proceedings relying upon O.C.G.A. § 19-9-1.1 should follow, as much as possible, the generally-applicable Georgia Arbitration Code and the rules and procedures agreed to by the parties.[26] This article will not attempt to thoroughly discuss general arbitration practice, but rather will focus on the procedures most altered in the domestic relations context: confirmation, vacatur and modification.

After an award is issued through arbitration, a party may apply to the trial court for confirmation of the award, which shall be granted unless the award is vacated or modified.[27] If the arbitration award is confirmed by the trial court, it is incorporated into the court's final judgment and decree as provided by statute.[28] Because only a superior court may decree a married couple divorced, confirmation of an arbitration award should be expected in order to issue a final divorce decree.[29]

Under the Georgia Arbitration Code, a party has very limited grounds for moving to vacate an arbitration award.[30] Similarly, the Code also provides narrow grounds to grant a party's motion to modify an arbitration award.[31] Arbitration awards may generally only be vacated or modified based on the grounds enumerated in O.C.G.A. § 9-9-13 and § 9-9-14, respectively. As more fully discussed in the following section, however, when the award involves a child, the trial court is statutorily required to consider the best interest of the child at issue and may vacate or modify an award in light of that interest.

Superior Court Must Review Award in Light of the Best Interest of the Child

Even where binding domestic relations arbitration is permitted, courts have consistently recognized the trial court's independent duty and authority to protect the best interests of the child.[32] In Georgia,[33] as in Michigan,[34] Texas[35] and North Carolina,[36] the trial court's authority to consider whether an arbitration award is in the best interest of the child is codified. In light of this statutory mandate, the superior court should consider on its own whether the award is in the best interest of the child, even where none of the parties have requested such a review.

The trial court's role in reviewing arbitration awards regarding children is comparable to the court's role in reviewing voluntary settlements affecting children. The Supreme Court of Georgia has recently stated that a trial court has the ultimate duty to determine the propriety of a settlement agreement and must properly review a voluntary settlement agreement prior to its incorporation into a final decree of divorce.[37]

Whether parties reach agreement on their own, through private mediation, court-annexed mediation or by agreeing to an arbitration process, it is desirable to settle domestic relations cases without resorting to trial.[38] No matter how a resolution of issues affecting children is attained, it remains clear that trial courts maintain the authority to set private agreements aside to protect the best interest of the child.[39]

What Type of Review is Necessary?

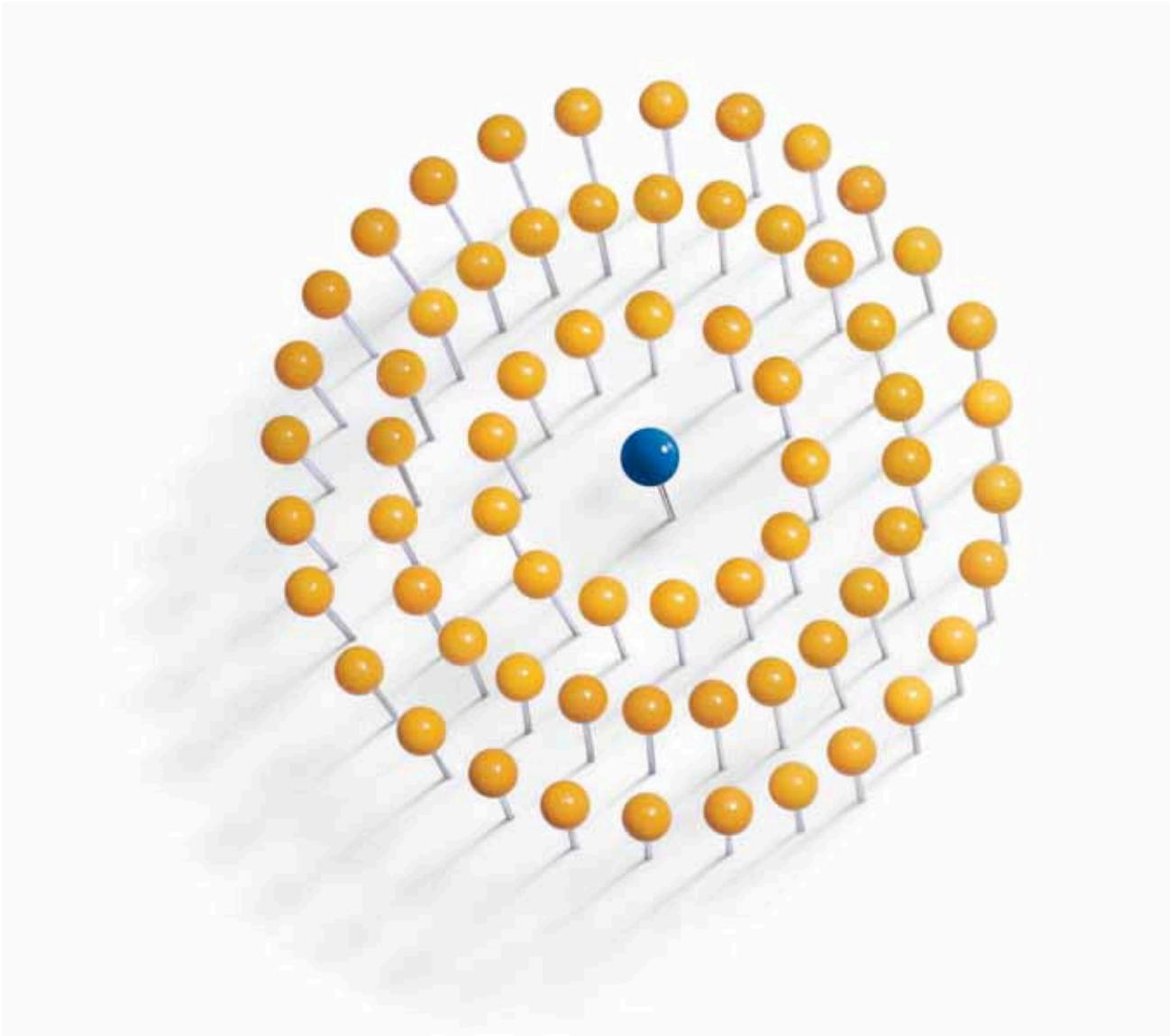
Given that trial courts must review domestic relations arbitration awards for the best interest of the child, it is important to establish exactly how courts should conduct that review. Because comprehensive domestic relations arbitration is a new development in Georgia and O.C.G.A. § 19-9-1.1 provides sparse instruction, however, it is not altogether clear how superior courts are to proceed. Case law from other states may provide persuasive instruction for Georgia courts considering the issue.

