1 Civ. A 109 595
Alameda County Superior Court Case No. 852570-1

In the Court of Appeal
State of California

FIRST APPELLATE DISTRICT
DIVISION ONE

BETTY ANN HARRISON, A*ppellant*

v.

JEFFREY BOKOR, R*espondent*

APPELLANT'S OPENING BRIEF

From the Alameda County Superior Court
Post-Judgment Child Custody Modification Order
Honorable Jon S. Tigar

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1. INTRODUCTION: COURT EMPLOYED WRONG LEGAL STANDARD WHEN PARENT OBJECTED TO CHILD CUSTODY SPECIAL MASTER DECISION; CHILD CUSTODY SPECIAL MASTER PROCESS NOT AUTHORIZED BY LAW; DE NOVO REVIEW REQUIRED

Betty Ann Harrison (Ann) appeals from a post-trial decision modifying child custody by awarding Respondent Jeffrey Bokor (Jeffrey) sole authority to make all future educational and medical decisions[1], and to choose a therapist for their preschooler, Nathan (born 10/3/99). [App.V.1038-1051] Because Jeffrey lives in the East Bay and Ann lives in San Francisco, all participants understood that Nathan would spend more time in the custody of the parent residing nearest to his school. Giving Jeffrey authority over schools meant that Nathan would the majority of his school week custody time in his father's custody. [RT/5-24-04/2/15-22][2]

[1] The order gives Ann sole decisionmaking authority over dental, orthodontic and vision care.

[2] Key to Record Citations: Citations to the Reporter's Transcript are formatted RT/date/exhibit number/page(s)/lines. Citations to the Appendix in Lieu of Clerk's Transcript are formatted App. volume number/page(s).

Under the prior court order, Nathan had moved from spending more time in the care of his mother to spending equal time in the care of each of his parents, and his parents shared decisionmaking authority. [App.I/34-37]

In modifying that order, the Court rubber-stamped the decisions of a child custody special master (CCSM) that exceeded the scope of her powers under the stipulation and order [App.I/1-8] .appointing her to decide "disputes" between the parents. The CCSM issued the disputed decision sua sponte, although the parties had not submitted disputes over those future decisions to her. The CCSM ended up playing the combined roles of mediator, evaluator, minor's counsel and referee.

The order appointing Christine Pigeon, Ph.D. as a CCSM used the pretexts of Evidence Code §730 (expert witness) and Code. Civ. Proc. §638 (referee) to disguise an experimental model of dispute resolution that is not authorized by law. The broad duties assigned to Pigeon were neither those of an expert witness, nor those authorized under §638. All proceedings pursuant to that order are void. Pigeon did not comply with California Rules of Court, rule 5.220 in any particular and her report and testimony were consequently inadmissible.

Because a family court has a *parens patriae* duty to children in child custody matters, public policy bars delegation of judicial authority to a private party. Consequently the order fails as a reference. The Court could not consider the findings of the CCSM as type of child custody evaluator because the CCSM complied with none of the mandatory requirements of California Rules of Court, rule 5.220. The order appointing the CCSM is void, and it was error for the trial court to act pursuant to the void order.

The proceeding itself was a trial on the recommendations of the CCSM. The CCSM was not a party with standing to raise issues for consideration by the Court.

One of the most shocking aspects of the CCSM order is that it authorizes the CCSM to "formulate her decisions on what is perceived by the Master/Expert to be in the child's best interests, and in order to promote the child's development and emotional adjustment," rather than requiring her to follow the criteria for determining best interests established by statute, rule of court and published appellate decisions.

The question of school week physical custody was embedded in what appeared to be litigation about school and therapy decision-making authority. When the proceedings commenced, the Court recognized the latent physical custody issue that it ignored in the findings.

