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THE ENFORCEABILITY OF ARBITRATION CLAUSES IN VIRGINIA MARITAL SEPARATION AGREEMENTS

Arbitration, a widely utilized method for resolving commercial and labor disagreements, has become an increasingly accepted means of settling domestic disputes that arise under separation or divorce agreements.¹ The number of judicial decisions reviewing clauses in divorce and separation agreements which provide for the arbitration of disputes involving spousal support payments, child support and custody matters, has more than doubled since 1950.² In a number of jurisdictions, courts have consistently enforced arbitration clauses to settle matrimonial disputes.³ Attorneys are more frequently drafting separation agreements which con-

1. Coalson, *Family Arbitration—An Exercise in Sensitivity*, 3 FAM. L.Q. 22, 22 (1969). Inter-spousal agreements formed before marriage are "antenuptial," those formed during marital harmony are "postnuptial," and those formed in contemplation of or during separation are separation agreements. 1 A. LINDEY, SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 3, at 3-6 to -7 (1978).

2. Annot., 18 A.L.R.3d 1264, 1266 (1968). States which have considered the use of arbitration in domestic cases include California, Delaware, Indiana, Kentucky, Maine, Massachusetts, New Jersey, New York, North Carolina and Tennessee. *See id.* at 1264. The American Arbitration Association (AAA) has convened a special committee to study the need for more accessible and inexpensive means for dispute resolution. This committee recently concluded a study on alternatives to formal litigation and reviewed a number of states whose legislatures had made significant progress in formulating dispute resolution laws. The report briefly analyzes passed or pending legislation in California, Colorado, Connecticut, Delaware, Florida, Michigan, Minnesota, New York, North Carolina, Oklahoma and Texas. L. FREEDMAN & L. RAY, STATE LEGISLATION ON DISPUTE RESOLUTION 1 (ABA Special Committee on Alternative Dispute Resolution, Monograph Series No. 1 1982). The study found that, as of 1982, 188 communities in 38 states have established neighborhood and citizen oriented dispute centers. Further, the study found that there were over four hundred private agencies and city governmental entities designed to resolve problems by providing informal processes instead of formal litigation. *Id.* at "forward." For information on over one hundred of these dispute resolution programs (such as types of cases, funding sources, annual caseloads, staff and training) see SPECIAL COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION, A.B.A. DISPUTE RESOLUTION PROGRAM DIRECTORY (L. Ray ed. 1982).

3. *See generally* Annot., 18 A.L.R.3d 1264 (1968). Provisions for the arbitration of disputes governing spousal and child support payments have generally been upheld. *See, e.g.,* Faherty v. Faherty, 97 N.J. 99, 477 A.2d 1257 (1984). However, cases which have examined provisions for the arbitration of disputes involving child custody or visitation rights are split. *Compare* Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982) (parties may settle custody issues by arbitration, although the decisions are reviewable by the court) and Sheets v. Sheets, 22 A.D.2d 176, 254 N.Y.S.2d 320 (1964) (agreement to submit issue of child custody to arbitration held valid and enforceable) *with* Nestel v. Nestel, 38 A.D.2d 942, ___, 331 N.Y.S.2d 241, 243 (1972) (agreements to arbitrate custody and visitation of minor children is inappropriate; "the judicial process is more broadly gauged and better suited" to protect the children's best interests).

tain arbitration clauses,⁴ and the American Arbitration Association has promulgated a variety of rules and procedures specifically designed to deal with such agreements.⁵ However, Virginia courts have yet to decide whether arbitration clauses in separation agreements are judicially enforceable under the Virginia arbitration statutes.⁶

Arbitration is one of a growing array of marital dispute resolution alternatives⁷ which are increasingly utilized by the public and advocated as worthy alternatives to the courtroom.⁸ However, there is a continued con-

4. See generally Coalson, *supra* note 1; Comment, *The Enforceability of Arbitration Clauses in North Carolina Separation Agreements*, 15 WAKE FOREST L. REV. 487, 487 (1979).

5. See Spencer & Zammit, *Reflections on Arbitration Under the Family Dispute Services*, 32 ARB. J. 111 (1977). In 1976 the American Arbitration Association promulgated a series of rules and procedures designed to specifically deal with the resolution of marital disputes. The Association drafted a model arbitration clause:

Any controversy arising out of or relating to this agreement or the breach thereof, shall be settled in accordance with the rules of the American Arbitration Association. Both parties agree to abide by the terms of the award rendered by the arbitrator[s] and judgment upon the award may be entered in any court having jurisdiction thereof.

AMERICAN ARBITRATION ASSOCIATION, *FAMILY DISPUTE SERVICES* 305 (1977).

The AAA is a non-profit organization, and while it does not act as an arbitrator, it provides services and facilities for arbitration. The AAA is basically an administrative agency, with services including providing lists from which arbitrators may be selected, as well as supplying administrative personnel and procedures for cases being arbitrated under its rules. F. ELKOURI & E.A. ELKOURI, *HOW ARBITRATION WORKS* 25 (3rd ed. 1973) [hereinafter cited as ELKOURI].

6. VA. CODE ANN. §§ 8.01-577 to -581 (Repl. Vol. 1984).

7. Phear, *Family Mediation: A Choice of Options*, 39 ARB. J. 23 (1984). Other options to adjudication include mediation, negotiation and conciliation. Negotiation has long been used by divorcing spouses and their counsel, while mediation and conciliation are becoming increasingly used. See generally VIRGINIA LAW FOUNDATION, *SECOND ANNUAL FAMILY LAW SEMINAR: AVOIDING LITIGATION IN DIVORCE SETTLEMENTS—RECENT DEVELOPMENTS IN FAMILY LAW* (1983).

Conciliation is an informal process which involves a very limited role for the conciliator. Generally, the conciliator's main role is simply to facilitate discussions and negotiations between the parties. He or she is, theoretically, not supposed to take an active role in the discourse between the parties, but merely to serve as a "go-between" who provides a place and time for negotiations to occur. See Phear, *supra*, at 23-24.

Mediation is a third party intervention strategy in which the mediator actively participates in the identification, clarification and resolution of controversies between disputing parties. By definition, mediators do not have the coercive powers of an arbitrator. Rather, they must rely on the mutual agreement of the "disputants" to continue their mediation sessions and to come to a resolution of the controversy. *Id.* For a comparison between mediation and arbitration, see Meroney, *Mediation and Arbitration of Separation and Divorce Agreements*, 15 WAKE FOREST L. REV. 467 (1979).

