

PRIVATE ORDERING AND ALTERNATIVE DISPUTE RESOLUTION

by

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I. Introduction

In litigation, publicly-elected or appointed judicial officers resolve disputes that the parties do not settle themselves. In alternative dispute resolution (ADR), one or more neutral persons either resolve the dispute (as in binding arbitration) or assist the parties in settling it (as in mediation). California law, for example, defines ADR as a “process, other than formal litigation, in which a neutral person or persons resolve a dispute or assist parties in resolving their dispute.”¹

Private ordering refers to parties’ freedom to make their own decisions regarding a dispute. Private ordering ADR issues fall into two categories: decider-selection issues and decision issues. With binding arbitration ADR, the parties’ only freedom lies in their ability to select their arbiter. Once that selection has been made, private ordering ceases and the dispute is resolved autocratically, as it would be in litigation. Binding arbitration ADR is a form of private ordering that involves decider-selection issues only.

The parties have greater freedom with mediation ADR in which, provided they are able to settle the case, the parties control their entire process. After they jointly select their neutral, the parties mutually reach their resolution. If mediation does not resolve the matter, the parties either select a more directive form of ADR, such as arbitration, or they litigate.

Other forms of ADR include collaborative practice, non-binding arbitration, use of a referee to make certain findings, and

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¹ CAL. R. CT. R. 3.800.

various types of private judging. This article focuses on binding arbitration and mediation, the polar categories of ADR, and explores approaches taken to ADR private ordering by four states: California, Illinois, New York, and Texas.

II. Lack of National Standards for Family Law Private Ordering

Alternative dispute resolution in family law is on the rise nationally, and with good reason. The ability to determine one's own fate, the de-escalation of a charged emotional environment and the privacy gained through avoidance of public litigation are all excellent reasons for taking a less traditional path. When minor children are involved, these litigation alternatives can help parties become more responsible parents. By making affirmative adult decisions about their pre- and post-judgment issues rather than leaving choices to the judicial officer, parents empower themselves to privately order their own lives, and effectively reinforce their roles as problem-solving adults.

Divorcing spouses are better informed about their own needs, goals, patterns, predilections and fears than any judge could be. If the parties reach an agreement (provided they do so with reasonably-equal bargaining power) their agreement will be superior to any judicially-imposed ruling.

For better or worse, few mandatory national standards exist for private ordering ADR in family law. The American Bar Association's Section of Dispute Resolution was established in 1993. The ABA provides that a family law attorney-mediator should be "qualified by training, experience, and temperament."²

In 2001, the ABA House of Delegates approved the Model Standards of Practice for Family and Divorce Mediation, produced by the Association of Family and Conciliation Courts. The Model Standards endorse individual freedom, stating: "Self-determination is the fundamental principle of family mediation. The mediation process relies upon the ability of participants to make their own voluntary and informed decisions."³ The Model

² ABA House of Delegates, Symposium on Standards of Practice, Model Standards of Practice for Family and Divorce Mediation, Overview and Definitions, 2001, available at <http://www.abanet.org/family/reports/mediation.pdf>.

³ *Id.* at Standard I.

Standards have been adopted by the Academy of Family Mediators, a voluntary professional organization, but are not mandatory to any group.

Similarly, the Ethical Standards of Professional Responsibility, approved by the Society of Professionals in Dispute Resolution (now known as the Association for Conflict Resolution), provide guidelines for a neutral in various types of dispute, but those standards are also voluntary. The key points of the standards include disclosures to parties, duty of impartiality, full disclosure between parties, confidentiality, roles of parties and consulting attorneys, and understanding termination of mediation.⁴

While voluntary guidelines provide elucidation, the field of private ordering remains mostly opaque, with parties free to choose their own neutrals and neutrals free to follow their own paths. We now turn to samples of approaches to mediation regulation in four states.