> The Court: "...I know that the parties would like to settle the issue of whether Nathan is ready to go to kindergarten, and if he is, what school is he going to attend."
>
> Ms. Gibbs: Your Honor, the issue is more complicated in the sense that the parties live in two separate communities. So besides just whether he goes to pre-K or kindergarten, which community is he going to school in, so that's the issue.
>
> The Court: Right. I think one of the papers framed this issue of who is going to be the primary parent during the time that Nathan is in school." [RT/5-24-04/1/15-18 to 2/15-22]

This is a case in which the tail (school choice) wagged the dog (physical custody). Before deciding *what school* Nathan should attend (or who should choose schools), the Court had to decide *which parent* would be the primary school year parent based upon the legal factors

to be considered in determining physical custody. California Rules of Court, rule 5.220, *Marriage of LaMusga* (2004) 32 Cal.4th 1072; *Enrique M. v. Angelina V.* (2004) 121 Cal.App.4th 1371; *Marriage of Heath* (2004) 122 Cal.App.4th 444; and *Marriage of Melville* (2004) 122 Cal.App.4th 601. Once the Court determined which parent would have primary school-year custody based on a full best-interests hearing, that decision would narrow the school choice decision. At that point, the Court could exercise discretion to determine how school decisions would be made, and limit the range of choices to those geographically feasible in view of the physical custody orders. The CCSM structured the decisionmaking process so that the factors bearing on physical custody were never assessed. Because the litigation was framed around whether to ratify the CCSM decision, it continued the cart-before-the-horse approach to determining physical custody.

As a matter of law, there was insufficient basis to modify the joint legal and physical plan by reducing Ann's caretaking time and decisionmaking authority. See *In re Marriage of McLoren* (1988) 202 Cal.App.3d 108 where the Court of Appeal found that the burden of proof had not been met to shift from sole legal custody to joint legal custody. Since the Special Master was not a party, she cannot have a burden of proof. It was Jeffrey's burden of proof to establish that he should have primary school week custody and sole authority to make educational and school decisions.

The method the trial court used resulted in a proceeding that never addressed the best interests factors that drive physical custody determinations. Under California's statutory scheme governing child custody and visitation determinations, the overarching concern is the best interest of the child. *Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255.

Nathan's physical custody plan was decided based purely on

the factors relating to which parent would make wiser school selection choices. A trial court must consider a far broader range of factors when modifying physical custody.

The Court deprived Ann of a voice in Nathan's education, medical care and psychological treatment to punish her for defending herself against the CCSM's improper decisions. The CCSM and the evaluator had gone far afield from the questions presented to them, and the scope of the assessment conducted. They, not the parties, raised new issues, organized the "wag the dog" process by which school decisionmaking was decided *before* primary custody, and then threw in a therapy recommendation for good measure. They, not the parties, transformed a process by which the parents, with the CCSM's assistance, would make decisions for the coming school year into a long-term modification of legal and physical custody.

Jeffrey failed to meet his burden of proof to establish that the changes, including the change in physical custody, were in Nathan's best interests. The standard of proof a parent sharing joint custody must meet to effect a change in parenting time is the best interest of the child. E*nrique* M. *v.* A*ngelina* V., *supra.*, 121 Cal.App.4th 1371, 1373; B*urchard v.* G*aray* (1986) 42 Cal.3d 531. Although the OAT notes that the changed circumstances standard will apply to all future modifications, it contains no findings of changed circumstances to make the modifications it orders.

The trial court also erred in ordering Ann to contribute $10,000 to Jeffrey's attorneys fees and costs as sanctions. Ann could not be compelled to participate in the CCSM process. She could not be punished for asking the Court to independently determine the issues.

Appellant's Opening Brief begins with a discussion of the standard of review, so that when reading the Factual and Procedural

History, this Court considers that history through the lens of original review, rather than the deferential abuse of discretion standard.

2. STANDARD OF REVIEW

Unlike most child custody cases, this case does not require deference to the trial court. This Court must exercise independent review.

2,1 DUE PROCESS VIOLATIONS PREVENT EVIDENTIARY PROCEEDINGS ON SCHOOL YEAR CUSTODY; APPEAL REQUIRES MOST FAVORABLE STANDARD OF REVIEW

By focusing on Ann's rejection of the Special Master decisions, rather than on the factors required for consideration of Nathan's best interests, the trial court deprived Ann of a fair, due process hearing on the merits of the modifications Pigeon had dictated. E*dwards v.* C*entex* (1997) 53 Cal.App.4th 15.