8. See Broderick, *Compulsory Arbitration: One Better Way*, 69 A.B.A. J. 64 (1983) (an arbitration program can provide litigants with a less expensive and more expedient alternative for the resolution of their disputes than the courtroom); Coalson, *supra* note 1, at 22-24; Phear, *supra* note 7, at 23; Comment, *supra* note 4, at 487.

There are basically three types of arbitration: (1) the single arbitrator, (2) an impartial

troverly over whether public policy will permit divorcing spouses to resolve all aspects of their disputes through arbitration⁹—particularly disputes involving child support, custody and visitation. Several jurisdictions have addressed this debate, and have formulated various responses regarding the enforceability of arbitration agreements between divorcing spouses.¹⁰

This comment will analyze Virginia cases and statutory law, and compare the relevant Virginia authority to the positions adopted by the other jurisdictions. By considering Virginia law, examining the public policy arguments, and integrating the positions adopted in other jurisdictions, this comment seeks to formulate the likely Virginia response to the enforcement of arbitration clauses in marital separation agreements.

I. BACKGROUND: ARBITRATION AS A SUBSTITUTE FOR THE COURTROOM

A. *An Overview of Arbitration*

An agreement to arbitrate generally consists of a contract between the parties to submit their dispute to an arbitrator, and a grant of power from each side authorizing the arbitrator to act on their behalf to resolve the conflict.¹¹ At common law there was no right of arbitration, and if a dispute was to be submitted for arbitration it usually had to be pursuant to a statute.¹²

tri-partite board appointed by an independent agency such as the AAA, and (3) a tri-partite board where each party appoints a designee and the two designees, or an outside party, appoint the third. A. LINDEY, *supra* note 1, § 29, at 29-1 to -2.

9. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481 (1981) (the goals of arbitration may be overridden by paramount state and public interests).

10. See *supra* note 3.

11. For the specific prerequisites for an agreement to arbitrate in Virginia, see VA. CODE ANN. § 8.01-577 (Repl. Vol. 1984). For a more detailed analysis of the history of arbitration in Virginia see Daughtrey, *Enforceability of Agreements to Arbitrate: It's Time to Review Virginia Law*, 10 VA. B.A.J. No. 3, at 15 (1983). For an authoritative analysis of the entire arbitration process see ELKOURI, *supra* note 5.

Although disputing parties may pick an arbitrator any way they wish (depending upon their arbitration agreement), many utilize the American Arbitration Association. The AAA has over 60,000 arbitrators on its roster—many of these arbitrators are specialists in a particular field or science. After the disputants contact the AAA, the Association will normally send the parties a list of possible choice. Each party then indicates which arbitrators are preferred, and the AAA selects a mutually acceptable arbitrator. Meyerwetz, *The Arbitration Alternative*, 71 A.B.A. J. 78, 79 (1985).

12. *Parsons v. Norfolk & W. Ry.*, 310 F. Supp. 1197, 1201 (S.D. W. Va. 1970), *aff'd*, 442 F.2d 1075 (4th Cir. 1971). The relevant Virginia statutes are VA. CODE ANN. §§ 8.01-577 to -581 (Repl. Vol. 1984).

The following is a general list of provisions common to many of the more "modern" arbitration statutes around the country:

1. Agreements to arbitrate existing and future disputes are made valid and enforceable.

As a general rule, agreements which make arbitration the means of resolving all future disputes between parties are contrary to public policy because such agreements attempt to deprive the courts of their jurisdiction.¹³ While a private agreement cannot oust the courts of their jurisdiction, parties may lawfully make arbitration a *condition precedent* to a right of action upon a contract.¹⁴ Virginia has enacted a statute which recognizes that the submission of any claim or controversy to arbitration may be made a prerequisite to a suit on a contract.¹⁵

Since parties normally voluntarily abide by their agreements to arbitrate, courts usually do not need to force adherence to arbitration provisions.¹⁶ Judicial review is normally sought only under two circumstances:

2. Courts are given jurisdiction to compel arbitration, or to stay arbitration if no agreement to arbitrate exists.

3. Courts are given jurisdiction to stay litigation when one party to an arbitrable dispute attempts to take it to court instead of arbitrating.

4. Courts are authorized to appoint arbitrators where the parties fail to provide a method for appointment.

5. Majority action by arbitration boards is authorized.

6. Provision is made for oath by the arbitrator and/or witnesses, unless waived by the parties.

7. Default proceedings (in the absence of a party) are authorized under certain circumstances.

8. Provision is made for continuances and adjournments of hearings.

9. Limitation is placed upon the effect of waivers of the right to be represented by counsel.

10. Arbitrators are given the subpoena power.

11. Awards are required to be in writing and signed by the arbitrator, and some limitation is stated regarding the time within which awards must be rendered.

12. Arbitrators are granted limited authority to modify or correct awards upon timely application by a party, and the Uniform Act additionally permits the arbitrator to clarify his award by application from a party.

13. A summary procedure is provided for (1) court confirmation of awards, (2) court vacation of awards on limited grounds stated by the statute, (3) court modification or correction of awards on limited grounds stated by the statute.

14. Courts are authorized to enter judgment upon awards as confirmed, modified, or corrected; the judgment is then enforceable as any other judgment.

15. Provision is made for appeals from court orders and judgments under the statute.

ELKOURI, *supra* note 5, at 38-39. See, e.g., CAL. CIV. PROC. CODE §§ 1280-1295 (West 1982 & Supp. 1985); N.Y. CIV. PROC. LAW §§ 7501-7514 (McKinney 1980 & Supp. 1985).

13. *Big Vein Pocahontas Co. v. Browning*, 137 Va. 34, 120 S.E. 247 (1923) (a contract to submit future differences to arbitration is not binding); M. BURKS, COMMON LAW & STATUTORY PLEADING AND PRACTICE § 12 (4th ed. 1952).

14. See *Condon v. South Side R.R. Co.*, 55 Va. (14 Gratt.) 484 (1858); *Daughtrey*, *supra* note 11.

15. VA. CODE ANN. § 8.01-577 (Repl. Vol. 1984). That section reads in part: "Submission of any claim or controversy to arbitration pursuant to such agreement shall be a condition precedent to institution of suit or action thereon, and the agreement to arbitrate shall be enforceable . . ."

