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Who's Watching out for the Children - Making Child Custody Determinable by Binding Arbitration - Dick v. Dick

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Who's Watching Out for the Children? Making Child Custody Determinable by Binding Arbitration

Dick v. Dick[1]

I. INTRODUCTION

"Many is the custody case which almost seems to outlive the parents . . . ."[2] To remedy this problem, many members of the legal profession advocate greater utilization of arbitration to include determination of child custody.[3] As state courts struggle to incorporate and interpret the Uniform Arbitration Act ("UAA") into child custody case law, the *Dick* case stands as the latest decision demonstrating the advantages and pitfalls of using binding arbitration to resolve custody disputes.

II. FACTS AND HOLDING

In 1990, Leslie Dick filed for divorce from his wife of two and a half years, Linda Dick.[4] Both parties agreed to submit all issues, including child custody and support, to binding arbitration.[5] After the arbitrator issued his opinion, including

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1. 534 N.W.2d 185 (Mich. Ct. App. 1995).

2. Stephen W. Schlissel, *Why Arbitrate Domestic Relations Matters?*, 458 PLI/LIT 195 (1993).

3. Warren E. Burger, *Isn't There A Better Way?*, 68 A.B.A. J. 274, 276 (1982); Alfred R. Belinkie, *Matrimonial Arbitration*, 65 CONN. B.J. 309, 311-12 (1991); Stephen W. Schlissel, *A Proposal for Final and Binding Arbitration of Initial Custody Determinations*, 26 FAM. L.Q. 71 (1992); Vincent P. Celli, *Matrimonial Arbitration: An Old Technique in a New Home*, 157 NEW JERSEY LAWYER 40 (Dec. 1993); Schlissel, *supra* note 2.

4. Dick v. Dick, 534 N.W.2d 185, 187 (Mich. Ct. App. 1995).

5. Important conditions of the parties' arbitration agreement include:

> B. The Arbitrator shall be considered, in all respects, to be a substitute for the Circuit Judge in this case and shall be accorded all of the powers, duties, rights and obligations of the Circuit Judge, including, but not necessarily limited to, the determination of all issues present in this divorce action, including all pre-judgment (discovery, etc.) and judgment matters involving the parties to this litigation and their minor child.
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> IT IS FURTHER ORDERED that the decision of the Arbitrator, as incorporated in the Judgment of Divorce, shall be appealable to the Court of Appeals on the same basis and with the same legal effect as though the decision had been rendered by the Circuit Judge; IT IS FURTHER ORDERED that any appeal of this matter to the Court of Appeals shall not be based on the procedure which the Arbitrator has deemed to be reasonable, as set

findings of fact utilizing the "best interests of the child" factors enumerated in Michigan statutory law,[6] the trial court entered a judgment of divorce that fully incorporated the arbitrator's conclusions.[7]

Leslie Dick then brought the arbitrator's decision to the Michigan Court of Appeals.[8] He argued that the arbitration agreement was void *ab initio* because it was tantamount to allowing the trial court to appoint a private judge.[9] Alternatively, he asserted that if the court deemed the arbitration agreement valid, the agreement should be declared void because Michigan does not recognize

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forth above, but shall be based solely on the substantive decision of the Arbitrator; neither party having the right to a trial de novo in this matter, except as it may be based upon errors of substance (as opposed to procedure) committed by the Arbitrator which the Court of Appeals determines to necessitate such trial de novo.

Dick, 534 N.W.2d at 187.

6. The arbitrator issued a comprehensive, detailed opinion on all the terms of the divorce. *Id.* Michigan law, found at MICH. COMP. LAWS ANN. § 722.23 (Supp. 1995), sets forth the following factors to be assessed in determining the "best interests of the child":

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

MICH. COMP. LAWS ANN. § 722.23 (Supp. 1995).

7. The arbitrator issued his opinion over two years after the commencement of arbitration. According to the court,

[t]he length of the arbitration proceedings is directly related to the acrimonious approach of the parties, especially plaintiff. But for the vexatious litigation tactics employed by the parties throughout the proceedings, this matter could have been resolved in a more expeditious manner. At this point, the parties' divorce proceedings have lasted nearly twice as long as their marriage.

Dick, 534 N.W.2d at 187.