III. Sample State Regulatory Systems

A. California's Approach to Private Ordering

Mediation is only lightly regulated in California. Sections of the California Evidence Code address confidentiality of mediation⁵ and admissibility of documents created for or in mediation.⁶ Mediation is confidential, and no evidence of statements made during the course of mediation is admissible in court.⁷ This confidentiality extends to writings made in the course of mediation.⁸ However, no writing that would otherwise be admissible becomes inadmissible solely due to its introduction in mediation.⁹

No legal requirements specify how a mediation must occur. Although the mediator role is commonly performed by an attorney or retired judge, no specific qualifications are required for a

⁴ Society of Professionals in Dispute Resolution, Ethical Standards of Responsibility, 1986, available at <http://www.acrnet.org/Page.aspx?id=633&terms=ethical+standards>.

⁵ CAL. EVID. CODE §§ 1119, 1125, 1126.

⁶ *Id.* §§ 1119, 1120, 1122, 1123, 1126.

⁷ *Id.* § 1119(a).

⁸ *Id.* § 1119(b).

⁹ *Id.* § 1120(a).

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mediator – any person may act as a mediator, so long as that person is agreed upon by the parties.

Another common approach to private ordering is arbitration. In California, the family law court has the power to order arbitration regarding property characterization, valuation, and/or division if the amount in controversy does not exceed \$50,000.¹⁰ The parties can voluntarily opt-in to arbitration if they so desire¹¹ if the amount in controversy is greater than \$50,000.¹² The parties should be careful to note, however, that an arbiter is not required to follow the law unless the arbitration agreement so states. Generally, arbiters can base their decisions on “broad principles of justice and equity.”¹³ Since the arbiter is not bound to follow the law, arbitration awards are rarely appealable.¹⁴ If parties elect binding arbitration, they are generally bound by their decision and without legal recourse.

The parties may also agree to retain a private judge, if the appointment is approved by the presiding judge of the local Superior Court.¹⁵ With a private judge, the hearings must be open to the public, and the presiding judge can order the hearings to be held at a location easily accessible to the public. As a practical matter, however, private judge proceedings usually remain “under the radar,” and parties seeking privacy find private judge proceedings attractive.

Other options in California include the use of a court-appointed referee to decide controverted issues of fact or law,¹⁶ and collaborative practice, in which participating attorneys agree not to represent the parties if the matter proceeds to court. Collaborative practice is prevalent in New York, Illinois and Texas, as well.

There are, however, some limitations on private ordering, intended to protect third parties. Except in unusual cases, child support orders must be calculated within the statewide child sup-

¹⁰ CAL. FAM. CODE § 2554.

¹¹ CAL. CIV. PROC. CODE § 1281.

¹² *Cream v. Cream*, 16 Cal. Rptr. 2d 575, 580-82 (Cal. Ct. App. 1993).

¹³ *Sapp v. Barenfeld*, 212 P.2d 233, 239 (Cal. 1949).

¹⁴ *Case v. Alperson*, 5 Cal. Rptr. 635, 636-37 (Cal. Ct. App. 1960).

¹⁵ CAL. CONST. art. VI, § 21; CAL. R. CT. R. 2.831.

¹⁶ CAL. CIV. PROC. CODE § 638.

port guidelines.¹⁷ Parents cannot contract away or impair the child's right to support. Similarly, the court maintains jurisdiction to determine custody and visitation in the best interests of minor children. The parties cannot divest the court of this jurisdiction, despite a private ordering attempting to do so.¹⁸ These safeguards are designed to protect children from unwise decisions of their parents.

Other than the protection of the child's best interests in regards to support, custody and visitation, California provides few limitations in private ordering. Competent adults are generally free to resolve their disputes as they desire, to their own benefit or at their own detriment.

B. New York's Approach to Private Ordering

New York's approach to private ordering is similar to California's. Parties to a family law proceeding may mediate, arbitrate, or choose another method of dispute resolution. However, certain types of decisions are subject to judicial review to make certain third parties are not being adversely affected.

The New York Constitution provides: "nor shall any divorce be granted otherwise than by due judicial proceedings,"¹⁹ which means (as is true in all other states) that only the court can grant a divorce. Although parties are free to elect their method of resolution, all settlement agreements that are incorporated into the final resolution must be submitted to the court as necessary components of the divorce documents required for entry of dissolution.