16. ELKOURI, *supra* note 5, at 10, 26-44; see also *Virginia Beach Bd. of Realtors, Inc. v.*

when one of the contracting parties challenges the arbitrability of the subject of the dispute¹⁷ or protests the arbitrator's award.¹⁸

When a party challenges the arbitrability of the subject, a court must determine if the parties intended the issue to be included in their arbitration agreement.¹⁹ If a court finds that the parties designed their agreement to include the particular controversy, the arbitration provision will be upheld unless it violates public policy.²⁰

There are several grounds upon which a party can attack the arbitrator's award. An arbitration award may be set aside in Virginia if it appears on its face to be totally unfounded or is clearly illegal.²¹ Virginia Code section 8.01-580 enumerates several specific grounds for setting aside an award, including fraud, mistake, corruption, partiality or misconduct of the arbitrators.²² If a party simply refuses to comply with a valid arbitration agreement, a court can order the arbitration process to proceed as if the party *had* cooperated.²³ Similar provisions can be found in other states' arbitration statutes.²⁴

Goodman Segar Hogan, Inc., 224 Va. 659, 299 S.E.2d 360 (1983) (recognizing that since the arbitration award is the decision of a judge of the parties' own choosing, it should be favorably viewed by the courts).

17. For a detailed analysis of how and by whom arbitrability may be challenged see ELKOURI, *supra* note 5, at 169-81.

18. See, e.g., VA. CODE ANN. § 8.01-580 (Repl. Vol. 1984) ("No such award shall be set aside, except for errors apparent on its face, unless it appears to have been procured by corruption or other undue means, or that there was partiality or misbehavior in the arbitrators or umpires, or any of them . . .").

19. Comment, *supra* note 4, at 489. When parties have agreed to submit their disputes to arbitration, it remains the province of the courts to decide the threshold issue of what disputes are arbitrable. This is so because the extent of the duty to arbitrate at all is based upon the initial contractual agreement between the parties. Doyle & Russell, Inc. v. Roanoke Hosp. Ass'n, 213 Va. 489, 494, 193 S.E.2d 662, 666 (1973); see also Comment, *Arbitration Clauses in Separation Agreements*, 19 WASH. & LEE L. REV. 286, 288 (1962).

20. Comment, *supra* note 4, at 489-90; see also, Sterk, *supra* note 9.

21. Wyatt Realty Enters., Ltd. v. Bob Jones Realty Co., 222 Va. 365, 367, 282 S.E.2d 8, 9 (1981) ("Absent corruption or undue means on the part of arbitrators, the sole statutory bases for setting aside an arbitration award is for errors apparent on the award's face."); Martin v. Winston, 181 Va. 94, 106, 23 S.E.2d 873, 878, cert. denied, 319 U.S. 766 (1943) (every reasonable presumption will be indulged in support of arbitrators, and awards are not to be set aside unless they are clearly illegal).

22. VA. CODE ANN. § 8.01-580 (Repl. Vol. 1984); see also United Paperworkers Int'l Union v. Chase Bad Co., 222 Va. 324, 281 S.E.2d 807 (1981) (gross misbehavior or inattention by the arbitrator is ground for setting aside an award); McKennie v. Charlottesville & A. Ry., 110 Va. 70, 65 S.E. 503 (1909) (the reasons for setting aside an award must appear on its face, or there must be misbehavior in the arbitrators, or some palpable mistake).

23. VA. CODE ANN. § 8.01-577(B) (Repl. Vol. 1984).

24. See, e.g., CAL. CIV. PROC. CODE §§ 1286-1286.8 (West 1982); N.Y. CIV. PROC. LAW § 7511 (McKinney 1980). According to ELKOURI, *supra* note 5,

The limited grounds for setting aside awards under many of the state statutes . . . are along the following general lines, which differ little from the common law grounds:

Arbitrators are generally given "extremely broad and flexible" powers over the disputes they moderate.²⁵ They often may "disregard the law entirely, and resolve disputes solely upon principles of equity and good conscience."²⁶

B. *Advantages of Arbitration*

Arbitration, once viewed with judicial mistrust and skepticism, has become increasingly embraced as "an effective and efficient method for resolving disputes."²⁷ Virginia courts consistently uphold agreements to submit disputes to arbitration,²⁸ thereby joining other state courts in acknowledging the strong public policy considerations favoring the resolution of disputes through the arbitration process.²⁹

The main advantage of arbitration over adjudication is that arbitration affords parties the opportunity to promptly, privately, and less expensively resolve their differences. Concurrently, arbitration provides judges with substantial relief from overcrowded dockets,³⁰ a problem which has

1. The award was procured by corruption, fraud, or other undue means.

2. The arbitrator was guilty of evident partiality, corruption, or misconduct (some statutes expressly limit the impartiality requirement to neutrals).

3. The arbitrator refused to postpone the hearing upon sufficient cause shown, or refused to hear material evidence; or otherwise so conducted the hearing as to prejudice substantially the rights of a party.

4. The arbitrator exceeded his powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

5. There was no valid agreement to arbitrate (and it has not been determined otherwise by an action to compel or stay arbitration), and objection to that fact was properly raised.

Id. at 39-40 (footnotes omitted).

25. *See, e.g., Swartz v. Swartz*, 49 A.D.2d 254, —, 374 N.Y.S.2d 857, 860 (1975) (court upheld arbitration provision for adjustment of alimony and acknowledged the broad and flexible powers that arbitrators hold over controversies properly before them).

26. *Moore v. Luckess*, 64 Va. (23 Gratt.) 160 (1873).

27. *See Sterk, supra* note 9, at 482.

28. *E.g., Virginia Beach Bd. of Realtors, Inc. v. Goodman Segar Hogan, Inc.*, 224 Va. 659, 299 S.E.2d 360 (1983) (an arbitration award, being the judgment of a "judge" of the parties' own choosing ought to be favorably viewed by the courts, liberally construed, and upheld whenever possible).

29. *See, e.g., Riess v. Murchison*, 384 F.2d 727, 734 (9th Cir. 1967) (public policy favors arbitration agreements so as "to encourage persons who wish to avoid delays . . . [and] to obtain adjustment of their differences by a tribunal of their own choosing") (citing *Myers v. Richfield Oil Corp.*, 98 Cal. App. 2d 667, 220 P.2d 973 (1950)); *Nationwide Gen. Ins. Co. v. Investors Ins. Co.*, 37 N.Y.2d 91, —, 332 N.E.2d 333, 335, 371 N.Y.S.2d 463, 466 (1975) ("[a]nnounced policy of [New York] favors and encourages arbitration as a means of conserving the time and resources of the courts and the contracting parties").