8. *Id.*

9. *Id.*

binding arbitration in divorce agreements.[10] Mr. Dick stressed his belief that "arbitration [was] not an acceptable procedure for resolving issues of child custody and support."[11]

The court of appeals found that although the parties' arbitration agreement referred to the arbitrator as a "private judge," those references were at most "colloquial expressions describing the arbitrator's powers by analogy to judicial functions."[12] In holding the agreement valid, the court stated that the parties sought permission from the circuit court to enter into binding arbitration, such permission was granted, and that the parties were now bound by the arbitration determination.[13]

In this case of first impression,[14] the *Dick* court held that when divorcing parties agree to binding arbitration of all issues, including child custody and support, the arbitration award is valid and unappealable except in cases involving fraud or duress.[15] The court could find no case law or any specific legislative intent, in either the Michigan Child Custody Act or the Uniform Arbitration Act, to limit arbitration in child custody situations.[16]

III. LEGAL BACKGROUND

Historically, the legal system frowned on the use of arbitration in situations involving child custody or support.[17] More recently, as arbitration becomes more desirable and acceptable as an alternative to traditional litigation, the arbitrability of child custody is again under consideration.[18] Because child custody remains one of the few areas of law over which courts generally wish to exercise exclusive control, courts are under increasing pressure to demonstrate valid reasons for continuing to deny enforceability of arbitrated child custody.[19]

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10. *Id.*

11. *Id.* Leslie Dick raised this objection only after the arbitration awarded custody to Linda. *Id.*

12. *Id.* The court determined that the agreement did not intend to make the arbitrator a judge "acting under the color of right as a duly appointed judge." *Id.* (citing Brockman v. Brockman, 317 N.W.2d 327, 328 (Mich. Ct. App. 1982)).

13. *Id.* at 188.

14. *Id.*

15. *Id.* at 190.

16. *Id.* at 190-91.

17. HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 14.8 (2d ed. 1988).

18. *See supra* note 3.

19. *Id.*

The traditional premise of non-arbitrability of child custody disputes is well articulated by Stewart Sterk.[20] Professor Sterk believes that "[i]t is the inability to represent properly the interests of the child, who, of course, never consented to arbitration in the first place, that makes arbitration an inappropriate forum for resolution of custody disputes."[21] Ample support for this view is found in the case law of many jurisdictions.[22] In *Sheets v. Sheets*,[23] a New York court reasoned that arbitration could not limit the court's *parens patriae* power.[24] The arbitrator's award would be subject to de novo review by the court to the extent that such an award conflicted with the best interests of the child,[25] and the award would not be res judicata against the child who was not a party to the arbitration.[26]

In *Fence v. Fence*,[27] the court expressed serious doubt whether custody should be arbitrable at all,[28] stating that the courts are the only decisionmakers capable of evaluating and protecting the best interests of the child. Until recently, the overwhelming majority of courts and legal authorities followed this view.[29] The consensus of most courts was that custody disputes could be arbitrated, but that the arbitrator's award would be subject to de novo review.[30]

In recent years, arbitrability of child custody is receiving inconsistent treatment. Some courts refuse to enforce agreements to arbitrate custody as contrary to the traditional public policy of entrusting the courts to protect the best

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20. Stewart E. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481 (1981).

21. *Id.* at 502.

22. *See* Sheets v. Sheets, 22 A.D.2d 176 (N.Y. 1964); Fence v. Fence, 314 N.Y.S.2d 1016 (N.Y. City Fam. Ct. 1980); Faherty v. Faherty, 477 A.2d 1257 (N.J. 1984); Crutchley v. Crutchley, 293 S.E.2d 793 (N.C. 1982); Biel v. Biel, 336 N.W.2d 404 (Wis. 1983); Rustad v. Rustad, 314 S.E.2d 275 (N.C. 1984). *See generally* J.F. Ghent, *Validity and Construction of Provision for Arbitration of Disputes as to Alimony and Support Payments, or Child Visitation or Custody Matters*, Annot., 18 A.L.R.3d 1264 (1968).

23. *Sheets*, 22 A.D.2d at 176.

