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Giving Competency Its Day in Court - In re Fellman

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GIVING COMPETENCY ITS DAY IN COURT

In re Fellman[1]

I. INTRODUCTION

The use of arbitration as a forum for dispute resolution has encountered widespread acceptance and approval; it is generally embraced as an effective and efficient mechanism for resolving disputes.[2] However, there also exists an awareness that arbitration is unsatisfactory for resolving certain classes of disputes.[3] These disputes generally require broad procedural safeguards and involve issues of public policy.

This Note will examine the decision in *In re Fellman*,[4] where the Superior Court of Pennsylvania determined that the issue of competency was a matter for the courts, not arbitration, to determine.[5] Furthermore, this Note will explain how *Fellman* is consistent with cases concerning different issues, but which similarly denied arbitrators authority based upon similar reasoning.

II. FACTS AND HOLDING

The situation giving rise to the case at hand was the refusal of a potential beneficiary of a revocable trust to assist the settlors, Mr. and Mrs. Fellman, in terminating the trust.[6] Harold and Marie Fellman, husband and wife, created a revocable trust, transferring their assets to co-trustees, consisting of themselves and their nephew, Sidney J. Fellman.[7] The trust was created for the benefit of the settlors, Mr. and Mrs. Fellman, during their lifetime.[8] Paragraph 7 of the trust agreement provided that following the death of Mr. and Mrs. Fellman, "the entire remaining trust fund after payment of [certain] special bequests set forth above in this § 7 shall be held and administered for the benefit of the Grantor's

1. 604 A.2d 263 (Pa. Super. Ct. 1992).
2. *See* Weinrott v. Carp, 298 N.E.2d 42, 47-48 (N.Y. 1973).
3. Stewart E. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 1981 CARDOZO L. REV. 481, 482.
4. 604 A.2d 263.
5. *Id.* at 267.
6. *Id.* at 263.
7. *Id.*
8. *Id.*

nephew, SIDNEY J. FELLMAN."[9] The trust agreement also contained a clause explicitly reserving the right of Mr. and Mrs. Fellman to revoke the trust.[10]

On July 18, 1990, Harold and Marie Fellman decided to revoke the trust and desired to withdraw all assets belonging to the trust.[11] They requested that Sidney J. Fellman join with them to "execute and deliver to the undersigned as grantors any and all instruments required to transfer to the grantors all of the assets of the trust."[12] Sidney refused to comply with this request.[13]

Following their nephew's refusal, Mr. and Mrs. Fellman sought relief from the Orphans' Court, which issued a citation to Sidney directing him to show cause why he should not assist in helping to revoke the trust.[14] Sidney answered the citation by averring that the Fellmans were physically and/or mentally impaired and moved for physical and mental examinations of the Fellmans.[15] Sidney J. Fellman thus challenged Mr. and Mrs. Fellman's rights to revoke the trust based on their competency at the time of the attempted revocation.[16]

The Court of Common Pleas of Allegheny County, Orphans' Division, denied the relief sought by the Fellmans and directed the parties to submit to arbitration the question of the settlors' competency.[17] The Orphans' Court held that it lacked jurisdiction to hear the case based on an arbitration clause in the trust agreement which required a dispute concerning the competency of a beneficiary or trustee to be arbitrated.[18]

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9. *Id.*

10. *Id.* That clause read:

§ 1. Rights of the Grantor During his Lifetime.

The Grantor shall have the following rights while he is alive:

(a) The Grantor reserves the right at any time or times during his lifetime by written notice to the Trustee to:

(i) revoke all or any part of this agreement;

(ii) withdraw all or any part of the assets belonging to the trust estate;

(iii) alter or amend any term or provision of this Agreement, except the Grantor shall have no right or power to change the duties or immunities of the Trustee without the Trustee's written consent.

A complete revocation of this Agreement shall vest in the Grantor all assets then possessed by the Trustee. Upon the Grantor's request, the Trustee shall execute and deliver to the Grantor any and all instruments required to transfer to the Grantor any trust asset to which the Grantor may be entitled.

Id.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 263-64.

18. *Id.* at 264. That clause read:

§ 29. Arbitration.