30. *See generally* O. J. COOGLER, *STRUCTURES MEDIATION IN DIVORCE SETTLEMENT* 71-72 (1978); Broderick, *supra* note 8, at 64 (recognizing arbitration as a viable means of combating mushrooming caseloads); Coalson, *supra* note 1, at 22-24 (recognizing the privacy and cost-minimizing attractiveness of arbitration over adjudication); Note, *Family Law—A Nod*

been recently augmented by a dramatic upsurge in marital separation and divorce proceedings.³¹ One study has found that more than half of all trial court cases deal with matrimonial actions. The reported statistics indicated that during 1979 there were 1.2 million divorces in the country, subjecting over two million adults and nearly 1.5 million children to the trauma of a failed marriage.³² Judicial delays often compound the frustration that families must endure during their break ups; "delays of nine to ten months are common for no-fault divorces, and contested divorces often have to wait a year or two to be scheduled."³³

Judges are required to assimilate and decide a number of matrimonial cases every day. These cases are usually held within the public setting of a courtroom, and are constantly subject to postponements and appeals.³⁴ Furthermore, some commentators seriously question the continued viability of the adversarial system for resolving the often complex and private issues raised in a family dissolution.³⁵

In contrast, arbitrators usually hear and decide only one case at a time. They may focus their undivided attention on the parties, and offer more flexibility in terms of scheduling hearings than do courts. Arbitration hearings, once scheduled, are not as susceptible to delays and the often stifling formality that accompanies a courtroom presentation.³⁶ Since the divorcing spouses choose their own arbitrators and presumably help formulate the final award, commentators suggest that the parties have a much greater incentive to abide by the terms of their settlement.³⁷ Finally, arbitration is viewed as a more sensitive method of dispute resolution—it deemphasizes the adversarial aspects of a separation or divorce, and minimizes the intense polarization and traumatic impact that flow from marital litigation.³⁸

to "Judges of the Parties' Own Choosing," 4 CAMPBELL L. REV. 203 (1981) (outlining advantages of resolving sensitive matters in a private and more informal setting chosen by the parties' judges).

31. Pearson & Thoennes, *Mediating and Litigating Disputes: A Longitudinal Evaluation*, 17 FAM. L.Q. 497, 497 (1984).

32. *Id.*

33. *Id.*

34. O. J. COOGLER, *supra* note 30, at 71-72 (in court the practice is to schedule more cases than can be heard, resulting in continual delays).

35. See generally Spencer & Zammit, *Mediation-Arbitration: A Proposal for Private Resolution of Disputes Between Divorced or Separated Parents*, 1976 DUKE L.J. 911. Family counseling professionals are often encouraged to utilize the arbitration process in resolving family disputes. See Spencer & Zammit, *supra* note 5, at 112.

36. O.J. COOGLER, *supra* note 30, at 71-72.

37. See generally Meroney, *supra* note 7. For a detailed analysis of the mechanisms involved in selecting arbitrators, arbitration procedure and techniques, as well as standards utilized in the arbitration process for interpreting the parties' arbitration contract, see ELKOURI, *supra* note 5.

38. See generally Phear, *supra* note 7, at 23 (adjudication "is not well suited to resolving disputes that arise from complex and reciprocal relationships in which there is no clear right

C. Disadvantages of Arbitration

Perhaps the most criticized aspect of the arbitration process is that arbitrators are not bound by rules of law or evidence.³⁹ Although the arbitrability of the disputed subject, as well as the award, may ultimately be challenged in court, arbitrators are only bound to resolve the dispute between the parties fairly.⁴⁰ Consequently, the judicial rules that ensure the veracity of evidence are not required in the arbitration process. Although most arbitration awards will equitably resolve the given dispute,⁴¹ there is no guarantee that the arbitrator has not contravened some law or fundamental public policy of the state in reaching a decision.⁴² Finally, some courts have questioned the qualifications of arbitrators to decide domestic disputes in general, and have particularly stressed the myriad intangible elements which the judiciary has to consider in settling child support, custody and visitation issues.⁴³

Advantages and disadvantages aside, there is certainly a growing public

or wrong").

39. See generally Sterk, *supra* note 9, at 490-91 (arbitrators are not bound by private law of jurisdiction most closely associated with the dispute); Comment, *supra* note 4, at 492 (parties submitting to arbitration are removed from the judicial protections of precedent and the court's procedural rules designed to guarantee truth).

It has generally been the practice of most arbitrators to liberally allow evidence during their hearings. Although the disputing parties may specifically require that the Rules of Evidence be followed, such a request is rarely made. In fact, parties which arbitrate under the rules of the American Arbitration Association are subject to the AAA procedures which grant the individual arbitrator broad discretion in determining the relevancy and materiality of the evidence offered. Such broad discretion vested in the arbitrator has been the general practice of both the common law and state statutes which deal with arbitration. ELKOURI, *supra* note 5, at 252-56.

For a detailed and authoritative analysis on the use and admissibility of evidence in arbitration procedures, see ELKOURI, *supra* note 5, at 252-95.

Other authors have articulated two schools of thought as to how to resolve this problem of evidence. One view argues that arbitrators may conduct their hearings with a "common sense" notion of what is important to a case, and thus liberally allow evidence offered by the parties. The second, more restrictive, view is that the arbitrator, while not specifically bound by federal or state rules of evidence, should nevertheless make their evidentiary decisions consistent with these rules. M. HILL & A. V. SINECROFT, EVIDENCE IN ARBITRATION 1-3 (1981).

40. See *supra* text accompanying notes 19-26. Arbitrators, while acting in their official arbitral capacity, are immune from civil liability. ELKOURI, *supra* note 5, at 95. Arbitrators are nevertheless accountable for their actions. Arbitrators who demonstrate an inability to equitably, efficiently and justly resolve disputes before them will soon become unacceptable to future parties seeking arbitration, their own peers and the appointing agency. *Id.* at 96. As to the background, training, qualifications, integrity and effectiveness of arbitrators, see *id.* at 90-97.

41. Since the parties arbitrate voluntarily, prompt compliance with the award is obtained in most cases. Courts are seldom petitioned to enforce or vacate awards. *Id.* at 10.

42. Sterk, *supra* note 9, at 490-92.

43. Nestel v. Nestel, 38 A.D.2d 942, ___, 331 N.Y.S.2d 241, 243 (1972); accord Agur v. Agur, 32 A.D.2d 16, ___, 298 N.Y.S.2d 772, 777 n.4, 778 (1969).

utilization of arbitration. In recognition of this trend, statistics indicate an increasing number of state legislatures broadening the flexibility and enforceability of their arbitration statutes,⁴⁴ and a growing number of cases favoring the enforceability of the arbitration process in domestic disputes.⁴⁵ Under the Virginia arbitration statutes, parties may agree in writing to submit to arbitration "any controversy" existing between them or make arbitration a condition precedent to court action.⁴⁶ Since the Virginia General Assembly did not exempt domestic relations disputes from coverage by these arbitration laws, it appears that the legislature does not view the arbitration of such disputes as against Virginia's public policy.⁴⁷ However, this issue has not been fully litigated in Virginia. Because of the growing popularity of arbitration agreements in marital dispute resolutions, the question of whether Virginia courts will enforce arbitration clauses in separation agreements under the state's arbitration statutes, or void such clauses as contrary to public policy, is ripe for adjudication.