Parties divorcing in New York have freedom to determine the division of their property without oversight, but issues affecting parenting and support are reviewed. Decisions regarding child support must be calculated under the statewide guidelines, and are subject to judicial review.²⁰ All child support awards agreed to outside court are subject to review.²¹

¹⁷ CAL. FAM. CODE §§ 4050-4076.

¹⁸ *Goodarzirad v. Goodarzirad*, 230 Cal. Rptr. 203, 206 (Cal. Ct. App. 1986).

¹⁹ N.Y. CONST. art. I, § 9.

²⁰ N.Y. DOM. REL. LAW § 240.

²¹ *Id.* § 240(1-b)(h).

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Child custody and visitation issues may not be arbitrated.²² Further, the court cannot delegate its authority to determine issues of custody and visitation.²³ A decision by the parties regarding spousal support will not be judicially upheld if it would make a spouse a public charge, or if it is unfair and unreasonable or unconscionable.²⁴ This protects both the would-be supported spouse and the public fisc.

Mediation in New York is designed by the parties who elect to engage in the process. As in California, “there are no specific statutory requirements for private party mediation in the matrimonial field.”²⁵ Unlike California, no explicit statutory or case-made confidentiality protections exist in private mediation. The parties can contract to make their mediation confidential, but in the absence of such agreement, the content of a mediation is admissible in court.²⁶

Arbitration is permissible and has been used for a significant period of time in New York.²⁷ One great decision regarding arbitration coming out of New York, although decided at the federal level, stated:

short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract.²⁸

The only limitation on this freedom to determine the parameters of arbitration is, as mentioned above, that the use of arbitration for custody and visitation issues is prohibited as against public policy.

New York provides for an early settlement panel and an early neutral evaluation, a confidential, non-binding process in which a neutral third party or panel listens to an abbreviated

²² *Schechter v. Schechter*, 881 N.Y.S.2d 151, 152 (N.Y. App. Div. 2009); *Hirsch v. Hirsch*, 774 N.Y.S.2d 48, 49 (N.Y. App. Div. 2004).

²³ *Rhodie v. Nathan*, 888 N.Y.S.2d 159, 160 (N.Y. App. Div. 2009); *Millet v. Millet*, 703 N.Y.S.2d 596, 598 (N.Y. App. Div. 2000).

²⁴ N.Y. DOM. REL. LAW § 236B(3)(4); N.Y. GEN. OBLIG. LAW § 5-311.

²⁵ N.Y. CIV. PRAC.: MATRIM. ACT. § 28.01.

²⁶ *Hauzinger v. Hauzinger*, 892 N.E.2d 849, 850 (N.Y. 2008).

²⁷ N.Y. C.P.L.R. §§ 7501-7514.

²⁸ *Baravati v. Josephthal, Lyon & Ross, Inc.* 28 F.3d 704, 709 (7th Cir. 1994).

presentation and provides an evaluation of strengths and weaknesses in an effort to foster settlement. These methods, although not dispositive of the case, can assist parties in reaching a fair and efficient settlement, without the many costs (financial, emotional, judicial, etc.) of extensive litigation.

The New York Office of Court Administration funds and oversees Community Dispute Resolution Centers (“CDRC”), some of which provide free or low cost family law alternative dispute resolution. Unlike private mediation, a CDRC mediator must be qualified by 25 hours of training in conflict resolution, and CDRC mediation is confidential and not subject to disclosure in judicial proceedings.²⁹ In addition, New York has set guidelines establishing qualifications for mediators and evaluators serving on court rosters.³⁰

Private ordering is promoted in New York, but with the recognition that people can be damaged by unfair agreements. To prevent unfair agreements affecting the parties to the action or third parties, New York has instituted a review process. Where the issues of custody, visitation, child support, or spousal support are concerned, the court retains jurisdiction to approve or deny an agreement or arbitration award.