Denial of trial on some or all issues triggers an appellate standard of review presuming the truth of evidence in appellant's favor. This standard arises from the due process right to an evidentiary trial of factual questions bearing on a final judgment. S*ee, e.g.*, M*ancina v.* H*oar* (1982) 129 Cal.App.3d 796, 801; P*ianka v.* C*alifornia* (1956) 46 Cal.2d 208, 212; C*allahan v.* C*hatsworth* P*ark* (1962) 204 Cal.App.2d 597, 602; D*vorin v.* A*ppellate* D*epartment* (1975) 15 Cal.3d 648, 651; K*elly v.* N*ew* W*est* F*ed.* S*avings* (1996) 49 Cal.App.4th 659, 677; J*enkins*

v. McKeithen (1969) 395 U.S. 411, 429.

This Court must accept the evidence most favorable to Ann. as true, disregarding conflicting evidence. *Carson v. Facility Development Co.* (1984) 36 Cal.3d 830, 838-39.

Under this standard, the substantial evidence rule is essentially reversed. Factual contentions made by the appellant in the trial court, applicable to the disputed factual contentions, will generally be accepted if is "substantial evidence" to support them. The testimony of a single witness may constitute substantial evidence. *Marriage of Mix* (1975) 14 Cal.3d 604, 614; *Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, 1052.

2.2 DEFERENTIAL "ABUSE OF DISCRETION" STANDARD DOESN'T APPLY TO FAILURE TO APPLY CORRECT LEGAL CRITERIA, OR DECISION BASED UPON ERRONEOUS LEGAL ASSUMPTIONS

The trial court applied the wrong standard of law to the child custody modification proceedings, and relied on the void special master order. Where the trial court applies the wrong legal standard, appellate courts use de novo review.

The deferential "abuse of discretion" standard of review does not apply when a court fails to apply the correct legal criteria, or bases a decision upon erroneous legal assumptions. *Bussey v. Affleck* (1990) 225 Cal.App.3d 1162, 1165-66; *Washington Mutual Bank, FA v. Superior Court (Briseno)* (2001) 24 Cal.4th 906, 914; *Barella v. Exchange Bank* (2000) 84 Cal.App.4th 793, 797; *People Ex Rel Department of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135 at 1144.

In *Enrique M. v. Angelina V.* (2004) 121 Cal.App.4th 1371, 1373 the Court of appeal held that the deferential abuse of discretion standard does not apply to child custody modification proceedings where the trial court fails to apply the correct legal standard.

Another way to reach the same result is to treat application of the erroneous legal standard as an abuse of discretion, per se. "A trial court abuses its discretion when it applies the wrong legal standards applicable to the issue at hand." *Adams v. Aerojet-General Corp.* (2001) 86 Cal.App.4th 1324, 1341. In *In re Marriage of Lloyd* (2003) 106 Cal.App.4th 754 the appellate court stated that it was applying the deferential abuse of discretion test. However, when reviewing the trial court decision, it treated the trial court's consideration of an impermissible factor as an abuse of discretion.

Similarly, this district held in *In re Marriage of Olson* (1993)14 Cal.App.4th 1, 3 "In this case we hold that delegation of judicial authority to a special master to make factual findings and exercise judgment in determining the income of the parties for the purpose of setting spousal support is an abuse of discretion, unless done by agreement of the parties." The Court used abuse of discretion language, but the reversal was mandated because the trial court's error of law led it to act outside of statutory authority.

This Court's opinion in *Ruisi v. Thieriot* (1997) 53 Cal.App.4th 1197 reverses a trial court that appointed a CCSM. While the opinion does not discuss the standard of review, it in no way defers to the trial court. Rather, the Court reverses the special master appointment as unauthorized by law. The sanction issue should also receive independent review. As a matter of law, challenge of an order that exceeded the trial court's jurisdiction (the CCSM order) cannot be deemed conduct that frustrates settlement. This Court should also

hold that, as a matter of law, the fact that a parent opposes a request to strip her of joint legal and physical custody cannot be the basis for Fam. Code §271 sanctions. To allow otherwise would be to transform the statute from a penalty for extreme conduct to a prevailing party attorneys fees provision. In *In re the Marriage of Abrams* (2004)105 Cal.App.4th 979 said it was using the abuse of discretion standard, but the analysis looks more like a finding that the trial court applied a mistaken legal standard, and misconstrued the purpose and intent of Fam. Code §271.