24. *Id. Parens patriae*, in the context of child custody determination, occurs when the court is acting on behalf of the state to protect the interests of the child. "It is the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

25. *Id.*

26. *Id.* Support for this proposition is found in both case law and public policy. *See supra* note 22. The public policy concept that non-parties should not be bound is traditionally demonstrated with the precepts of res judicata. For further support of the policies involved, *see* CLARK, *supra* note 17; Sterk, *supra* note 20.

27. 314 N.Y.S.2d 1016 (N.Y. City Fam. Ct. 1970).

28. *Id.* at 1020.

29. *See supra* note 22.

30. CLARK, *supra* note 17, at 577; *see also infra* note 35.

interests of the child.[31] In *Glauber v. Glauber*,[32] the court stated that "when circumstances require determining which living arrangements are in the best interests of children, the courts alone must undertake the task."[33] *Glauber* held that custody must be determined by the court and may not be submitted to arbitration.[34]

Other courts, in keeping with the *Sheets* viewpoint, uphold the arbitrated custody arrangement as long as it does not negate the best interests of the child.[35] As stated in *Miller v. Miller*,[36] the court wants to encourage parties to resolve disputes, if possible, without court intervention.[37] Once called upon to protect the best interests of the child, however, the court may not ignore its obligation to do so.[38]

No court, until *Dick*, enforced the arbitration of custody solely on the ground that there was no "clear prohibition in case law, court rule, or statute against the use of binding arbitration in the resolution of custody disputes."[39]

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31. Glauber v. Glauber, 192 A.D.2d 94 (N.Y. App. Div. 1993). *See also Biel*, 336 N.W.2d at 404 (custody determinations must be made by the court and cannot be delegated to any other person). It was noted in *Faherty* that "[c]hildren's . . . custody . . . and overall best interests have always been subject to the close scrutiny and supervision of the courts despite any agreements to the contrary." *Faherty*, 477 A.2d at 1262. These courts also continue to mention the lack of res judicata. *See supra* notes 22 and 26 and accompanying text.

32. *Glauber*, 192 A.D.2d at 94.

33. *Id.* at 99.

34. *Id.*

35. *See Faherty*, 477 A.2d at 1257 (no review if it is clear that the award could not adversely affect the best interests of the child); Miller v. Miller, 620 A.2d 1161 (1993) (arbitration of child custody not void as against public policy, but not binding if award is challenged by one of the parties as not being in the best interests of the child); Kovacs v. Kovacs, 633 A.2d 425 (1993) (parens patriae necessitates independent judgment by the court with respect to matters concerning the best interests of the child). *See supra* note 3 and text accompanying note 18.

It is certainly worth noting that those courts who believe arbitrated custody is enforceable but reviewable on the merits seem unconcerned with the fact that they are violating the basic premise of unreviewability of arbitration as set forth in the UAA. Uniform Arbitration Act § 12(a), 7 Unif. L. Ann. 140 (1985) [hereinafter UAA]. *See* CLARK, *supra* note 17, at 578.

36. Miller, 620 A.2d at 1165.

37. *Id.*

38. *Id.*

39. *Dick*, 534 N.W.2d at 190.

IV. INSTANT DECISION

The *Dick* court located authority to permit the use of binding arbitration in Michigan Court Rule 3.216.[40] Noting that the rule focuses on mediation, the court determined that the rule nonetheless authorized the use of other unenumerated "settlement procedures" to resolve domestic disputes.[41] Moreover, the court discovered additional support in Michigan case law for using binding arbitration.[42]

Having gone this far in supporting the arbitration agreement, the court next turned to the validity of allowing child custody and support to be determined by arbitration.[43] The court found authority to uphold arbitrated child support disputes under the Michigan Child Custody Act.[44] The court then turned to the remaining issue: Whether child *custody* may be submitted to binding arbitration.[45]

The *Dick* court used a three-prong analysis to determine arbitrability of child custody.[46] Case law "that has led to the widely held belief that custody decisions are the exclusive province of the circuit court"[47] was balanced with the provisions of the Child Custody Act and the effect of the UAA.[48] The court ultimately

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40. The court noted that this rule concerns itself with mediation in domestic relations proceedings but that it contains a fairly broad grant of authority regarding settlement procedures. MICH. CT. RULE 3.216 provides:

> (A) Scope and Applicability of Rule. A court may submit any pending divorce, separate maintenance, or annulment proceeding, including post-judgment matters, to mediation under this rule for the purposes of attempting to settle contested issues. Nothing in this rule . . .
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> * * *
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> (3) prohibits the court from ordering, on stipulation of the parties, the use of modified mediation or other settlement procedures.