The case of *MacIntyre v. MacIntyre*[40] may be the leading authority on the standard of review that a trial court should give to an arbitrator's domestic relations award affecting a child. In that case, the party who lost custody at arbitration moved to vacate the arbitrator's award and requested a de novo evidentiary hearing to determine the custody issue. The trial court instead conducted a de novo *review* of the arbitration without conducting an evidentiary hearing and entered a divorce decree consistent with the award. The Michigan Court of Appeals held that the trial court erred and remanded the matter to the trial court to conduct a de novo evidentiary hearing. The Michigan Supreme Court reversed the Court of Appeals and stated:

> The parties' agreements may not waive the availability of an evidentiary hearing if the circuit court determines that a hearing is necessary to exercise its independent duty[.] . . . But as long as the circuit court is able to "determine independently what custodial placement is in the best interest of the children" . . ., an evidentiary hearing is not required in all cases.[41]

This rule has been consistently followed in subsequent appellate decisions in Michigan.[42]

Texas also provides some indication of how trial courts should review domestic relations arbitration awards.[43] In the case of *In the Interest of C.A.K.*,[44] the Texas Court of Appeals considered whether a



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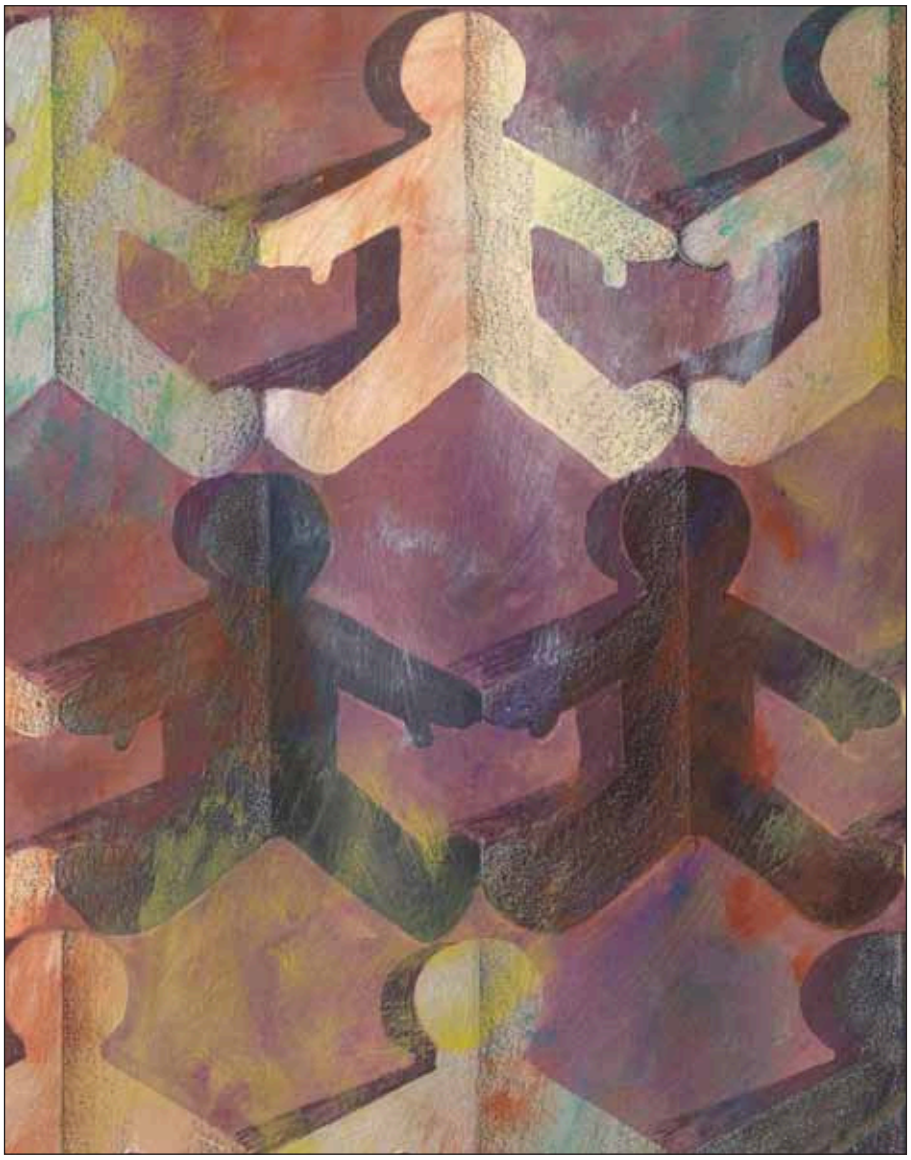

trial court erred in confirming an arbitration award that modified child custody without first holding an evidentiary hearing to determine whether the award was in the child's best interests. The challenger did not request a best interest hearing and actually agreed to waive her right to the hearing. The Court of Appeals held that trial courts are not always required to conduct a best interest hearing before confirming an arbitration award. The court emphasized the statutory terms "shall" and "unless" to support its conclusion that conducting an evidentiary hearing is an exceptional procedure, not the general rule.[45]

The conclusion reached in Michigan and Texas has also been reached in other states. For example, in *Reynolds v. Whitman*,[46] the Massachusetts Appeals Court held that there was no need for an evidentiary hearing where the trial court judge considered the arguments of counsel and received financial statements and other written documents to review the arbitrator's award.[47]