C. Illinois’ Approach to Private Ordering

Parties divorcing in Illinois may enter into an agreement regarding property division, spousal support, child support, child custody and visitation. The terms of the agreement, except for child support, custody and visitation, are binding unless the court finds them unconscionable.³¹ Child support, custody and visitation agreements are not binding if they are not in the best interests of the child.³² Similar to both California and New York, the law of Illinois seeks to protect the children of the relationship from bad agreements.

In regards to mediation, the parties may elect to engage in that process if they desire. However, where good cause is shown, the court may prohibit mediation that requires parties to meet

²⁹ N.Y. Rules of the Chief Administrator of the Courts §§ 116.1-116.8.

³⁰ N.Y. Rules of the Chief Administrator of the Courts §§ 146.1-146.6.

³¹ Illinois Marriage and Dissolution of Marriage Act, 750 ILL. COMP. STAT. § 5/502 (2009).

³² *In re Marriage of Duffy*, 718 N.E.2d 286, 289 (Ill. App. Ct. 1999).

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without counsel.³³ The court may also order mediation to assist in custody determinations³⁴ or as part of a visitation enforcement proceeding.³⁵

Although the Illinois General Assembly has discussed a “Mediator Certification Act,”³⁶ none has been passed and there are currently no mediator requirements. The only requirement regarding mediation is that the process be confidential.

Arbitration in family law appears to be a little-legislated area in Illinois. While attorneys’ fees disputes between attorneys and clients may be arbitrated,³⁷ that appears to be the only guidance in the field. Illinois supports conciliation and the court may order conciliation conferences at the motion of either party or sua sponte.³⁸

While private ordering has long been discussed, and in many cases encouraged, in Illinois the field remains largely unregulated. Parties can elect whomever they desire as a mediator and may be free to engage in other processes. However, the court again recognizes that third parties may be affected by private agreements, and retains jurisdiction to review decisions on child support, custody and visitation.

D. Texas’ Approach to Private Ordering

Texas has a well-established policy for alternative dispute resolution. Mediation, arbitration, and several other options are presented in the Civil Practice Code. The legislature expresses its position clearly:

It is the policy of this state to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship, including the mediation of issues involving conservatorship, possession, and support of children, and the early settlement of pending litigation through voluntary settlement procedures.³⁹

³³ Illinois Marriage and Dissolution of Marriage Act, 750 ILL. COMP. STAT. § 5/404 (2009).

³⁴ *Id.* § 5/602.1(b).

³⁵ *Id.* § 5/607.1(c)(4).

³⁶ Illinois 2000 HB 1971.

³⁷ Illinois Marriage and Dissolution of Marriage Act, 750 ILL. COMP. STAT. § 5/508 (2009).

³⁸ *Id.* § 5/404.

³⁹ TEX. CIV. PRAC. & REM. CODE § 154.002.

Despite its policy of supporting private ordering, Texas, like California, New York and Illinois, recognizes that rubber-stamping all agreements would not serve justice. The court can decline to enter judgment on an agreement if a party has been a victim of family violence which affected that person's ability to make decisions, or if the agreement is not in a child's best interest.⁴⁰

Mediation has more statutory involvement in Texas than in the other three states discussed above. A person appointed by the court as a mediator must have 40 hours' classroom training in a court-approved dispute resolution program and 24 additional hours in family dynamics, child development and family law, or be otherwise qualified by legal or professional training.⁴¹

Parties may voluntarily agree to mediation without any court involvement,⁴² or the court may refer parties to mediation by the parties' written agreement or *sua sponte*.⁴³ An exception to the court's power to order mediation is if domestic violence has occurred and the victim spouse objects to mediation on the basis of that violence.⁴⁴ This does not mean that there cannot be mediation, but provisions for safety must be made prior to the mediation taking place. Mediation communications are confidential and cannot be disclosed, unless specifically admissible under another rule of law,⁴⁵ similar to California and New York regulations.

Arbitration is also authorized as an acceptable form of private ordering in dissolutions⁴⁶ and suits involving parent and child relationships.⁴⁷ Parties may contract to arbitrate without judicial permission,⁴⁸ or the court may refer parties to arbitration on the parties' written agreement.⁴⁹ Such an order must specify if arbitration is binding or nonbinding. If the order does not state, then the arbitration is not binding.⁵⁰ If the arbitration in-

⁴⁰ TEX. FAM. CODE § 153.0071.