Dick, 534 N.W.2d at 188 (citing MICH. CT. RULE 3.216).

41. According to the court, "Binding arbitration certainly qualifies as a settlement procedure." *Id.*

42. In Marvin v. Marvin, 511 N.W.2d 708 (Mich. Ct. App. 1993), the court relied on the same court rules (*see supra* note 36) to approve the use of binding mediation to resolve property distribution issues in divorce cases. *Id.* The *Marvin* court also reiterated their prior court ruling that "where the parties to a divorce action agree to submit certain issues to a third party and to accept the decision of the third party as binding, they are bound by the third party's decision absent a showing of such factors as duress or fraud." *Marvin*, 511 N.W.2d at 709-10 (citing Balabuch v. Balabuch, 502 N.W.2d 381 (Mich. Ct. App. 1993)).

43. *Dick*, 534 N.W.2d at 188.

44. "The Child Custody Act, M.C.L. § 722.21 *et seq.*, M.S.A. § 25.312(1) *et seq.*, grants circuit courts the power to enter a support order to which the parties have agreed." *Dick*, 534 N.W.2d at 188.

45. *Id.* at 189.

46. *Id.*

47. *Id.* The court notes that circuit courts have "zealously and carefully refrained from permitting the friend of the court of any other party or agency to make custody determinations," however, this court then goes on to do just the opposite. *Id.*

48. MICH. COMP. LAWS ANN. § 600.5001 (1992).

found "no clear prohibition in case law, court rule, or statute against the use of binding arbitration in the resolution of custody disputes."[49] The court went further to say "[b]inding arbitration is an acceptable and appropriate method of dispute resolution in cases where the parties agree to it."[50]

Finally, the court addressed the availability of judicial review in binding arbitration.[51] The premise of binding arbitration is that the agreement is to be given broad application.[52] The parties in this case attempted to create a "hybrid form of arbitration."[53] No authority could be found for such an agreement, and the court determined that, "having invoked binding arbitration, the parties are required to proceed according to the applicable statute and court rule."[54] The

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49. *Dick*, 534 N.W.2d at 190. In essence, the court found that case law, while prohibiting the friend of the court or any other party to make custody determinations, did allow agreements by the parties regarding child custody to be enforced. *See* Koron v. Melendy, 523 N.W.2d 870, 871 (Mich. Ct. App. 1994). Further, the provisions of the UAA were deemed "clear on its face," with language that is broad and seemingly all inclusive. *Dick*, 534 N.W.2d at 190. The UAA provides:

> (1) All persons, except infants and persons of unsound mind, may, by an instrument in writing, submit to the decision of 1 or more arbitrators, any controversy existing between them, which might be the subject of a civil action, except as herein otherwise provided, and may, in such submission, agree that a judgment of any circuit court shall be rendered upon the award made pursuant to such submission.

MICH. COMP. LAWS ANN. § 600.5001 (1992).

The court believed that the act "permits all persons to submit any controversy to arbitration upon their agreement." *Id.* By "balancing the Court's instructions to the lower courts regarding custody determinations with the arbitration statute's more recent and broad language, custody disputes are not exempted from arbitration." *Id.* The Child Custody Act was also found to have no specific prohibition of arbitration of custody disputes. *Id.*

The court looked last at the language of MICHIGAN CT. RULE 3.210(C), covering "Custody of a Minor." The Friend of the Court Act, cited within the court rule, requires the friend of the court to provide domestic relations mediation to assist the parties in voluntarily settling custody or visitation disputes. MICH. COMP. LAWS ANN. § 552.513 (1992). The *Dick* court did not believe that the rule prohibited binding arbitration, stating "[i]t requires a hearing in a contested case. Yet, if the parties agree to binding arbitration, they effectively move the dispute to a different forum. The court rule does not appear to prohibit such action." *Id.* at 190.

50. *Id.* at 191. This sweeping statement in favor of arbitration will be discussed more fully in Section V.