In *Faherty v. Faherty*,[48] the New Jersey Supreme Court used a slightly different approach and held that when a domestic relations arbitration award is challenged, the trial court should first consider the traditional grounds for vacatur. Next, the court "should conduct a *de novo* review unless it is clear on the face of the award that the award could not adversely affect the substantial best interests of the child."[49]

These cases suggest that Georgia superior courts should independently review arbitration awards to consider the best interests of children affected, but may conduct their review of arbitration awards in the manner that is appropriate in a given case and are not necessarily required to conduct a de novo hearing of the evidence.

Arguments and Evidence at a Best Interest Hearing

Some parties that "lose" an arbitration hearing seek vacatur by arguing that the hearing process itself was flawed.[50] This tactic may be regarded as employing an "appellate parachute." Courts frequently reject such motions, reasoning that the complaining party expressly or impliedly consented to proceed in the manner that they contend was flawed.[51]

Some courts have suggested that where a best interest hearing is required, trial courts "could utilize the proof adduced before the arbitration tribunal, could call for new proof, or could employ a combination of both."[52] Because the rules of evidence are typically relaxed in an arbitration hearing, some of the arbitration record may not be the type of evidence upon which a trial court would ordinarily rely. Because a judge is not required to make factual findings to conduct his or her review to confirm an award, this evidentiary issue may be limited to orders to vacate or modify the arbitration award.

Under the Georgia Arbitration Code, "[u]pon vacating an award, the court may order a rehearing and determination of all or any of the issues either before the same arbitrators or before new arbitrators[.]"[53] Therefore, if a trial court vacates an award on the grounds that it is not in the best interest of the child, the matter should be sent back to arbitration.[54] The trial court is not permitted to substitute its judgment on matters affecting children in its final decree. Consistently, O.C.G.A. § 19-9-1.1 provides: "In its judgment, the judge may supplement the arbiter's

decision on issues not covered by the binding arbitration."