II. ANALYSIS: ARBITRATION CLAUSES IN MARITAL SEPARATION AGREEMENTS—FORMULATING A VIRGINIA PLAN

Although the Virginia Supreme Court has yet to review the issue,⁴⁸ other states have adopted positions on the enforceability of arbitration between divorcing spouses.⁴⁹ Consequently, this comment will analyze the relevant Virginia statutes and cases, while incorporating the views of the other states as persuasive authority, in order to formulate the likely Vir-

44. See ELKOURI, *supra* note 5, at 35-41.

45. See *supra* notes 2-3.

46. VA. CODE ANN. § 8.01-577 (Repl. Vol. 1984).

47. Cf. *Crutchley v. Crutchley*, 306 N.C. 518, —, 293 S.E.2d 793, 796 (1982). ("Since the Legislature did not exempt domestic relations disputes from coverage by the Act, we find no legislative expression therein that arbitration of such disputes is against public policy.") (discussing North Carolina Law).

48. While the Virginia Supreme Court has not, some lower courts have. The Nineteenth Judicial Circuit found that an arbitration clause in a separation agreement is enforceable. *Blankespoor v. Blankespoor*, No. 76995, slip op. at 1 (Fairfax County, Va. Sept. 20, 1983). However, the decision is of dubious precedential value since the court summarily accepted the arbitration clause without considering the issues. The bulk of the opinion reads:

I find that the arbitration clause applies to all matters of controversy between the parties under the agreement, including those relative to the children.

There is nothing in the agreement itself to indicate that the parties intended to except matters relating to the children from the arbitration requirement. *No law is cited and none is found which prohibits child welfare matters being the subject of arbitration.* Indeed, in the informal setting of mediation and arbitration it is certainly just as likely, if not more likely, that the welfare of the children will be protected more fairly than in the more formal courtroom setting. In any event, the Court of equity retains jurisdiction to review any award, so the Court is not divested of its [sic] ultimate responsibility for the welfare of the children.

Id. (emphasis added).

49. See *supra* note 2.

ginia response to the use of arbitration in domestic controversies.

Most disputes arising under separation agreements may be categorized under five main headings: property settlement, spousal support, child support, child custody and visitation. Although some commentators have separately analyzed each of these areas,⁵⁰ the most recent cases⁵¹ have more broadly focused their inquiry into two distinct levels: (1) those disputes concerning the resolution of property rights between the divorcing spouses (property settlement and spousal support),⁵² and (2) those disputes which more directly affect the children of a dissolving marriage (child support, child custody and visitation rights).⁵³ The reasoning for this broader, two-level analysis is that the resolution of disputes concerning property rights are often viewed by courts as a contractual area in which adults should be allowed wide discretion to privately settle their differences;⁵⁴ while the child related matters are fraught with public concern, and traditionally safeguarded by the state.⁵⁵

A. *Property Settlements and Spousal Support*

This part of the analysis focuses on the enforceability of an arbitration provision in a separation agreement which requires that any dispute arising between the parties concerning the distribution of property or of spousal support must be arbitrated as a condition precedent to court action. These arbitration clauses have generally been upheld in other jurisdictions⁵⁶ and Virginia law strongly supports the enforceability of such agreements.⁵⁷

The jurisdictions which have reviewed this issue have cited a number of policy considerations in upholding the validity of arbitration in the

50. See Comment, *supra* note 4.

51. See *Faherty v. Faherty*, 97 N.J. 99, 477 A.2d 1257 (1984); *Crutchley v. Crutchley*, 306 N.C. 518, 293 S.E.2d 793 (1982).

52. An argument can certainly be made that the resolution of property rights and of spousal support affects the children of a divorce. Nevertheless, courts have analyzed these matters separately from those areas which are perceived as *directly* adjusting the rights of children, i.e., child support and custody. See cases cited *supra* note 51.

53. The resolution of visitation rights is primarily a determination of the rights of parents or other family members. Nevertheless, courts have treated this as a matter so important to the children that it is not perceived as a matter which ought to be settled with the property rights of the divorcing spouses. Rather, this is an area that has been consistently analyzed with the other elements of child welfare; child support and custody. See cases cited *infra* note 75. Virginia law appears to be consistent with this trend. Virginia Code sections 20-107.1 and 20-107.3 deal with spousal support and property rights, respectively, while section 20-107.2 controls child support, custody and visitation. VA. CODE ANN. §§ 20-107.1 to 107.3 (Supp. 1984).

54. See *infra* text accompanying notes 56-70.

55. See *infra* text accompanying notes 71-78.

56. See *supra* note 2.

57. See *infra* text accompanying notes 58-70.

“property rights” area. Many of these considerations are equally applicable in Virginia. In general, each jurisdiction has recognized that the claims of each spouse to property and support are, in fact, “property rights”⁵⁸ and that the parties may settle these rights and obligations by valid contract.⁵⁹ Similarly, in Virginia, divisions of property between spouses, as well as any claims for support and maintenance, are rights which may be settled, negotiated or waived by valid contract arrangements.⁶⁰ Further, Virginia law permits a divorcing couple to execute a separation agreement regulating post-divorce disposition of property or other matters.⁶¹ Such property settlements entered into by competent parties upon valid consideration will be enforced “unless their illegality is clear and certain.”⁶² There seems no valid reason, then, for denying divorcing spouses the option of submitting their property disputes to an arbitrator.

A second public policy consideration is that property division and spousal support are sensitive and intensely private areas of domestic disputes. In order to facilitate just and speedy resolution of these disputes, public policy strongly supports the use of private contracts between the parties regarding these areas.⁶³ The Virginia Supreme Court has recognized that upon the failure of a marriage, public policy strongly favors the prompt resolution of disputes concerning the property rights of the parties.⁶⁴ The Virginia court has stated that voluntary agreements certainly promote prompt dispute resolution and thus “should be encouraged.”⁶⁵

Moreover, each jurisdiction which has ruled on the matter has advocated the use of arbitration in settling marital disputes over property rights and acknowledged the process as an increasingly favored remedy to formal litigation.⁶⁶ This favored use of arbitration has been continually affirmed by the Virginia judiciary. Recently, the Virginia Supreme Court acknowledged that an arbitration award, “being the judgment of a judge of the parties’ own choosing, ought to be favorably viewed by the courts; and effect ought to be given [to the award] whenever it can be done consistently with the rules of law.”⁶⁷

58. See, e.g., *Schlemm v. Schlemm*, 31 N.J. 557, 158 A.2d 508 (1960); *Schukal v. Schukal*, 55 Misc. 2d 120, 284 N.Y.S.2d 534 (N.Y. Sup. Ct. 1967).