51. *Dick*, 534 N.W.2d at 191.

52. MICHIGAN CT. RULE 3.602(J) states that an arbitration award may not be set aside unless:

> (1) the arbitrator or another is guilty of corruption, fraud, or used other undue means; (2) the arbitrator evidenced partiality, corruption, or misconduct prejudicing a party's rights; (3) the arbitrator exceeded the arbitrator's power; or (4) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear material evidence, or conducted the hearing to prejudice substantially a party's rights.

Dick, 534 N.W.2d at 191 (citing MICH. CT. RULE 3.602(J); Gordon Sel-way, Inc. v. Spence Bros., Inc., 475 N.W.2d 704, 709 (1991).

53. *Dick*, 534 N.W.2d at 191.

54. *Id.*; *see supra* note 48. In the present case, there was no allegation of fraud, duress or any other exception that would allow judicial review of the substantive agreement.

Dick court struck the substantive appealability clause of the agreement which reformed the binding arbitration agreement to follow Michigan statutes and court rules.[55] Because the court could not find a permissible reason for substantive review based on the facts of this case, it declined to review the agreement any further.[56] The *Dick* court concluded that, when divorcing parties agree to binding arbitration to resolve the issue of child custody, the subsequent arbitration award is enforceable.[57]

V. COMMENT

The Michigan Court of Appeals decision in *Dick* effectively eliminates one of the last impediments to the use of binding arbitration in the domestic arena. By upholding an arbitral award that determines child custody, the court rejects traditional notions of unenforceability based on the child not being a party and on the court's *parens patriae* authority.[58] With this decision, the *Dick* court takes an enormous step away from previously decided cases relating to arbitration of child custody.[59] The question now becomes whether this is a positive step forward for domestic relations dispute resolution or a step further away from protecting the needs of the most important people involved -- the children.

Traditional limitations on arbitration of child custody have strong roots.[60] The fundamental premise of the non-binding nature of a legal determination on those not parties to the dispute is central to our jurisprudence.[61] To now effectively bind non-parties (the children) based on the decision of others runs completely contrary to this premise. It is accepted that, in divorce arbitration, the husband and wife may be bound by the arbitrator's findings.[62] But also to bind the children requires asking who is representing their interests.[63] While the *Dick* decision discusses the arbitrator's utilization of the statutory "best interests of the child" considerations,[64] what allows the court to determine that the arbitrator was in fact putting the child's interests before those of the parents? The court has no substantive review in binding arbitration, except in jurisdictions that permit limited

55. *Dick*, 534 N.W.2d at 191.
56. *Id.* The court found support for this interpretation in *Marvin*, 511 N.W.2d at 709-10.
57. *Dick*, 534 N.W.2d at 190-91.
58. *See* sources cited *supra* note 22; *see also supra* note 24.
59. *See supra* notes 22, 31-36 and accompanying text.
60. *See supra* note 17.
61. RESTATEMENT (SECOND) OF JUDGMENTS § 34(3) (1982).
62. Belinkie, *supra* note 3, at 309.
63. CLARK, *supra* note 17; Sterk, *supra* note 20.
64. *See supra* note 6 and accompanying text.

review for manifest disregard of the law.[65] Furthermore, the precedent in *Dick* opens the door to future fact situations where the child will be unrepresented and unheard, yet bound by the parents agreed determination.[66]

Glauber stated that "[a] court cannot be bound by an agreement as to child custody and visitation . . . and simultaneously act as *parens patriae* on behalf of the child."[67] According to the *Glauber* court, in any situation involving custody of children, this *parens patriae* responsibility should always supersede agreements made by others.[68] *Glauber* also noted that, given the increasing acceptance of binding arbitration, the "best interests" analysis paramount in child custody determinations is more incompatible with arbitration than ever before.[69]

There are cogent arguments for increasing the availability and use of arbitration for the resolution of domestic disputes.[70] For example, there is little merit to the idea that agreed upon arbitration is anything but a positive development in the resolution of most divorce actions.[71] The parties' satisfaction increases when they feel that their individual needs have been considered and that determinations were made to best reflect the relative importance of those needs.[72] The adversarial nature of the traditional divorce action is minimized, and the likelihood of continuing cooperative relations between the parties is greater.[73]