What About Child Support?

Interestingly, O.C.G.A. § 19-9-1.1 does not specifically authorize parents to agree to arbitrate the issue of child support. Thus, one may wonder whether an agreement to arbitrate child support is enforceable under Georgia law. In a recent footnote, the Supreme Court of Georgia narrowly avoided deciding whether an arbitrator can determine child support payments.[55] As a result, there is no definitive guidance on this issue.

O.C.G.A. § 19-6-15(c)(5), however, provides that a voluntary agreement by the parties for child support that is contrary to the presumptive amount of support under the child support guidelines is subject to review by the trial court. If the agreement does not contain findings of fact to support the deviation, the court shall reject it.[56] Because parties may agree to an amount of support, it follows that parties may agree to a method of determining the amount of support that will be subject to judicial review. Similarly, given that the Georgia Legislature has approved arbitration of child custody, it would follow that the state's public policy also supports arbitrating the related and rather technical matter of child support. Thus, if the arbitrator's support award is contrary to the presumptive amount of support under the guidelines, the factual basis for this departure would likely be subject to review by the trial court. Hopefully, the Supreme Court's Family Law Pilot Project will provide it the opportunity to definitively answer the question of child support arbitration in the near future.[57]

Cooperation or Antagonism?

One finds in appellate opinions and academic literature a widespread sentiment that it is necessary *either* to decide matters efficiently through arbitration *or* to protect the best interest of children. If a trial court treats a domestic relations arbitration award with the typical deference that it applies to other arbitration awards, these authors maintain, the court's role in protecting children is frustrated. On the other hand, if courts routinely conduct de novo hearings questioning arbitrators' findings, the utility of arbitration in the domestic relations context is lost.

This author would suggest that this widespread belief is premised on a false choice between arbitration and children. Does protracted litigation really serve the best interests of children?[58] How can one ascribe inherent features to arbitration proceedings when the choice of rules, procedures and identity of the arbitrator is largely a matter of choice of the individual parties involved? What is the record in states that have permitted domestic relations arbitration?

As we gain familiarity with domestic relations arbitration in Georgia, we may learn how to better protect the best interests of children *and* use arbitration in the domestic relations context.[59] The experience of other states suggests adopting a review standard that enables judges to safeguard the best interests of children while, at the same time, allowing parties to effectively and efficiently resolve domestic relations issues through arbitration.

If comprehensive domestic relations arbitration is to succeed in Georgia, it is important that the arbitration proceedings cultivate trust and confidence from the courts. To that end, these arbitration proceedings should be conducted under rules that allow thorough consideration of relevant evidence, including proper consideration of the best interests of children. Parties should agree to sound rules and procedures at the outset before parties know who will "prevail." Arbitrators should also be sure to apply applicable law to the matters in dispute.

Moreover, it is not enough to simply apply these processes during the arbitration hearing; arbitrators must be sure that they also detail them in the arbitrator's award with sufficient clarity for the court on review. If an arbitrator's application of law to the evidence presented during the arbitration hearing is not apparent in a detailed award, how can a judge review whether the award is in the best interests of the children and incorporate the arbitrator's findings into a final judgment and decree?

The Georgia Arbitration Code does not require that a record of proceedings be kept in all cases,[60] but parties and arbitrators should consider making a reviewable record of the testimony and exhibits introduced during arbitration.[61] This will facilitate the court's review and may also eliminate any need to have further evidence submitted into the record.

Can Parties Modify Review and Appeal Standards?

An interesting question is whether parties can agree to modify the terms on which their arbitration award is reviewed by the trial and appellate courts. Perhaps allowing parties to appeal a mistaken arbitration award on the same terms that they may appeal a judgment from trial would give parties confidence to proceed through arbitration.[62] Appellate courts in some states have not been receptive to this concept.[63] Other states, however, have embraced modified review standards. In California, "private judges" are becoming an increasingly popular method of resolving celebrity divorces.[64] North Carolina has codified a provision that allows parties to preemptively agree to judicial review for errors of law in a domestic relations arbitration award.[65]

Outside of the domestic relations context, several federal appellate courts have specifically permitted parties to expand the grounds upon which the trial court may vacate or modify their arbitration awards.[66] These federal cases may someday be cited in the domestic relations context. The Supreme Court of Georgia has stated, "Because our state arbitration code closely tracks federal arbitration law, we look to federal cases for guidance in construing our own statutes."[67]

Modification Actions

What if parties to a binding arbitration seek to modify an award based on a subsequent material change of circumstances?