59. *Kunker v. Kunker*, 230 A.D. 641, —, 246 N.Y.S. 118, 121 (1930); *Kiger v. Kiger*, 258 N.C. 126, 128-29, 128 S.E.2d 235, 237 (1962); see also Comment, *supra* note 4, at 496-99 (as a property right, spousal support is a proper subject of contract).

60. *Chapman v. Chapman*, 20 Bankr. 810, 812-13 (E.D. Va. 1982).

61. VA. CODE ANN. §§ 20-109 to 109.1 (Cum. Supp. 1984).

62. *Capps v. Capps*, 216 Va. 378, 380, 219 S.E.2d 901, 903 (1975).

63. *Faherty v. Faherty*, 97 N.J. 99, —, 477 A.2d 1257, 1262 (1984).

64. *Morris v. Morris*, 216 Va. 457, 459, 219 S.E.2d 864, 867 (1975).

65. *Id.* at 459, 219 S.E.2d at 866.

66. *Faherty*, 97 N.J. at —, 477 A.2d at 1261-62; *Crutchley v. Crutchley*, 306 N.C. 518, —, 293 S.E.2d 793, 796-97 (1982).

67. *Virginia Beach Bd. of Realtors, Inc. v. Goodman Segar Hogan, Inc.*, 224 Va. 659, 662,

Finally, other jurisdictions have ruled that if arbitration is expressly adopted by the parties as their preferred method of distributing property and support, such a choice is not only judicially enforceable, but "highly desirable."⁶⁸ Virginia courts have yet to adopt such unequivocal language, but it is clear that public policy favors the private resolution of property rights and spousal support arrangements. Accordingly, it should be left to the parties to decide whether they would rather negotiate, adjudicate or arbitrate their differences.

Virginia appears to be on the threshold of upholding clauses in separation agreements which provide for the arbitration of property rights and spousal support. Several commentators have observed that Virginia has recently taken a more progressive view of contracts relating to the adjustment of property rights between spouses.⁶⁹ This is indicative of the general trend towards granting divorcing adults a more voluntary and autonomous rule in effectuating a prompt resolution of disputes concerning their property rights.⁷⁰ The Virginia judiciary is likely to continue this trend by upholding the enforceability of arbitration clauses in separation agreements which control the distribution of property and spousal support.

B. *Child Support, Custody and Visitation*

There is considerable debate as to whether public policy will allow parents to conclusively resolve disputes concerning child support, child custody and visitation.⁷¹ As noted in the previous section, in disputes over spousal support and property settlement, states have acknowledged the broad discretion which divorcing spouses have to privately resolve their controversies.⁷² One commentator suggests that since the resolution of these property rights appears to be a matter which society is content to leave to private agreement, there is no reason to prohibit the parties from referring these contractual disputes to arbitration.⁷³ Similarly, if public policy will permit parties to privately and conclusively resolve debates over child support, custody and visitation, there would be no reason to prohibit the resolution of such disputes by arbitrators.⁷⁴

299 S.E.2d 360, 362 (1983) (quoting Pollack's Adm'r v. Sutherlin, 66 Va. (25 Gratt.) 78, 80 (1874)).

68. *Faherty*, 97 N.J. at ___, 477 A.2d at 1262.

69. See generally Note, *Overview of Supreme Court Decisions on Domestic Relations 1970-1980*, 15 U. RICH. L. REV. 321, 342-44 (1981) [hereinafter cited as *Overview on Domestic Relations*]; Note, *Domestic Relations*, 64 VA. L. REV. 1439, 1447 (1978) [hereinafter cited as *Domestic Relations*].

70. *Domestic Relations*, *supra* note 69, at 1447.

71. See, e.g., *Sterk*, *supra* note 9, at 494.

72. See *supra* text accompanying notes 56-70.

73. *Sterk*, *supra* note 9, at 494.

74. *Id.*

Courts that have reviewed this issue have recognized two major characteristics which distinguish the resolution of these child-related matters from settling property and spousal support controversies.⁷⁵ First, in the distribution of property and support between divorcing spouses, the parents are allocating their own rights.⁷⁶ However, in child support, custody and visitation matters, it is primarily the rights of the children that are affected.⁷⁷ Second, because of the doctrine of *parens patriae*, states have retained a substantial role in protecting the best interests of children.⁷⁸

Despite these factors, there has been a growing tendency to enforce arbitration agreements regarding child support, custody and visitation disputes.⁷⁹ However, courts are presently unwilling to completely abdicate their special supervisory role in protecting the best interests of the child. In reviewing the enforceability of such arbitration agreements, courts are divided along a continuum which, at one end, recognizes the efficiency and multiple benefits offered by arbitration and would readily uphold arbitration awards dealing with "child related" matters; on the opposite end, traditional *parens patriae* notions reign with the court, not an arbitrator, being viewed as best suited to determine child support, custody and visitation issues.⁸⁰

Three views exemplify the positions adopted by courts which have addressed the enforceability of arbitration agreements affecting "child related" matters.⁸¹ First, there is an extreme minority "pro-arbitration"

75. See *Faherty v. Faherty*, 97 N.J. 99, 477 A.2d 1257 (1984); *Agur v. Agur*, 32 A.D.2d 16, 298 N.Y.S.2d 772 (1969); *Schneider v. Schneider*, 17 N.Y.2d 123, 216 N.E.2d 318, 269 N.Y.S.2d 107 (1966); *Crutchley v. Crutchley*, 306 N.C. 518, 293 S.E.2d 793 (1982).

76. See *supra* note 52.

77. See *supra* note 47.

78. In early common law there developed a strong presumption that infants should be protected by the courts, and the chancellor was given power as the ultimate guardian and protector of children. Note, *New York Court Approves Use of Arbitration in Custody Disputes*, 33 *FORDHAM L. REV.* 726, 727 (1965). In the words of Lord Esher in *Queen v. Gynghall*, "The court is placed in a position by reason of the prerogative of the crown to act as supreme parent of children, and must exercise that jurisdiction in the manner in which a wise, affectionate and careful parent would act for the welfare of the child." *Id.* at 727 (quoting *Queen v. Gynghall* [1893] 2 Q.B. 232). The doctrine of protecting the best interests of the child was formulated in the United States by Judge Cardozo in his opinion in *Finlay v. Finlay*, 240 N.Y. 429, 148 N.E. 624 (1925).