However, close judicial scrutiny must accompany any binding arbitration that determines child custody.[74] Until further developments in arbitral procedure are made to insure the protection of the child's interests, the court system must remain involved.[75] Crowded dockets and a public policy favoring arbitration[76] do not

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65. *See* Wilko v. Swan, 346 U.S. 427, 436-37 (1953), *overruled on other grounds,* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989). *Wilko* addresses, in dictum, vacating arbitral awards which are in "manifest disregard" of the applicable law. *Id. See* Douglas E. Abrams, *Arbitrability in Recent Federal Civil Rights Legislation: The Need for Amendment,* 26 CONN. L. REV. 521, 568 n.227 (1994).

66. This is one of the cautions discussed by both Sterk and Clark; *see supra* notes 17 and 20. A good example of what could occur involves the situation where neither parent is a suitable custodian for the child; yet, the arbitrator is unable to consider any other options. *See* Sterk, *supra* note 20, at 500.

67. *Glauber,* 192 A.D.2d at 97-98.

68. *Id.* at 98.

69. *Id.*

70. *Faherty,* 477 A.2d at 1262. *See also supra* note 3.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Kovacs,* 633 A.2d at 431; *Miller,* 620 A.2d at 1164. *See also* CLARK, *supra* note 17, at 577-78 and Sterk, *supra* note 20, at 500-01.

75. *Glauber,* 192 A.D.2d at 99.

76. *Faherty,* 477 A.2d at 1262. *See also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985) (Stevens, J., dissenting).

outweigh the needs of the children.[77] The fact that *Dick* is the first decision to uphold binding arbitration on child custody is acknowledgment of this fact. The arguments against this application of arbitration are well-reasoned.[78]

Perhaps it is better to look at the *Dick* decision not as breaking new ground for court abdication of child interests, but rather as the court's plea for help from the legislature of Michigan and any other state that does not specifically address this issue in its enactment of the UAA or in its custody act. The *Dick* court was careful to enunciate that "[t]he language of the arbitration statute is broad and seemingly all inclusive. It permits *all* persons to submit *any* controversy to arbitration upon their agreement. It does not *specifically* exempt any civil action from binding arbitration."[79] We should view *Dick* as a call for legislative action to protect children of divorce.[80]

Our goal should be to protect children from the pitfalls of arbitrable child custody while allowing them to gain the benefits of private dispute resolution. Such protection should include legislative amendments to each state's version of the UAA that specify the procedures required in arbitrating child custody. For example, a guardian ad litem should be required to represent the child's interests in the arbitral proceeding. Parties using arbitration should be required to choose an arbitrator specializing in domestic relations. The courts should allow substantive review in cases of manifest disregard of the law.[81] Limiting arbitration of child custody in this manner incorporates the protections needed for the children while allowing both parents and children to resolve sensitive issues in privacy and with minimal acrimony, thereby serving both arbitration promotion policies and the needs of the children.

VI. CONCLUSION

In *Dick*, not only did the arbitration of the marriage dissolution take longer than the existence of the marriage, but the parties were dissatisfied with the result. Meanwhile, the child of the marriage was unrepresented and largely unheard. If arbitration is to be utilized as a positive alternative to litigation of domestic relations disputes, provisions must be made for protecting the child's interests. Absent specific guidelines within state enactments of the UAA or state custody acts, binding arbitration of child custody has the potential to contradict the "best

77. *Faherty*, 474 A.2d at 1262.

78. *See supra* notes 17, 20, 31. *See also* Agur v. Agur, 32 A.2d 16 (Pa. 1969) and Nestel v. Nestel, 38 A.D.2d 942 (N.Y. App. Div. 1972).

79. *Dick*, 534 N.W.2d at 190 (emphasis added).

80. *See supra* note 16 and accompanying text.

81. *See supra* note 65 and accompanying text.

interests of the child" analysis integral to custody determinations.[82] Allowing the *Dick* precedent to increase the use of binding arbitration in custody disputes without refinements to the process inhibits progress toward satisfactory resolution of child custody where the best interests of the child are truly served.

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82. CLARK, *supra* note 17, at 577; *Fence*, 314 N.Y.S.2d at 1020.