Generally, a party has just three months to apply for modification of an arbitration award based on the narrow grounds provided by O.G.C.A. § 9-9-14(b). Certainly, the time limitations on modifying an arbitration award cannot be construed to limit the continuing jurisdiction of Georgia's superior courts over child custody orders and other domestic relations issues.[68] Because parties may not restrain the trial court's authority to review arbitration awards for the best interests of children, it may follow that parties cannot agree to restrict the court's continuing jurisdiction over modification actions.

Assuming that a party may seek modification of an arbitration award based on a material change of circumstances at any time, the question arises whether the parties must arbitrate the proposed modification. If the initial agreement or order to arbitrate specifically contemplates future modification actions, then the parties would likely be required to arbitrate the modification. In situations where future modification petitions were not addressed, the answer is much less clear. North Carolina addresses modification actions based on substantially changed circumstances through a specific statute that provides parties several options.[69] Georgia provides no such specific guidance. In the absence of a default rule to follow, determining whether the proposed modification is subject to arbitration may require careful interpretation of the arbitration agreement or order.

As a practical matter, if domestic relations arbitration proves a useful method of initially deciding domestic relations issues, it would likely also be helpful in resolving applications for modification. Similarly, family law attorneys may find arbitration a useful method for resolving disputes that arise out of settlement agreements.

Conclusion

Attorneys who work in the dispute resolution field have an important role to play in the success or failure of this new process. It may require some refinement. The experience of other states suggests that we can expedite the resolution of domestic relations cases and, at the same time, protect the best interests of children. Hopefully, the State Bar of Georgia will embrace this opportunity. GBJ

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Endnotes

1. Judicial caseload statistics are derived from the Administrative Office of the Courts of Georgia's Annual Reports and Research Reviews, available at http://www.georgiacourts.org/aoc/.
2. N.C. GEN. STAT. §§ 50-41 to 50-62 (1999). Passed in 1999, the North Carolina Family Law Arbitration Act was the first state arbitration statute specifically designed for domestic relations cases. The North Carolina Bar Association has published a Family Law Handbook containing model rules and forms for arbitrating family law cases under the Act, available at http://family.ncbar.org.
3. Under Michigan's Domestic Relations Arbitration Act, passed in 2001, parties "may stipulate to binding arbitration by signed agreement" of issues including child custody, child support and parenting time. *See* MICH. COMP. LAWS §§ 600.5070 to .5082 (2001).
4. TEX. FAM. CODE ANN. § 153.0071(b) (2007).
5. COLO. REV. STAT. § 14-10-128.5 (2008) (arbitrator may be appointed to resolve disputes concerning the parties' minor or dependent children); *see also In re* Popack, 998 P.2d 464 (Colo. App. 2000) (stating that issues affecting children may be arbitrated but are subject to de novo review).
6. MO. REV. STAT. § 435.405(5) (2008) (providing for de novo judicial review of arbitration awards that determine issues regarding children of a marriage).
7. N.H. REV. STAT. ANN. § 542:11 (1997).
8. *See* Miller v. Miller, 620 A.2d 1161 (Pa. Super. Ct. 1993) (agreements to arbitrate custody disputes are not void but trial court is not bound by arbitrator's award in order to protect best interest of the child).
9. Spencer v. Spencer, 494 A.2d 1279 (D.C. 1985) (arbitration of custody and child support is permitted but subject to trial court review for best interest of child concerned).
10. Kovacs v. Kovacs, 633 A.2d 425 (Md. Ct. Spec. App. 1993) (arbitration permitted but trial court must exercise its independent judgment to determine whether the best interests of the children are met by the award).
11. Faherty v. Faherty, 477 A.2d 1257 (N.J. 1984).
12. Reynolds v. Whitman, 663 N.E.2d 867 (Mass. App. Ct. 1996) (arbitration award of alimony and child support must be subject to review by trial court judge).
13. Cashman v. Huff, 650 N.W.2d 559 (Wis. Ct. App. 2002) (affirming trial court confirmation of arbitration award modifying custody without questioning the legality of an agreement to arbitrate post-judgment placement disputes).
14. Readers interested in a comprehensive review of the status of domestic relations arbitration on a state-by-state basis are encouraged to consult LINDA ELROD, CHILD CUSTODY PRACTICE & PROCEDURE § 16:4 (Arbitration) (2007) and Elizabeth Jenkins, Annotation, *Validity and Construction of Provisions of Arbitration of Disputes as to Alimony or Support Payments or Child Visitation or Custody Matters*, 38 A.L.R.5th 69 (1996).
15. In *Cohoon v. Cohoon*, 770 N.E.2d 885 (Ind. Ct. App. 2002), the Indiana Court of Appeals held that a settlement agreement term to arbitrate child support, custody and visitation issues was void as contrary to public policy. On appeal, the Indiana Supreme Court did not decide the validity of the binding arbitration agreement. *Id.* at 904.
16. In *Kelm v. Kelm*, 749 N.E.2d 299 (Ohio 2001), the Ohio Supreme Court held that parents could agree to arbitrate child support but held that their agreement to arbitrate child custody and visitation was void as contrary to public policy.
17. *See* FLA. STAT. § 44.101(14) (2006) (child custody, visitation and child support are not subject to voluntary binding arbitration). *But see* Schulberg v. Schulberg, 883 So. 2d 351 (Fla. Dist. Ct. App. 2004) (parents may arbitrate dispute over child's private school education, despite statutory prohibition of arbitrating matters affecting children).
18. CAL. R. CT. 3.811(b)(5) provides that family law act proceedings, except property division in divorce actions, are exempt from arbitration eligibility.
19. *See* Masters v. Masters, 513 A.2d 104, 112-14 (Conn. 1986) (child support can be arbitrated, but arbitration of child custody is prohibited; arbitration can help resolve "minor decisions relating to the day-to-day upbringing and support of minor children," which the judicial process frequently worsens); Nashid v. Andrawis, 847 A.2d 1098, 1101 (Conn. App. Ct. 2004) (order to arbitrate substantive parenting issues is improper delegation of trial court authority).
20. New York's First Appellate Department authorized binding arbitration of custody and visitation issues, subject to trial court review for the best interest of the child, in *Sheets v. Sheets*, 254 N.Y.S.2d 320 (App. Div. 1964), but the *Sheets* decision was called into question by the Second Appellate Department in *Nestel v. Nestel*, 331 N.Y.S.2d 241 (App. Div. 1972), and *Glauber v. Glauber*, 600 N.Y.S.2d 740 (App. Div. 1993). More recent decisions indicate that binding arbitration of matters affecting children is not allowed in New York. *See* Stein v. Stein, 707 N.Y.S.2d 754 (Sup. Ct. 1999).
21. *See* Ghertner v. Solaimani, 254 Ga. App. 821, 825, 563 S.E.2d 878, 881 (2002) (legislature's adoption of Georgia Arbitration Code establishes clear public policy in favor of arbitration).
22. *See* Harper v. Ballensinger, 226 Ga. 828, 830, 177 S.E.2d 693, 694 (1970) (courts must act as parents patriae to protect best interests of children).
23. O.C.G.A. § 19-9-1.1 (Supp. 2007).