⁴¹ TEX. CIV. PRAC. & REM. CODE § 154.052.

⁴² *In re J.A.W.-N.*, 94 S.W.3d 119, 121 (Tex. App. 2002).

⁴³ TEX. FAM. CODE § 6.602(a).

⁴⁴ TEX. FAM. CODE § 6.602(d).

⁴⁵ TEX. CIV. PRAC. & REM. CODE § 154.073.

⁴⁶ TEX. FAM. CODE § 6.601.

⁴⁷ TEX. FAM. CODE § 153.0071.

⁴⁸ *Kilroy v. Kilroy*, 137 S.W.3d 780, 787 (Tex. App. 2004).

⁴⁹ TEX. FAM. CODE § 6.601(a).

⁵⁰ TEX. CIV. PRAC. & REM. CODE § 154.027(b).

volving the divorce matter is designated as binding, the court must enter an order reflecting the arbiter's award.⁵¹ When the arbitration involves child issues it will be binding on the court unless a party who wants to avoid the arbiter's award convinces the court that the order is not in the child's best interest.⁵²

Similar to New York's early settlement panels, Texas provides for mini-trials and moderated settlement conferences, which are conducted under agreement of the parties. In a mini-trial, each party presents its case to an impartial third party who then makes a non-binding advisory opinion (unless the parties agree that it is binding and enter into a written settlement agreement).⁵³ In a moderated settlement conference, a neutral panel makes a non-binding, advisory opinion.⁵⁴ The goal of such evaluation is to encourage settlement by demonstrating to the parties a likely trial outcome. Additionally, provisions for any or all of the aforementioned alternative disputes resolution methods may be incorporated in a collaborative law case.

IV. The Divorce Triangle

State governments hold monopolies over divorce. The domestic relations court maintains exclusive jurisdiction over termination of marital status.

The Supreme Court of California has stated:

In every civilized country marriage is recognized as the most important relation in life, and one in which the state is vitally interested. The right of the legislative department to determine upon what conditions and in what manner the marriage relation may be entered into, and, having been entered into, for what causes and in what manner it may be dissolved, is unquestioned. The well-recognized public policy relating to marriage is to foster and protect it, to make it a permanent and public institution, to encourage the parties to live together, and to prevent separation and illicit unions. . . . While an action to obtain a decree dissolving the relation of husband and wife is nominally an action between two parties, the state, because of its interest in maintaining the same, unless good cause for its dissolution exists, is an interested party. It has been said by eminent writers upon the subject

⁵¹ TEX. FAM. CODE § 6.601(b).

⁵² *Id.* § 153.0071(b).

⁵³ TEX. CIV. PRAC. & REM. CODE § 154.024.

⁵⁴ TEX. CIV. PRAC. & REM. CODE § 154.025.

that such an action is really a triangular proceeding, in which the husband and the wife and the state are parties.⁵⁵

On January 1, 1970, the California legislature replaced various types of “fault” with “irreconcilable differences”⁵⁶ as grounds for divorce.⁵⁷ One reason for the modern rise in family law private ordering has been the establishment of “no fault” divorce laws in all states.⁵⁸ When parties may terminate their marital status without being required to prove misconduct to a judge, governmental involvement in the case is reduced.

“No fault” divorce has not changed the triangular nature of family court proceedings, however. The family law court retains exclusive jurisdiction over rights of child custody, child visitation, child support, spousal support and property ownership. Domestic relations litigants still need a judge’s signature for meaningful resolution of issues. Although judicial involvement changed with the advent of “no fault” divorce laws, the government remains “an interested party” in domestic relations cases.

V. Parenting the Parents

This section and the next section (“Piercing the Contractual Veil”) focus on the mediation aspect of private ordering. When divorcing parties present a judge with a settlement agreement they have signed, should the judge simply rubber stamp it? What duty does the government have to assure fair (and not merely consensual) resolution of divorces? Although these issues exist irrespective of whether ADR played a role in the creation of the agreement, the rise in mediation and collaborative practice has

⁵⁵ Deyoe v. Superior Court, 74 P. 28, 30 (Cal. 1903).