Any controversy or claim arising out of or relating to this trust Agreement, or the breach thereof, shall be to the extent permitted by law settled by arbitration in the city of Miami, Florida, in accordance with the rules then obtaining of the American Arbitration

After being denied relief by the Orphans' Court, the Fellmans appealed to the Superior Court of Pennsylvania, contending that: (1) they reserved the right to revoke the trust, and Sidney, a co-trustee, could not prevent them from exercising the power so reserved; and (2) their competency was not an arbitrable issue.[19]

On appeal, the Superior Court of Pennsylvania held that, as a matter of public policy, issues of incompetency cannot be submitted to arbitration and further that the arbitration clause in the Fellman Trust Agreement was ineffective so as to deprive the Orphans' Court jurisdiction to hear and decide the issue of the settlors' alleged incompetency to revoke the trust.[20]

III. LEGAL BACKGROUND

Due to a lack of case law regarding the issue of an arbitrator's authority to determine mental competency, the *Fellman* court chose to examine cases dealing with arbitrators' authority in different contexts.[21] Courts have addressed the issues of arbitrability in areas including civil rights disputes,[22] child custody,[23] education,[24] civil service appointments,[25] and punitive damage awards.[26] In each of these contexts, various courts have denied the authority of an arbitrator to rule based on either constitutional[27] or public policy concerns.[28]

The United States Supreme Court has denied the authority of arbitrators to determine issues that require substantial procedural protections guaranteed by the

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> Association, and judgment upon the award rendered may be entered in any court having jurisdiction thereof.
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> The above § 7 and § 28 require that a dispute concerning the competency of a beneficiary or trustee be arbitrated. The Grantor recognizes that the issue of the competency of the Grantor, his spouse, his children and other descendants, all of whom are potential beneficiaries and trustees hereunder, involves not only the financial affairs of the Trust but the family relationships among Grantor, his spouse, his children and other descendants and it is his intention whenever possible to avoid litigation on the issue of competency and to resolve that issue entirely through the process of arbitration.

Id.

19. *Id.*

20. *Id.* at 267.

21. *See id.* at 266-67 (discussing Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Garrity v. Lyle Stuart, Inc., 353 N.E.2d 793 (N.Y. 1976)).

22. *See Alexander*, 415 U.S. at 56-58.

23. *See* Agur v. Agur, 298 N.Y.S.2d 772, 777 (App. Div. 1969).

24. *See* Three Village Teachers' Ass'n v. Three Village Cent. Sch. Dist., 494 N.Y.S.2d 644, 646-47 (Sup. Ct. 1985).

25. *See* City of Salamanca v. City of Salamanca Police Unit, 497 N.Y.S.2d 856, 859 (Sup. Ct. 1986).

26. *See Garrity*, 353 N.E.2d at 795-96.

27. *See Alexander*, 415 U.S. at 57-60.

28. *See Garrity*, 353 N.E.2d at 795—96; *Agur*, 298 N.Y.S.2d at 777; *City of Salamanca*, 497 N.Y.S.2d at 859; *Three Village*, 494 N.Y.S.2d at 646—47.

Due Process Clause of the Constitution.[29] In *Alexander v. Gardner-Denver Co.*,[30] the Supreme Court dealt with the issue of arbitrability of a claim under Title VII of the Civil Rights Act.[31] In *Alexander*, the Court determined that an employee had a statutory right to trial *de novo* under Title VII, despite a prior adverse ruling made by an arbitrator pursuant to a collective bargaining agreement.[32] The Court's argument against arbitrability was supported by its finding that federal courts have plenary powers to enforce Title VII requirements.[33] The Court noted that the purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII.[34] Therefore, the Court held that deferral to arbitral decisions would be inconsistent with that goal.[35]

The *Alexander* Court further stressed the constitutional safeguards required in civil rights cases.[36] In an arbitration proceeding, the rights protected by constitutional notions of due process are not guaranteed.[37] The Court noted that the fact finding process in arbitration usually is not equivalent to judicial fact finding,[38] the record of the arbitration proceedings is not as complete,[39] and the usual rules of evidence in a judicial setting do not apply.[40] Furthermore, the Court found that in an arbitration proceeding, the rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable.[41] The Supreme Court determined that the informality of the arbitral proceedings, which enables them to function as efficient, inexpensive, and expedient means of dispute resolution, also makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.[42]

In a similar vein, New York state courts have refused to honor arbitration clauses in a variety of contexts based on public policy concerns.[43] In each

29. *See Alexander*, 415 U.S. at 56.