24. "What the Legislature allows cannot be contrary to public policy." NEC Techs., Inc. v. Nelson, 267 Ga. 390, 394, 478 S.E.2d 769, 773 (1996). Additionally, "[t]hat which the law specifically permits cannot be unconscionable." William J. Cooney, P.C. v. Rowland, 240 Ga. App. 703, 704, 524 S.E.2d 730, 732-33 (1999).
25. Parties could still agree to arbitrate particular issues and litigate others.
26. The Georgia Arbitration Code does not apply to "[a]ny other subject matters currently covered by an arbitration statute." O.C.G.A. § 9-9-2(c)(4) (2007) (referring to stand-alone arbitration statutes). Interestingly, the Legislature passed H.B. 369 rather than S.B. 201 for a "Georgia Family Law Arbitration Act." S.B. 201 called for a separate and comprehensive set of statutes to govern domestic relations arbitration akin to the family law arbitration acts in Michigan and North Carolina or Georgia's Medical Malpractice Arbitration Act.
27. O.C.G.A. § 9-9-12 (2007).
28. *Id.* § 9-9-15. For an interesting illustration of these procedures, see *Ciraldo v. Ciraldo*, 280 Ga. 602, 631 S.E.2d 640 (2006), where the trial court incorporated a non-existent arbitration award into its final judgment and decree.
29. Georgia's superior courts have exclusive jurisdiction over divorce cases. GA. CONST. art. VI, § 4, ¶ 1.
30. *See* O.C.G.A. § 9-9-13(b) (2007). This statute has been strictly construed. *See* ABCO Builders, Inc. v. Progressive Plumbing, Inc., 282 Ga. 308, 309, 647 S.E.2d 574, 575 (2007) (elaborating the "manifest disregard of the law" standard).
31. O.C.G.A. § 9-9-14(b) (2007). If a party believes that the arbitrator's award is mistaken, O.C.G.A. § 9-9-11 authorizes a party to request that the arbitrator correct mistakes or perfect the form of the award. The grounds for an arbitrator's correcting the award are the same as the grounds for a trial court's modifying the arbitrator's award pursuant to O.C.G.A. § 9-9-14.
32. The Michigan case of *Dick v. Dick*, 534 N.W.2d 185 (Mich. Ct. App. 1995) is the only appellate court opinion that this author has located that would not permit a trial court to review an arbitration award based on the best interest of the child. This may be "bad law" resulting from an "acrimonious" and "vexatious" litigation. *Id.* at 187. The Michigan Domestic Relations Arbitration Code supersedes this decision, and *Dick* is not followed in more recent Michigan cases. *See* MacIntyre v. MacIntyre, 693 N.W.2d 822 (Mich. 2005), and the cases cited *infra* note 42.
33. O.C.G.A. § 19-9-1.1 (Supp. 2007).
34. MICH. COMP. LAWS 600.5080 (1998); *see also* Harvey v. Harvey, 680 N.W.2d 835 (Mich. 2004) (parties cannot usurp trial court's statutory duty to review custody decision by agreement).
35. TEX. FAM. CODE ANN. 153.0071(b) (2004) provides: "If the parties agree to binding arbitration, the court shall render an order reflecting the arbitrator's award unless the court determines at a non-jury hearing that the award is not in the best interest of the child."
36. N.C. GEN. STAT. § 50-54(a)(6) (2007).
37. *See* Arnold v. Arnold, 282 Ga. 246, 647 S.E.2d 68 (2007) (affirming where the trial court properly reviewed the evidence and considered the arguments of the parties before incorporating their voluntary settlement into its final judgment and decree); *see also* Page v. Page, 281 Ga. 155, 635 S.E.2d 762 (2006).
38. O.C.G.A. § 19-9-5(b) (Supp. 2007) now provides for ratification of voluntary custody agreements in similar terms to the arbitration statute:

    > The judge shall ratify the agreement and make such agreement a part of the judge's final judgment in the proceedings unless the judge makes specific written factual findings as a part of the final judgment that under the circumstances of the parents and the child in such agreement that the agreement would not be in the best interests of the child.

39. A number of sources compare trial court review of voluntary domestic relations settlements to arbitration awards on the same subject matter. *See* Miller v. Miller, 620 A.2d 1161, 1164-65 (Pa. Super. Ct. 1993). It would, however, be rather ironic for judges to be more skeptical of a decision reached by an arbitrator (generally a lawyer) based on an adversarial process generally conducted in the manner of a trial than a compromise agreement reached between parents working with a mediator (often a non-lawyer) in an informal setting.
40. 693 N.W.2d 822 (Mich. 2005).
41. *Id.* (citations omitted).
42. *See, e.g.*, Kirby v. Vance, No. 136050, 2008 WL 314943 (Mich. June 11, 2008) (trial court must make independent review of arbitration award); Hartt v. Hartt, No. 276227, 2007 WL 4731071 (Mich. Ct. App. Jan. 27, 2007) (trial court made independent determination of children's best interests by thorough review of arbitrator's findings; not required to consider transcribed witness testimony); *see also* Mark Snover, *Recent Case Law's Impact on Family Law Arbitration*, 85 MICH. B.J. 20 (Feb. 2006) (concluding that the prevailing review standard has become "much more user friendly.")
43. In another illustrative case, the Texas Court of Appeals considered a motion to vacate an arbitrator's award regarding the modification of child support. The court observed that a trial court may vacate an arbitrator's award only as (1) allowed by the Texas Family Code, or (2) as allowed under the Texas Arbitration Act. A party moving to vacate an award that "is not in the best interests of the child" bears the burden of proving the award is not in the child's best interest. The trial court conducted an evidentiary hearing and then vacated the arbitration award. The Court of Appeals found that the trial court did not abuse its discretion. *See* Stieren v. McBloom, 103 S.W.3d 602 (Tex. App. 2003).
44. 155 S.W.3d 554 (Tex. App. 2004).
45. *Id.* at 561.
46. 663 N.E.2d 867 (Mass. App. 1996).
47. *Id.* at 871; *see also Bagley v. Bagley*, No. 03-P-907, 2005 WL 549477 (Mass. App. Ct. Mar. 8, 2005) (trial court judge appropriately confirmed arbitration award deciding custody, child support and alimony after hearing arguments by counsel at hearing); *Miller v. Miller*, 620 A.2d 1161, 1165 n.4 (Pa. Super. Ct. 1993) (observing that simply because an arbitration award