Where trial courts base their decisions on impermissible criteria, appellate courts, in practice, show them little deference. In effect, by declaring the criteria used in the exercise of trial court discretion legally impermissible, appellate courts engage in actual independent review.

An appellate court independently reviews the failure of a trial court to engage in de novo review of a child's best interests in a child custody modification proceeding. *In re Marriage of Rose and Richardson* (2002) 102 Cal.App.4th 941.

In a child custody modification proceeding where the Court correctly applied the best interests standard, but considered an improper factor, the California Supreme Court engaged in independent review. The Supreme Court treated consideration of an impermissible factor as a form of applying the wrong legal standard, and did not defer to the trial court's exercise of discretion.

> But although we conclude that the trial court correctly ruled that the case was governed by the best-interest standard, we find that it erred in applying that standard. The court's reliance upon the relative economic position of the parties is impermissible; the purpose of child support awards is to ensure that the spouse otherwise best fit for custody receives adequate funds for the

> support of the child. Its reliance upon the asserted superiority of William's child care arrangement suggests an insensitivity to the role of working parents. And all of the factors cited by the trial court together weigh less to our mind than a matter it did not discuss -- the importance of continuity and stability in custody arrangements. We therefore reverse the order of the trial court.
> *Burchard v. Garay* (1986) 42 Cal.3d 531, 535

2.3 Where Legal Questions Predominate in a Mixed Question of Fact and Law, Appellate Courts Engage in Independent Review

The issues Ann raises are predominantly legal ones. The dispute centers around the legal significance of the facts, and the design of a process that did not elicit evidence on the key facts, not the facts themselves. Consequently, this Court should engage in independent review

> "If, ... the question requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed de novo."'"[Citations]
> *Ghirardo v. Antonioli, supra*, 8 Cal.4th at 800-801

2.4 Independent Review Required for Issues Relating to Validity, Construction and Legal Effect of Special Master and School Evaluator Appointment orders; Construction of Statutes

Ann's appeal asks this Court to determine the validity of the

order appointing Pigeon, and to construe that order, and the statutes that the order cites as its basis.

A claim that a decision is in excess of a referee's authority, presents a question of law for the appellate court's independent review. *In re Marriage of Petropoulos* (2001) 91 Cal.App.4th 161, 175. In determining the validity of an order or interpreting an order, an appellate court exercises its independent judgment. *Estate of Smith* (1981) 117 Cal.App.3d 511, 516.

The Second District applied these principles to independently review a judgment in a child custody modification proceeding in *In re Marriage of Rose and Richardson, supra.*, 102 Cal.App.4th 941, 948-949.

Ann's appeal also requires this Court to construe Evidence Code §730, and Code Civ. Proc. §638. Statutory construction is a question of law, which appellate courts must review de novo. *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699; *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420; *In re Marriage of Petropoulos* (2001) 91 Cal.App.4th 161, 169.

2.5 WHERE TRIAL COURT IMPROPERLY BELIEVED IT LACKED DISCRETION, OR FAILED TO CONSIDER REQUIRED FACTORS, APPELLATE COURT REVIEWS DE NOVO

If the record demonstrates that the trial court erroneously believed it had no discretion, the appellate court will reverse and remand for the required exercise of discretion. *Fletcher v. Superior Court (Oakland Police Department)* (2002) 100 Cal.App.4th 386, 392; *People v. Melony* (2003) 30 Cal.4th 1145, 1165; *People v. Hard* (2003) 112 Cal.App.4th 272, 283-84; *People v. Gillespie* (1997) 60 Cal.App.4th 429,

434; *People v. Surplice* (1962) 203 Cal.App.2d 784, 791-92.