30. 415 U.S. 36.

31. *Alexander*, 415 U.S. at 55-60; *see* 42 U.S.C. § 2000(e) (1988).

32. *Alexander*, 415 U.S. at 44-60. The Court further stated that arbitral decisions may be admitted as evidence and accorded such weight as the court deems appropriate. *Id.* at 60.

33. *Id.* at 47.

34. *Id.* at 56.

35. *Id.*

36. *See id.* at 56-58.

37. *Id.*

38. *Id.* at 57.

39. *Id.*

40. *Id.*

41. *Id.* at 57-58.

42. *Id.* at 58.

43. *See Garrity*, 353 N.E.2d at 794; *Agur*, 298 N.Y.S.2d at 777; *City of Salamanca*, 497 N.Y.S.2d at 859; *Three Village*, 494 N.Y.S.2d at 647.

situation, the court vacated an arbitral ruling based on a consideration that the ruling was counter to some provision of the state's public policy.[44]

The Appellate Division of the New York Supreme Court dealt with the issue of arbitration of child custody matters in *Agur v. Agur*.[45] In *Agur*, a marital separation agreement provided that any controversy arising between the parties would be arbitrated under Jewish religious law.[46] Respondent claimed that the matter of custody of the couple's child was subject to this arbitration clause.[47]

The *Agur* court based its authority in disallowing arbitration of child custody matters on the state's policy of acting as *parens patriae* to do what was best for the interests of the child.[48] The court noted that the very nature of a child custody decision calls for determination by a court as opposed to arbitration.[49] The *Agur* decision noted that, unlike a family court judge, there is no assurance of the qualifications of an arbitrator and no necessity that the parties nominate persons whose backgrounds or competence would certify a proper decision.[50] Further, the court stated that where arbitration stresses the end of a dispute by declaring custody to one of the parties, the reviewing court is not bound to grant custody to either parent but may decide that, in the child's best interests, neither should have custody.[51] The court noted that agreements by parents as to custody of their children are never final, but subject always to the supervening power of the court.[52] Thus, as a matter of public policy, the *Agur* court determined that the limited function of arbitration, as stipulated by the parties, would not serve the court in discharging its duties as *parens patriae*.[53]

The Court of Appeals of New York addressed the issue of an arbitrator's power to award punitive damages in *Garrity v. Lyle Stuart, Inc.*[54] In *Garrity*, the court vacated an arbitrator's award of punitive damages[55] and held that an

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44. *See Garrity*, 353 N.E.2d at 794; *Agur*, 298 N.Y.S.2d at 777; *City of Salamanca*, 497 N.Y.S.2d at 859; *Three Village*, 494 N.Y.S.2d at 647.

45. 298 N.Y.S.2d 772; *see* Sterk, *supra* note 3, at 501-02 (discussing *Agur*).

46. *Agur*, 298 N.Y.S.2d at 774.

47. *Id.* at 775. The court agreed that the arbitration clause takes into account the dispute of custody, as the clause included as a subject for deliberation "any controversy . . . over the . . . application of any part" of the agreement. *Id.* at 776.

48. *Id.* "*Parens patriae*" refers to the role of state as sovereign and guardian of persons under legal disabilities, such as juveniles or the insane, and in child custody determinations, when acting on behalf of the state to protect the interests of the child. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

49. *Agur*, 298 N.Y.S.2d at 777. The court did agree that arbitration was useful when the mundane matter of the amount of support is the issue. *Id.* However, it is less so when the delicate balancing of the factors composing the best interests of the child is the matter at hand. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 776.

53. *Id.* at 779.

54. 353 N.E.2d 794; *see also* Sterk, *supra* note 3, at 527-33 (discussing *Garrity*).