⁵⁶ CAL. FAM. CODE § 2311.

⁵⁷ In addition to irreconcilable differences, there is one other ground for dissolution of marriage in California: “A marriage may be dissolved on the grounds of incurable insanity only upon proof, including competent medical or psychiatric testimony, that the insane spouse was at the time the petition was filed, and remains, incurably insane.” CAL. FAM. CODE § 2312. To our knowledge this ground has never been used.

⁵⁸ New York was the last state to retain only fault based divorce. This changed in 2010. See Governor Patterson Signs No-Fault Bill, Post-Standard, Aug. 15, 2010, available at http://www.syracuse.com/news/index.ssf/2010/08/governor_pateron_signs_no-fau.html.

greatly increased the numbers of agreed-upon documents being filed by divorcing parties.

The doctrine of *parens patriae* (literally: “parent of his or her country”) refers to a government’s protection of persons unable to protect themselves. If law is a parent, the parenting duties of the family law department judge far exceed the parenting duties of judges sitting in other departments.

As divorcing spouses, valuing freedom, address their relations with one another, courts must decide daily the extent to which litigants should govern themselves versus the extent to which government should “protect” litigants from their ill-advised decisions. Freedom instructs to allow willing persons to resolve their family law disputes with as much autonomy as possible.

Private ordering is vetoed every time a bench officer refuses to approve a mediated settlement agreement. The two primary logical justifications for the exercise of judicial veto power are: first, because the parties’ settlement adversely impacts a third party, and second, because unequal bargaining power has resulted in an unfair settlement.

One of the unique characteristics of family law is the considerable extent to which the litigants’ decisions impact lives of third parties. Of course, the “third parties” most at risk from unwise divorce decisions are the parties’ minor children. Another example of third party impact is the spouse who was intimidated into waiving necessary spousal support and ends up a burden on a creditor or a welfare budget.

The U.S. Supreme Court has described America as a “government resting on . . . the protection of the weak against the strong.”⁵⁹ When the “weak one” is an innocent child, few would question the occasional necessity for governmental intervention. If an abused parent has been browbeaten into relinquishing physical custody of a child to the abuser, law must veto the parties’ agreement to protect the child.

But when the “weak one” is a divorce litigant who has agreed to an unfavorable property division, “protection of the weak against the strong” goes by a less flattering name: paternalism. In contrast to the above child custody example, in which the

⁵⁹ *Halter v. Nebraska*, 205 U.S. 34, 43 (1907).

parties' settlement adversely impacted a third party, in this example the only justification for disallowing private ordering would be the unfair settlement. The reviewing court would have to reach beyond ordinary contract principles to invalidate such a property settlement agreement.

Contract law is grounded in the theory that people mean what they say and should be forced to perform their promises. The very purpose of contract law is to hold folks to their bad decisions – no one needs to be sued to complete a profitable transaction.

Of course, public policy considerations impose limits on enforceability of some contracts. Employers must pay minimum wage and tenants cannot contract away habitable housing. But normally an agreement is enforceable unless the party seeking to avoid it establishes a contract defense such as incapacity, menace, fraud or undue influence. One must live with the results of a decision freely (albeit foolishly) made. Liberty carries consequences.

Some jurists contend that, even where rights of third parties are not affected, divorce litigants deserve special protection from disadvantageous agreements.⁶⁰ Freedom/protection policy considerations inevitably consider the skill sets that domestic litigants bring to their negotiating tables. One party may be highly educated and a savvy negotiator, while the other party is neither. Consider a wife who has a high IQ, strong social skills, a Ph.D. in Economics, and is a ferocious bargainer. Her husband has a below-average IQ, weak social skills, little education, and a desire to avoid conflict at all costs. The husband will have no remedy in contract law if the wife prevails on every issue in their marital termination agreement negotiation.