Here the trial court plainly believed that the task at hand was to approve or reject the special master decision, rather than to consider the proposed modifications of the parenting plan de novo. The judge evidently felt constrained to limit his analysis to the factors set forth in the findings, rather than to conduct the hearing no differently than he would a modification proceeding in which there was no special master.

The deferential "abuse of discretion" standard of review also does not apply when the record or the findings of the trial court suggest a "lack of consideration of the essential circumstances to be evaluated" in exercising discretion. *Marriage of Lopez* (1974) 38 Cal.App.3d 93, 117. "To exercise the power of judicial discretion all the material facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent and just decision." *In re Cortez* (1971) 6 Cal.3d 78, 85-86 (quoting *People v. Surplice* (1962) 203 Cal.App.2d 784, 791)

An appellate court cannot defer to trial court discretion where the trial court mistakenly thought it's discretion was very narrow or failed to consider the relevant factors. *Craig L. v. Sandy S.* (2004) 125 Cal.App.4th 36, 52.

A record demonstrating that the trial court failed to perform its function of weighing evidence or failed to exercise discretion in making a discretionary ruling overcomes the presumption of correctness and warrants a reversal on appeal" Eisenberg, Horvitz & Wiener, Cal. Prac. Guide: Civil Appeals & Writs (2003) ¶8:19 citing *Estate of Larson* (1980) 106 Cal.App.3d 560, 567; *Gardner v. Sup. Ct. (Statt)* (1986) 182 Cal.App.3d 335, 338-340.

2.6 TRIAL COURT NOT ENTITLED TO DEFERENCE UNDER DOCTRINE OF IMPLIED FINDINGS WHERE APPELLANT OBJECTED TO AMBIGUITIES AND OMISSIONS IN PROPOSED STATEMENT OF DECISION

The Court's decision is not entitled to deference under the doctrine of implied findings. Ann filed detailed objections bringing the omissions and ambiguities of the proposed statement of decision to the trial court's attention. [App V/1000-1028]. The doctrine does not apply where the omissions and ambiguities in the statement of decision are brought to the attention of the superior court in a timely manner. Code Civ. Proc. §634. If the Court believed those facts significant, it would have amended the proposed statement of decision accordingly.

Where Ann's objections to the proposed findings noted omitted factors that the Court should have considered in modifying legal and physical custody, the court of appeal cannot infer that the trial court considered those factors in the exercise of its discretion, and merely failed to note them. See *Craig L. v. Sandy S., supra.*, 125 Cal.App.4th 36, 52.

2.7 DEFERENTIAL REVIEW STANDARD DOES NOT APPLY WHERE TRIAL COURT FOLLOWED IMPROPER PROCEDURES IN REACHING ITS DECISION

The deferential standard of review also does not apply when the trial court fails to follow proper procedures in reaching its decision. *See, e.g., People v. Green* (1980) 27 Cal.3d 1, 24; *Ramona Manor Convalescent Hospital v. Care Enterprises* (1986) 177 Cal.App.3d 1120, 1137

(requirement to make affirmative record that court exercised its discretion and weighed probative value against prejudicial effect under Evidence Code §352); *Larwin-Southern Cal., Inc. v. JGB Inv. Co.* (1979) 101 Cal.App.3d 626.

Here the trial court conducted a trial to ratify the decision resulting from a void reference, and improperly treated the CCSM decision as having the same weight as a child custody evaluation. The CCSM lacked standing to initiate any proceedings, and the parents had not asked the Court to modify the legal or physical custody provisions of their parenting plan.

2,8 DE NOVO REVIEW USED TO DEVELOP DEFINED RULES AND/OR HELPFUL PRECEDENT OR WHEN CONSTITUTIONAL PRINCIPLES IMPLICATED

Appellate courts use independent review to develop defined sets of rules or a helpful body of precedent. Where there are constitutional implications, independent review is more likely. *People v. Kennedy* (2005) 36 Cal.4th 595; *People v. Cromer* (2004) 24 Cal.4th 889.