55. *Garrity*, 353 N.E.2d at 794.

arbitrator has no power to award punitive damages, even if it has been agreed to by the parties.[56]

The *Garrity* court based its conclusion on public policy grounds, stating that the award of "[p]unitive damages is a sanction reserved to the State, a public policy of such magnitude as to call for judicial intrusion to prevent its contravention."[57] The court noted that punitive damages are enforced not only to punish the individual defendant but to deter the defendant, as well as others, from indulging in similar conduct in the future.[58] It is a social "remedy," not a private compensatory remedy.[59]

The court stated that "[t]he evil of permitting an arbitrator whose selection is often restricted or manipulat[ed] by the party in the superior bargaining position, to award punitive damages is that it displaces the court and the jury, and therefore the State, as the engine for imposing a social sanction."[60] Since enforcement of an award of punitive damages as a purely private remedy would violate strong public policy, the court held that an arbitrator's award which imposes punitive damages should be vacated.[61]

The New York Supreme Court next addressed an arbitrator's authority to determine a teacher's employment status in *Three Village Teachers' Ass'n v. Three Village Central School District*.[62] In this case, pursuant to a collective bargaining agreement, the parties agreed to submit to arbitration controversies between the teachers' association and the school district and to accept the arbitrator's judgment as binding.[63] The teachers' union requested arbitration when the school district awarded a class assignment to a less-tenured teacher.[64] The arbitrator determined that the most important consideration for the district in making appointments was an ability to provide continuity of the learning experience.[65] Despite this fact, the arbitrator held that desiring continuity was not a bona fide educational reason for the district to hire as it did.[66] The school district sought to vacate the arbitrator's ruling on the grounds that it contravened public policy.[67]

The *Three Village* court held that an arbitrator dealing with issues concerning school district responsibility to maintain adequate standards in the classroom may not infringe on substantive issues without violating public policy.[68] The court

56. *Id.*
57. *Id.*
58. *Id.* at 795.
59. *Id.*
60. *Id.* at 796.
61. *Id.* at 794.
62. 494 N.Y.S.2d 644.
63. *Id.* at 645.
64. *Id.* at 646.
65. *Id.*
66. *Id.*
67. *Id.* at 645.
68. *Id.* at 647.

found that the arbitrator in this case "based her decision on substantive grounds not procedural grounds in holding that the Board lacked a compelling reason" to offer employment.[69] Since the award of the arbitrator contravenes public policy, and because continuity of education is a substantive issue, the court determined that the decision had to be vacated.[70]

Finally, the issue of making civil service appointments was declared inarbitrable based on public policy concerns in *City of Salamanca v. City of Salamanca Police Unit*.[71] In *City of Salamanca*, a police officer pursued arbitration after being terminated for lying about his eyesight on a civil service application.[72] The court referred to a number of statutory enactments concerning appointment of state civil service workers.[73] The court then noted that there is a strong public policy regarding civil service appointments and that such policy is born out of important constitutional and statutory enactments which impose heavy responsibilities on state courts.[74] The court noted that such strong public policy in the area of appointment to the state civil service imposes a proper restriction on the freedom to arbitrate.[75]

In addition, the *City of Salamanca* court referred to a previously developed test which determined when judicial intervention into arbitration proceedings under public policy considerations is appropriate.[76] According to this test, the judicial system should intervene and set aside an arbitration proceeding "only when the [arbitral] award contravenes a strong public policy, almost invariably involving an important constitutional or statutory duty or responsibility."[77]

Previously, courts have either vacated or refused to grant an arbitrator authority in certain delicate contexts. In the instant case, the court was confronted with the issue of an arbitrator's authority to determine mental competence, an issue involving both constitutional and public policy concerns.

IV. THE INSTANT DECISION

In *Fellman*, the Superior Court of Pennsylvania faced the question of whether determining competency is an arbitrable issue. The court first noted that the Fellmans had made a valid revocation of their trust.[78] Pennsylvania law allows a settlor to revoke or amend a revocable trust in accordance with the terms

69. *Id.*
70. *Id.*
71. 497 N.Y.S.2d 856.
72. *Id.* at 857.
73. *Id.* at 858.
74. *Id.* at 859.
75. *Id.*
76. *Id.* at 858 (citing *In re* Port Jefferson Station Teachers Ass'n v. Brookhaven-Comsewogue Union Free Sch. Dist., 383 N.E.2d 553 (N.Y. 1978)).
77. *Port Jefferson*, 383 N.E.2d at 554.
78. *Fellman*, 604 A.2d at 265.

of the trust.[79] Further, the court cited the Restatement (Second) of Trusts Section 330(a), which states that "[t]he settlor has power to revoke the trust if and to the extent that by the terms of the trust he reserved such a power."[80] The court found that the trust agreement contained a clear and unconditional revocation clause[81] and that the Fellmans gave the necessary notice and followed the required procedures effectively to revoke the trust.[82]