Negotiating imbalances can be exacerbated in the family law setting, which often finds people at the most distraught point in their lives. Their marriage, the world they have built for themselves, and the futures they have envisioned have failed. Their financial resources are stretched and their relationships with their children are strained. They find themselves unable to understand their place in the world. In this vulnerable emotional

⁶⁰ Penelope Eileen Bryan, *The Coercion of Women in Divorce Settlement Negotiations*, 74 *DENV. U. L. REV.* 931 (1997).

state, not all persons are capable of making good decisions about their long-term futures.

Divorce judges commonly have wide discretion in deciding whether to adopt as a court judgment an agreement reached by the parties: an Illinois judge can reject a property agreement that he or she considers unconscionable and a New York judge can reject a spousal support agreement that he or she considers unfair. Liberal standards of review permit judicial consideration of factors far beyond traditional contract defenses.

A history of physical abuse is an extreme example of unequal bargaining positions. Above-mentioned disparities in intelligence and education can be factors. One party may be prepared for trial – financially, emotionally, and in terms of risk tolerance – while the other party is unprepared for trial on all three fronts. One party (the “leavee”) may be reeling from recent revelations, such as marital infidelity and abandonment, while the other party (the “leaver”) coolly executes a well-planned strategy. One party may have a negotiating weak point that the other party identifies and intentionally exploits.

As experienced family law practitioners know, even if an emotionally-distraught litigant is represented by competent legal counsel, bargaining parity cannot be assured.

VI. Piercing the Contractual Veil

Although a judicial officer with broad discretion to decide whether to approve a divorce stipulation can consider many factors, including unfairness of the agreement and inequalities in the parties’ respective bargaining powers, applying those factors can be difficult. An agreement’s unfairness is seldom apparent, and unequal bargaining positions of the parties are even less frequently apparent on the face of the document. Also, what appears to be an unjust resolution in one area of the agreement can turn out to be fair when viewed in light of other settlement terms. Reasonable settlements can come in a wide variety.

If a bench officer suspects a stipulated agreement is so unfair as to lie beyond the realm of reasonable settlements, he or she can inquire further into the matter by, for example, requiring the submission of additional documentation or by conducting a hearing at which testimony is taken regarding the effects of the agree-

ment. But how is the bench officer to know, from the face of the agreement, that it is unfair enough to warrant further inquiry?

The adversarial system of justice is designed to bring all relevant matters to the attention of the court. But once parties have signed their agreement and submitted it for approval, the system is no longer adversarial or, if it is, the adversaries have changed to: the parties (now working together) versus the reviewing court. The parties' shared goal is to win a judicial imprimatur, and they will draft their agreement with that goal in mind.

Some portions of a submitted divorce agreement are susceptible of judicial review, while other portions are not. In states with formulaic child support guidelines, the judicial officer can review income levels and other factors for assurance that the support amounts have been calculated correctly. No state has formulaic child custody guidelines, however, because custody decisions depend on so many variables. Thus, the most important issue before the court – child custody – is all too often the issue regarding which the reviewing court is given the least amount of data. Because an unfair agreement can appear fair, the reviewing court is seldom able to “pierce the contractual veil.”

VII. Binding Arbitration of Child-Related Issues

This section focuses on the arbitration aspect of private ordering. Some states are better monopolists than others. Some jurisdictions permit binding arbitration of child custody, child visitation and child support issues, while others do not. The California Court of Appeal has ruled:

stipulations between parents involving the minor children which attempt to divest the court of jurisdiction are void and the doctrine of estoppel does not apply.