79. See *infra* text accompanying notes 82-85. It has been easier for some courts to uphold the enforceability of arbitration clauses where child support is concerned. See *Schneider*, 17 N.Y.2d 123, 216 N.E.2d 318, 269 N.Y.S.2d 107. However, the two most recent cases in this area from other jurisdictions have treated child support, custody and visitation as sufficiently related so as to be jointly analyzed. See *Faherty*, 97 N.J. at ___, 477 A.2d at 1263; *Crutchley*, 306 N.C. at ___, 293 S.E.2d at 798.

80. See *infra* text accompanying notes 81-89.

81. There is arguably a fourth view. There are those who support the complete abdication by the courts of their *parens patriae* role in favor of arbitrators chosen by the parties or child custody committees. Comment, *supra* note 4, at 504 nn.151-56. However, there is no case law which would support this option in the foreseeable future.

outlook adopted by the North Carolina Supreme Court. The majority of courts favor a strictly "pro-court" or "pro-*parens patriae*" view. Finally, a new compromise position, first adopted by New Jersey courts, allows parents a more private and autonomous role in the resolution of their domestic disputes, while at the same time providing necessary protection to the interests of the children. This compromise view appears most consistent with Virginia statutory and case law, and is arguably the position that the Virginia judiciary should adopt when reviewing the enforceability of arbitration clauses which seek to govern child support, custody and visitation issues.

1. The "Pro-Arbitration" View

The case of *Crutchley v. Crutchley*⁸² is the only state supreme court case which has adopted the "pro-parental choice" or "pro-arbitration" viewpoint. The court in *Crutchley* held that, "the amount of child support agreed on by parties to a separation agreement is presumed, in the absence of contrary evidence, to be *just and reasonable*."⁸³ Therefore, although the opinion asserts that the provisions of a separation agreement concerning child welfare matters will always be reviewable and modifiable by the judiciary, the court grants a presumption of validity to separation agreements.⁸⁴ The court subsequently implies that an arbitration award concerning child custody is similarly presumed just and reasonable.⁸⁵ Hence, the burden rests on the party challenging the arbitration to show cause why the award should be invalidated.

2. The "Pro-Court" View

Representing the other extreme, as well as the majority position, defenders of the judicial system argue that allowing the parties or arbitrators to decide these child related matters is a dangerous and unjustifiable encroachment on court authority.⁸⁶ A leading New York appellate case, *Agur v. Agur*,⁸⁷ strongly emphasized the historical role which courts have held as *parens patriae*, and concluded that, "the judicial process is more broadly gauged and better suited to reach [a just determination]"⁸⁸ than

82. 306 N.C. 518, 293 S.E.2d 793 (1982).

83. *Id.* at —, 293 S.E.2d at 797.

84. *Id.*

85. *Id.* at —, 293 S.E.2d at 798. For a very influential case which basically has an identical holding to *Crutchley*, see *Sheets v. Sheets*, 22 A.D.2d 176, 254 N.Y.S.2d 320 (1964).

86. See *Holman & Noland, Agreement and Arbitration: Relief to Over-Litigation in Domestic Relations Disputes in Washington*, 12 WILLAMETTE L.J. 527, 537 (1976); see also *Sterk, supra* note 9.

87. 32 A.D.2d 16, 298 N.Y.S.2d 772 (1969).

88. *Id.* at —, 298 N.Y.S.2d at 777; see also *Nestel v. Nestel*, 38 A.D.2d 942, 331 N.Y.S.2d 241 (1972).

is arbitration. One commentator criticizes the arbitration process as being overly concerned with justice between the divorcing spouses, while ignoring the paramount issue in all child support, custody and visitation disputes—the best interests of the children.⁸⁹ Thus, unlike the “pro-arbitration” view which grants a presumption of validity to arbitration awards, this view would completely ignore any arbitration award dealing with child support, custody or visitation. As soon as an interested party raises an objection to the award and challenges the arbitrator’s decision before a court, the judiciary would conduct a *de novo* review.

3. The *Faherty* Compromise

A compromise position has recently been recognized by the Supreme Court of New Jersey in *Faherty v. Faherty*.⁹⁰ The court evaluated the growing use of arbitration in the domestic area and could find “no valid reason why the arbitration process should not be available in the area of child support [custody and visitation].”⁹¹ Nevertheless, the court recognized that the judiciary carries “a nondelegable, special supervisory function [in these areas].”⁹² The *Faherty* court thus adopted a compromise position which is more “pro-court” than *Crutchley*, and more “pro-arbitration” than *Agur*.⁹³ The *Faherty* court places the initial burden of challenging the arbitrator’s decision on the party seeking to overturn the award. If no challenge is made, the award stands.⁹⁴ Once the award is challenged, however, the burden of showing that the award could not “actually and materially” adversely affect the child’s standard of living then falls upon the supporters of the arbitration award.⁹⁵ Should the supporters of the award fail to make the showing, the trial court may then conduct a *de novo* review.⁹⁶

The “pro-arbitration” view, which presumes the validity of an arbitrator’s award, initially places the burden of producing evidence on the party *challenging* the award. That party also has the burden of overcoming the award’s presumption of validity. By contrast, under *Faherty*, the party opposed to the arbitrator’s decision need only raise a challenge in court. Once he does this, the burden shifts to the *supporters* of the award to show that the award will not have an adverse effect on the child.

Under the “pro-court” view, when confronted with any challenge to an

89. See generally *Sterk*, *supra* note 9, at 489-93.

90. 97 N.J. 99, 477 A.2d 1257 (1984).

91. *Id.* at ___, 477 A.2d at 1262-63. The court states that the policy reasons for its holding with respect to child support may be equally applicable to custody and visitation cases. *Id.*

92. *Id.* at ___, 477 A.2d at 1263.

93. See *supra* text accompanying notes 82-89.

94. *Faherty*, 97 N.J. at ___, 447 A.2d at 1263.

95. *Id.*

96. *Id.*

arbitration decision, the judiciary will simply ignore the award and conduct a de novo trial. Under *Faherty*, if the proponents demonstrate that the award is substantially in the child's best interests, judicial intervention will terminate, and the award will stand.