The court next addressed the issue of competency to revoke a trust.[83] The court stated the general rule that an absolute right to revoke a revocable trust is subject to the limitation that the settlor must be competent at the time of acting to revoke the trust.[84] Thus, "although the settlor has reserved a power of revocation, he cannot revoke the trust if he lacks mental competence at the time when he attempts to revoke it."[85] The court noted the uniformity of this notion in other court decisions.[86]

The court noted that the issues determined by a competency hearing directly affect individual liberty interests, and, therefore, the individual must be guaranteed substantial procedural protections.[87] In Pennsylvania, these procedural guarantees have been codified in a statute.[88] Recognizing the individual rights at issue in an incompetency proceeding, the Pennsylvania legislature adopted a statutory framework which serves to protect an individual who may be incompetent.[89] One such provision establishes the following procedural safeguards: (a) notice to the alleged incompetent; (b) a hearing at which good cause for a finding of incompetency must be shown; (c) a hearing with a jury if requested by the alleged incompetent; and (d) the presence of the alleged incompetent at the hearing in the absence of exceptional circumstances.[90] The court noted that the Pennsylvania Supreme Court had earlier recognized the importance of statutory incompetency proceedings:[91] "[M]ental capacity and competency are to be presumed and before any person shall be deprived of the right to manage his own affairs, there must be *clear* and *convincing* proof of mental incompetency and such proof must be *preponderating*."[92]

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79. *See In re* Insurance Trust Agreement of Kaufmann, 331 A.2d 209, 211 (Pa. 1975).

80. *Fellman*, 604 A.2d at 265 (citing RESTATEMENT (SECOND) OF TRUSTS § 330(a) (1987)).

81. *Id.* The clause in question was Section 1 of the Fellman Trust Agreement. *See supra* note 10 (quoting the clause).

82. *Fellman*, 604 A.2d at 265.

83. *See id.*

84. *Id.*; *see* Florida Nat'l Bank v. Genova, 460 So. 2d 895, 898 (Fla. 1984).

85. *Fellman*, 604 A.2d at 265 (citing AUSTIN W. SCOTT, THE LAW OF TRUSTS § 330 (1989)).

86. *Id.*; *see* First Nat'l Bank v. Oppenheimer, 190 N.E.2d 70, 75 (Ohio 1963); Kemmerer v. Kemmerer, 139 N.E.2d 84, 86 (Ohio 1956).

87. *Fellman*, 604 A.2d at 265.

88. *See* 20 PA. CONS. STAT. ANN. § 5501 (1975).

89. *See Fellman*, 604 A.2d at 265.

90. *See* 20 PA. CONS. STAT. ANN. § 5511 (1975).

91. *Fellman*, 604 A.2d at 266; *see In re* Myers Estate, 150 A.2d 525, 526 (Pa. 1959).

92. *Myers*, 150 A.2d at 526 (emphasis in original).

The *Fellman* court observed that many of the rights guaranteed by the Pennsylvania incompetency statute included the essential procedural safeguards afforded by the Due Process Clause in the Fourteenth Amendment of the United States Constitution.[93] The court then referred to the differences between the procedure of an arbitration proceeding versus a civil trial.[94] The court stressed that in an arbitration proceeding, rights protected by constitutional notions of due process or rights afforded by a statute are not guaranteed.[95] Often, in an arbitral proceeding, "rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable."[96]

Because of this lack of guaranteed constitutional safeguards, the *Fellman* court found that "arbitration is not an appropriate vehicle for determining the incompetency of an individual."[97] In supporting this position, the court cited the *Alexander* Court's concern regarding the lack of procedural safeguards in arbitrating civil rights disputes under Title VII.[98] Generally, the *Fellman* court continued, as the issues involved in a case increase in importance, they require more procedural protections and are thereby afforded more due process.[99] Both *Fellman* and *Alexander* involved individuals whose liberty interests were threatened; both represent cases of such importance so as to command the highest due process protections.