affects a child, it does not necessarily follow that the award adversely affects the child and, thus, a de novo evidentiary hearing is not always necessary) (citing Sheets v. Sheets, 254 N.Y.S.2d 320 (App. Div. 1964)).
48. 477 A.2d 1257 (N.J. 1984).
49. *Id.* at 1263.
50. *See, e.g,.* Cashman v. Huff, 650 N.W.2d 559 (Wis. 2002) (party that fails to participate in arbitration, present evidence at arbitration regarding child's best interest or request court evaluation of child's best interest may be estopped from challenging arbitration award).
51. *See* Deer Creek, Inc. v. Section 1031 Servs., Inc., 235 Ga. App. 891, 893, 510 S.E.2d 853, 856 (1999) (where party continues with arbitration with notice of error and without objection, that party cannot later cite error as grounds to vacate award) (citing O.C.G.A. § 9-9-13(b)(4) (2007)).
52. *Miller*, 620 A.2d at 1165 (quoting *Sheets*, 254 N.Y.S.2d at 324).
53. O.C.G.A. § 9-9-13(e) (2007).
54. In *Stieren v. McBloom*, 103 S.W.3d 602 (Tex. App. 2003), the Texas Court of Appeals found that the trial court abused its discretion by ruling on the subject matter of the arbitration, the modification of child support, after it vacated the arbitrator's award. Under the Texas Arbitration Act, "the matter must be sent back to arbitration." *Id.* at 607.
55. Page v. Page, 281 Ga. 155, 156 n.3, 635 S.E.2d 762, 764 n.3 (2006) (parties stipulated to arbitrate all financial issues, including child support, but reached settlement before arbitrating).
56. Pursuant to O.C.G.A. § 19-5-12(c) (Supp. 2007), in any case involving child support, the court shall include certain specific findings in its final divorce decree.
57. *See* Maddox v. Maddox, 278 Ga. 606, 607 n.1, 604 S.E.2d 784, 785 n.1 (2004) (noting that under the Pilot Project, the Georgia Supreme Court will grant any non-frivolous discretionary application seeking review of a final decree of divorce).
58. *See* Joan Kessler, Allen Koritzinsky & Stephen Schlissel, *Why Arbitrate Family Law Matters?*, 14 J. AM. ACAD. MATRIMONIAL LAW. 333, 342-44 (1997).
59. The New Jersey Supreme Court has suggested: "As we gain experience in the arbitration of child support and custody disputes, it may become evident that a child's best interests are as well protected by an arbitrator as by a judge." Faherty v. Faherty, 477 A.2d 1257, 1263 (N.J. 1984).
60. O.C.G.A. § 9-9-8(e) (2007).
61. In Michigan, parties are required to record portions of the arbitration hearing concerning children. *See* MICH. COMP. LAWS 600.5077(2) (1998). The Michigan Supreme Court has recently held that a truly independent review is not possible without a properly recorded arbitration record. *See* Kirby v. Vance, No. 136050, 2008 WL 314943 (Mich. June 11, 2008).
62. For a compelling argument that parties should be allowed to preserve the right to appeal errors of law in the award by agreement, see Frank L. McGuane, Jr., *Model Marital Arbitration Act: A Proposal*, 14 J. AM. ACAD. MATRIMONIAL LAW. 393 (1997).
63. *See* Dick v. Dick, 534 N.W.2d 185, 191 (Mich. Ct. App. 1995) (finding no authority for this "hybrid form of arbitration").
64. A key difference between an arbitrator and a "private judge" is that the latter's award may be appealed directly to an appellate court. *See* Sheila Nagaraj, *The Marriage of Family Law and Private Judging in California*, 116 YALE L.J. 1615 (2007).
65. N.C. GEN. STAT. § 50-54(a)(8) (2007).
66. *See, e.g.,* LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884 (9th Cir. 1997) (parties may authorize district court to vacate, modify or correct findings of fact that are not supported by substantial evidence and erroneous conclusions of law); Gateway Techs., Inc. v. MCI Telecomm. Corp., 64 F.3d 993 (5th Cir. 1995) (parties may agree for de novo judicial review of errors of law in an arbitration award). *But see Chicago Typographical Union v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1507 (7th Cir. 1991) (dicta against modified review standards). These conflicting opinions may have been recently resolved by the United States Supreme Court. *See* Hall Street Assocs., LLC v. Mattel, Inc., 128 S. Ct. 1396, 1403 (2008) (holding that §§ 10 and 11 of the Federal Arbitration Act provide the exclusive grounds for expedited vacatur and modification but other statutes and rules may authorize more searching judicial review of arbitration awards).
67. ABCO Builders, Inc. v. Progressive Plumbing, Inc., 282 Ga. 308, 647 S.E.2d 574 (2007).
68. In *Cohoon v. Cohoon*, 770 N.E.2d 885 (Ind. Ct. App. 2002), for example, the Indiana Court of Appeals cautioned that following strict arbitration provisions would strip courts of their continuing jurisdiction to modify custody and support order. *Id*. at 892-93.
69. N.C. GEN. STAT. §§ 50-56 (2007).