“This continuing jurisdiction is vested in the court, and is to be exercised, in the interests of children. It is their right to have the court hear and determine all matters which concern their welfare and they cannot be deprived of this right by any agreement of their parents. The welfare of children is of interest to the state.”⁶¹

In contrast, the New Jersey Supreme Court has ruled in favor of binding child custody arbitration. “The constitutionally pro-

⁶¹ *Goodarzirad*, 230 Cal. Rptr. at 206 (citations omitted).

tected right to parental autonomy includes the right of parents to choose the forum in which to resolve their disputes over child custody and parenting time, including arbitration.”⁶² “An agreement to arbitrate must be in writing or recorded” and must establish that the parties are aware of and have knowingly and voluntarily waived their rights to a judicial determination.⁶³ A record of documentary evidence adduced during the proceedings must be kept; testimony must be recorded; and the arbitrator must issue findings of fact and conclusions of law in respect of the award.⁶⁴ The arbitrator’s award is subject to review under the Arbitration Act, N.J.S.A. 2A:23B-1 to -32, except that judicial review is also available if a party establishes that the award threatens harm to the child.⁶⁵

A striking contrast exists between arbitration and mediation, in that arbitration carries with it a fairness control that mediation lacks, namely, a dissatisfied litigant. As discussed above, unfairness in a mediated agreement is not brought to the attention of the court because the disadvantaged party has no complaint. In fact, in mediation the disadvantaged party does not consider itself disadvantaged, and so joins with the other party in submitting a “sanitized” (unfairness concealed) agreement for approval.

The opposite is true in binding arbitration. If the arbiter makes an award that displeases one of the litigants, that litigant is motivated to request that the court invalidate the award. As can be seen, the risk of court-sanctioned unfairness is much higher in mediation private ordering than it is in arbitration private ordering.

VIII. Conclusion

Under “no fault” laws, spouses have the right to end their marriage without having to convince a judge that they should be allowed to do so. Although government involvement in divorce litigation has thus diminished, the involvement remains substantial. A litigant who requires an order, judgment or decree always needs a judicial officer’s signature.

⁶² *Fawzy v. Fawzy*, 973 A.2d 347, 360 (N.J. 2009).

⁶³ *Id.* at 363.

⁶⁴ *Id.* at 362.

⁶⁵ *Id.* at 350.

California, New York, Illinois and Texas all permit private ordering ADR in domestic relations cases. All four states find themselves walking the line between freedom and paternalism, and seeking an appropriate balance.

Although binding arbitration is generally permitted in property matters, it remains controversial in child-related issues. California views binding child custody arbitration as an attempt by parents to divest the court of the power it needs to fulfill its responsibilities to children. In contrast, New Jersey views binding child custody arbitration as a constitutionally protected right of parental autonomy. A New Jersey trial court fulfills its responsibilities to children by retaining the power to review the arbitration award, and to invalidate it if the objecting party proves that the award threatens harm to a child. We favor the New Jersey approach, which permits private ordering while retaining a judicial safeguard in extreme cases.

All four states encourage mediation regarding all divorce issues. Mediation is helpful in resolving cases and furthers private ordering but how can a busy judge, holding dozens of stipulated agreements awaiting signature, be expected to conduct an insightful review of settlement terms? The answer is that he or she cannot – a reviewing judge sees only what lies inside the “four corners” of the settlement agreement and both settling parties are motivated to draft the agreement in such a manner that no indication of coercion or unfairness will appear.

Ironically, mediation private ordering is implemented out of procedural necessity, if not out of philosophical choice, and a divorce litigant’s freedom to settle foolishly is respected by practical default, if not by jurisprudential decision.

Under what standard should a judge reject a settlement agreement? We believe that a reviewing court should do so only in an extreme case where rejection appears necessary to prevent manifest injustice, such as where wife/mother has apparently waived financial support from husband/father in trade for child custody.⁶⁶ We believe that when rejection has occurred, a hearing should be conducted at which the parties are permitted to

⁶⁶ Penelope Eileen Bryan, *Vacant Promises?: The ALI Principles of the Law of Family Dissolution and the Post-Divorce Financial Circumstances of Women*, 8 DUKE J. GENDER L. & POL’Y 167 (2001).

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explain their motivations and intentions regarding the agreement.

Parties are more familiar with their needs and concerns than a bench officer can be, and are in a better position to make informed choices. A settlement that appears unworkable on its surface may properly serve its parties, and their children, for reasons that aren't apparent. Parties are more likely to comply with their own agreements than with judicial pronouncements. Mediation private ordering through should be the rule, and a rejected settlement agreement a rare exception.