The court next found support for its position by referring to a number of New York decisions which refused to honor arbitration clauses.[100] In each case, the matter involved was ruled inarbitrable based on state public policy reasons.[101] After citing these cases, the *Fellman* court held that, as a matter of

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93. *Fellman*, 604 A.2d at 266. These rights included "notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a tribunal having jurisdiction of the cause." Parker v. Children's Hosp., 394 A.2d 932, 945 (Pa. 1978).

94. *See Fellman*, 604 A.2d at 266.

95. *Id.*

96. *Alexander*, 415 U.S. at 57-58.

97. *Fellman*, 604 A.2d at 266.

98. *Id.* at 266-67; *see also Alexander*, 415 U.S. at 56-58.

99. *See Fellman*, 604 A.2d at 266; *see also, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

100. *Fellman*, 604 A.2d at 267 (citing *Garrity*, 353 N.E.2d at 794; *In re* Aimcee Wholesale Corp., 237 N.E.2d 223, 224 (N.Y. 1968); Durst v. Abrash, 213 N.E.2d 887, 888 (N.Y. 1965); *In re* Knickerbocker Agency, 149 N.E.2d 885, 887 (N.Y. 1958); Erdheim v. Selkowe, 380 N.Y.S.2d 20, 21 (App. Div. 1976)).

101. *See Garrity*, 353 N.E.2d at 794 (arbitrator's award of punitive damages as purely private remedy vacated as violative of public policy); *Aimcee Wholesale Corp.*, 237 N.E.2d at 224 (enforcement of the state's antitrust policy cannot be left to commercial arbitration); *Durst*, 213 N.E.2d at 888 (enforcement of usurious loan agreement); *Knickerbocker Agency*, 149 N.E.2d at 887 (claim concerning liquidation of insolvent insurer); *Erdheim*, 380 N.Y.S.2d at 21 (matters of attorney discipline).

Pennsylvania public policy, issues of incompetency could not be submitted to arbitration.[102]

The court concluded its opinion by stating that only the judicial system is equipped to handle incompetency hearings[103] and the legal ramifications following a determination of incompetency.[104] Thus, in the interests of public policy and of assuring constitutional and statutory safeguards, the court held that issues of incompetency in Pennsylvania could not be submitted to arbitration.[105] As a result, the *Fellman* court held that the arbitration clause in the trust agreement at hand was ineffective and the Orphans' Court had jurisdiction to decide the issue of incompetency to revoke the trust.[106]

V. COMMENT

The holding in *In re Fellman* is very much in line with current case law, which has denied the authority of an arbitrator in a variety of contexts.[107] The *Fellman* court achieved its goal of denying arbitration by relying primarily on New York case law.[108] It is the position of Justice Johnson in his dissent that the majority's examination of New York case law on a variety of matters not involving competency, as well as the majority's citing of a United States Supreme Court case for the principle that the resolution of statutory and constitutional issues is a primary responsibility of the courts, is of little help in determining "whether, *under Florida law*, arbitration of the issue brought under the Fellman Trust can be accomplished."[109] For whatever reasons the court relied on New York case law, the significance of the cases thus relied upon is their discussion of public policy concerns not, as the dissent would believe, their jurisdiction.

A major portion of the *Fellman* holding was based on the deficiencies in procedural safeguards offered by arbitration.[110] For support of this finding,

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102. *Fellman*, 604 A.2d at 267.

103. *Id.* The dissent argued that the trial court found no authority on the question whether an arbitrator may determine issues of competency. *Id.* at 269 (Johnson, J., dissenting). Judge Johnson, the lone dissenter, stated:

> The majority examines New York law on a variety of matters not involving competency, and cites to the United States Supreme Court for the principle that the resolution of statutory and constitutional issues is a primary responsibility of the courts. I find none of this helpful in determining whether, *under Florida law*, arbitration of the issue brought under the Fellman trust can be accomplished.

Id.

104. *Id.* at 267.

105. *Id.*

106. *Id.*

107. *See supra* notes 22-28 and accompanying text. *See generally* Sterk, *supra* note 3, at 481-543.

108. *See Fellman*, 604 A.2d at 267.

109. *Id.* at 269 (Johnson, J., dissenting).

110. *Id.* at 266-67.