4. A Virginia Plan

The Virginia judiciary has signified its willingness to uphold voluntary agreements which more promptly resolve disputes concerning the property rights of divorcing spouses.⁹⁷ Moreover, the Supreme Court of Virginia held in *Morris v. Morris*⁹⁸ that the purpose of Virginia Code section 20-109.1 is to facilitate the enforceability of such separation agreements.⁹⁹ Virginia courts have also recognized the growing viability of arbitration,¹⁰⁰ and joined the trend which encourages a more independent role for divorcing couples in planning their future.¹⁰¹

The Virginia judiciary should therefore be persuaded by the theoretical appeal of *Faherty* when dealing with arbitration agreement which resolve "child-related" matters. Specifically, if all parties¹⁰² are satisfied with an arbitrator's award, there will be no challenges and the award should stand. This analysis reflects the "pro-arbitration" portion of the *Faherty* view. Accordingly, the benefits of efficiency, less burdensome court dockets, and a more private and autonomous forum for parents will be realized in the majority of cases, since most arbitration awards are unlikely to be challenged.¹⁰³

Equally important to the viability of the *Faherty* analysis in Virginia is the ability of the court to fulfill its duty as protector of the child's best interests. The ultimate power of the court to review an arbitrator's award appears to be a necessary prerequisite for Virginia's judicial acceptance of the *Faherty* position. This is because the state courts' enthusiasm for arbitration and parental autonomy, though strong,¹⁰⁴ is tempered by an af-

97. See *supra* notes 60-62 and accompanying text.

98. 216 Va. 457, 219 S.E.2d 864 (1975).

99. *Id.* at 459, 219 S.E.2d at 866-67. VA. CODE ANN. § 20-109.1 (Repl. Vol. 1983) provides in relevant part: "Any court may affirm, ratify and incorporate by reference in its decree . . . any valid agreement between the parties . . . concerning the conditions of the maintenance of the parties, or either of them and the care, custody and maintenance of their minor children . . ."

100. See *supra* text accompanying notes 58-70.

101. See *Overview on Domestic Relations, supra* note 69, at 342-44.

102. "Parties" to an arbitration award should arguably include *any* interested party, including representatives of the children, parents, family members, probation officers and public welfare representatives.

103. Since the parties arbitrate voluntarily, prompt compliance with the award is obtained in most cases. Only infrequently is court action requested for the enforcement or vacation of awards. ELKOURI, *supra* note 5, at 10.

104. See *supra* text accompanying notes 97-101.

finity for the policy of *parens patriae*.

The Supreme Court of Virginia has stressed that in child related issues, "[o]ur first and foremost concern . . . is the welfare of the child. All other matters . . . must necessarily be subordinate."¹⁰⁵ Virginia Code section 20-107.2 grants the judiciary power to rule on such matters as the custody and support of minor children, as well as the visitation rights of the parents and other family members.¹⁰⁶ Virginia Code section 20-108¹⁰⁷ gives the divorce court continuing jurisdiction to change or modify its original decree, "and a contract between husband and wife cannot prevent the court from exercising this power."¹⁰⁸ Although the Supreme Court of Virginia has underscored the need to respect the legal and contractual rights of the parents, "the welfare of the child is to be regarded more highly than the technical rights of the parent. When the interests of the child demand it, the rights of the father and mother may be disregarded."¹⁰⁹

This strong language would initially appear to place Virginia in the category of jurisdictions adopting the "pro-court" stance, at the expense of arbitration agreements. However, while the court will disregard the arbitration rights of the mother and father, it should do so only when the interests of the child demand it.¹¹⁰ This standard seems more closely associated with *Faherty*. By adopting the *Faherty* view, Virginia courts may continue to oversee the welfare of children, while simultaneously embracing the multiple benefits inherent in the arbitration process.

Under the *Faherty* rule, if any interested party raises a challenge to the arbitrator's award, the burden of showing to the court that the award is in the child's best interests falls upon the supporters of the award.¹¹¹ Should the proponents fail to persuade the court, the court may then exercise its historic power as *parens patriae* and conduct a *de novo* trial.¹¹² This analysis comports with present Virginia law. Specifically, when the interests of the child are "actually and materially" threatened and *demand* judicial intervention, then, and only then, should the arbitration

105. *Brown v. Kettle*, 225 Va. 451, 457, 303 S.E.2d 864, 868 (1983).

106. VA. CODE ANN. § 20-107.2 (Supp. 1984) provides in relevant part: "the court may make such further decree as it shall deem expedient concerning the custody and support of the minor children of the parties, and concerning visitation rights of the parents and . . . other family members."

107. VA. CODE ANN. § 20-108 (Repl. Vol. 1983) provides in relevant part: "the court may . . . revise and alter such decree concerning the care, custody and maintenance of the children and make a new decree concerning the same, as the circumstances of the parents and the benefit of the children may require."

108. *Featherstone v. Brooks*, 220 Va. 443, 446, 258 S.E.2d 513, 515 (1979).

109. *Forbes v. Haney*, 204 Va. 712, 716, 133 S.E.2d 533, 536 (1963).

110. *Id.*

111. *Faherty v. Faherty*, 97 N.J. 99, —, 477 A.2d 1257, 1263 (1984).

112. *Id.*

rights of the father and mother be "disregarded."¹¹³

It is obvious that the Virginia judiciary values parental autonomy and the arbitration process more highly than does the view exemplified by *Agur*. It is equally evident that Virginia courts will not be inclined to allow a blanket presumption of validity to arbitration awards which govern child welfare matters, as had the *Crutchley* court. Consequently, by adopting the *Faherty* viewpoint, Virginia may continue its support of the arbitration process as well as the trend towards granting divorcing parents a more private and meaningful role in the resolution of their family controversies. Simultaneously, the judiciary may retain its historic role as guardian of the child's best interests by maintaining the court's ultimate position as *parens patriae*. As summarized in the *Faherty* decision:

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. If so, there would be no necessity for our *de novo* review. However, because of the Court's *parens patriae* tradition, [there will be occasions when] we prefer to err in favor of the child's best interest.¹¹⁴

III. CONCLUSION

Considering Virginia law, public policy, the multiple benefits inherent in the arbitration process, and the persuasive authority of the positions adopted by other jurisdictions, it is evident that arbitration clauses in separation agreements should be judicially enforceable under the Virginia arbitration statutes. Virginia policy favors the private resolution of property rights and spousal support arrangements. Accordingly, it should be left to the parties to decide whether they wish to arbitrate any disputes which arise in these areas. Virginia law strongly supports the enforceability of arbitration clauses in separation agreements which govern distribution of the property rights of divorcing adults.

In the areas of child support, custody and visitation, however, the law is not so clearly delineated. There are courts which highly regard the arbitration process and have granted arbitrators' decisions a presumption of validity. Conversely, a number of courts and commentators have advocated a stance which would basically ignore the arbitration process, and leave all authority in the judiciary to review the child welfare issues. Finally, there is a compromise view, articulated in the *Faherty* decision, which appears to be consistent with Virginia law. By adopting this compromise *Faherty* position, the Virginia judiciary may reaffirm its commitment to the arbitration process and to parental autonomy, while retaining

113. See *supra* text accompanying note 109.

114. *Faherty*, 97 N.J. at ____, 477 A.2d at 1263.

the ability to assert its traditional role as guardian of the child's best interests.

Antonio J. Calabrese