Fellman relied principally on *Alexander*.[111] The *Alexander* Court concluded: (1) that the fact finding process in arbitration was normally inferior to that of the courts; and (2) that common civil trial rights and procedures, such as discovery, cross-examination, and testimony under oath, are often severely limited or unavailable in arbitral proceedings.[112] Due to these procedural deficiencies, as well as the delicate nature of a discrimination claim, the *Alexander* Court held that it was Congress's intent for Title VII claims to be heard by the courts, not in arbitration.[113]

The issue in *Fellman* is comparable to the issue involved in *Alexander*. The person judged incompetent and the person being discriminated against are both subjected to a societal position inferior to those around them. Because of this, an alleged incompetent should be afforded every procedural safeguard available to assure the accuracy of the finding. Acknowledging this very point, the Pennsylvania Supreme Court stated: "A finding of mental incompetency is not to be sustained simply if there is *any* evidence of such incompetency, but only where the evidence is preponderating and points unerringly to mental incompetency."[114]

Courts have historically been involved with issues of judging competency. A constitutional right to a hearing on competence is triggered when a bona fide doubt arises as to a defendant's competence.[115] Trial courts also have been given increased responsibilities for monitoring the competence of defendants.[116] Finally, states must provide sufficient procedural protection for the competency proceeding.[117] The *Alexander* Court determined that arbitrators did not provide sufficient procedural safeguards to entrust Title VII claims to them.[118] The *Fellman* court was correct in reaching the same conclusion in regards to competency hearings.

Another justification for denying the authority of arbitrators in a competency proceeding is based on public policy concerns. Courts have recognized that in certain contexts, public policy strongly urges the use of the courts.[119] The *City of Salamanca* court stated that "[p]ublic policy, whether derived from, and whether explicit or implicit in statute or decisional law, or in neither, may restrict the freedom to arbitrate."[120] The *Fellman* court determined that allowing an arbitrator to determine competency would be contrary to the state's public policy.[121]

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111. *See id.*
112. *See Alexander*, 415 U.S. at 57-58.
113. *Id.* at 58; *see supra* notes 29-42 (discussing *Alexander*).
114. *See Myers*, 150 A.2d at 527 (emphasis in original).
115. *See* Pate v. Robinson, 383 U.S. 375, 378 (1966).
116. *See* Drope v. Missouri, 420 U.S. 162, 177 (1975).
117. *See Pate*, 383 U.S. at 378.
118. *See Alexander*, 415 U.S. at 58.
119. Sterk, *supra* note 3, at 482.
120. *City of Salamanca*, 497 N.Y.S.2d at 859.
121. *See Fellman*, 604 A.2d at 267.

There are several reasons why allowing competency to be determined by arbitration would violate public policy. The court in *Agur*, in denying arbitration of a child custody matter, determined that the state acts as *parens patriae* in such a matter.[122] Under the theory of *parens patriae*, the state acts as sovereign and guardian of juveniles, as well as the insane.[123] Thus, it is the state's responsibility to protect the interests of those persons either judged or alleged to be incompetent. The responsibility should include providing a full judicial inquiry with full procedural safeguards in determining competency. Allowing arbitration of this matter would minimize the state's effectiveness in its role of *parens patriae*.

City of Salamanca noted that public policy is born out of important constitutional and statutory enactments which impose heavy responsibilities on the courts.[124] In Pennsylvania, the legislature has enacted a statute which served to protect an individual alleged to be incompetent.[125] The statute includes provisions for an incompetency hearing and a jury where requested.[126] Where a statute exists, public policy is best served by adhering to the intent of the lawmakers. Because the efficient nature of an arbitrator may result in adhering to less of the procedural protections offered by the statute, public policy is served best by denying authority.

VI. CONCLUSION

In essence, *In re Fellman* determined that, based on the individual liberties at stake in a competency hearing, the issue of judging competency was too important to be determined by an arbitrator. Claims such as child custody, employment discrimination, and competency determination all involve issues of individual liberties for the parties involved. While the court's use of New York case law to support *Fellman* may be questionable, justice was served by assuring that findings of competency will be protected by the courts.

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122. *See Agur*, 298 N.Y.S.2d at 776.
123. *See supra* note 48.
124. *See City of Salamanca*, 497 N.Y.S.2d at 859.
125. *See Fellman*, 604 A.2d at 265; *see also* 20 PA. CONS. STAT. ANN. § 5501 (1975).
126. *See supra* note 90 and accompanying text.