This case is one of first impression in that it considers the validity and consequences of a stipulation creating a CCSM. It provides a strong vehicle for providing guidance to trial courts and the bar. *Ruisi v. Thieriot, supra.*, 53 Cal.App.4th 1197 considered whether a trial court could appoint a CCSM to address undefined future coparenting issues over the objection of one of the party. This case asks whether a stipulation to such a procedure is valid, and, if so, what are the legal consequences of the stipulation.

Where constitutional considerations are implicated, a case is

particularly suited for de novo review. See *State of Ohio v. Barron* (1997) 52 CaI.App.4th 62, 67; *Bell v. Farmers Insurance Exchange* (2004) 115 Cal.App.4th 715, 751, 756. The CCSM order represents an unconstitutional delegation of judicial authority. Cal. Const., art. VI §1. The parent-child relationship is protected by federal and state privacy, substantive due process, and equal protection guarantees. *Troxel v. Granville* (2000) 530 U.S. 57; *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307; *Adoption of Matthew* B. (1991) 232 Cal.App.3d 1239.

3. FACTUAL AND PROCEDURAL HISTORY

Ann appeals from orders after a trial "to determine whether the Court should adopt the recommendation of Special Master Dr. Christine Pigeon dated July 26, 2004' (App.I/250]. The court found that those recommendations were in the child's best interests and adopted them completely. [App.V, 1038-1051]

Nathan's parents divorced while he was in pre-school. [App. I/13] Ann and Jeffrey agreed to a parenting plan adopting the recommendations of a court-appointed child custody evaluator. [App.I/34-37]. That court-ordered plan provided for them to share full legal and physical custody, and to use the services of a CCSM to assist them in making future co-parenting decisions. Ann and Jeffrey chose Christine Pigeon, Ph.D., as their special master.

Per their stipulation, the Court entered an order captioned "Stipulation and Order Appointing Expert Pursuant to Evidence Code Section 730." [App.I/1-8] .The order appointing Pigeon classified her as an expert per Evidence Code §730 and as a special master

(referee) per Code. Civ. Proc. §638. The duties assigned to Pigeon were neither those of an expert witness, nor those authorized under §638. By stipulation, they adopted the recommendations of the evaluator in their parenting plan, agreeing to submit "all future disputes regarding the minor child" to her for decision.

Paragraph 3 gave Pigeon absolute discretion over how proceedings were to be conducted, and allowed her to consider privileged information from the child's therapist or the child and base decisions upon that information without disclosing it to the court, counsel or the parents.

The order specifically provided that Pigeon's decisions would not be binding,

> The Master/Expert's findings and recommendations, if timely challenged, shall be entitled to the same weight given any other evaluation report or Family Court Services recommendations, but are not entitled to have formal precedent value. They will not be res judicata. They will not be adjudications.

The parties worked closely with Pigeon as co-parenting decisions arose. Pigeon worked with Nathan's parents for approximately one year. The parents adopted her recommendation that Nathan change from his San Francisco preschool near Ann's home to the CSC preschool on the U.C. Berkeley campus where Jeffrey worked. Ann accepted this recommendation despite concerns about disrupting the continuity of Nathan's preschool experience and the impact of the commute on her ability to juggle the demands of her career, and the schedule of her older son, Kam, who attended school in San Francisco. [App. 111-113, [RT/10-29-04/30-31] The parties agreed that Nathan would attend preschool four days each week, and spend one weekday with his mother. [App.I/111-113]

She began with the same process for the 2004=2005 school year, and the parents agreed on a method for visiting prospective schools with Nathan and gathering information. Pigeon recommended adopting Jeffrey's choice of an Oakland public school. Ann was disappointed by that recommendation and brought in a report by an educational consultant that Pigeon rejected as biased. Pigeon recommended that they use a neutral educational consultant. At that point, Ann complained that Pigeon had ignored her concerns about the safety and supervision at CSC. Pigeon visited the school and concluded Ann's concerns were unfounded. [RT/10-29-04/31-35]

Jeffrey set a motion regarding a school choice. Ann opposed having that hearing set, because they were working with Pigeon to select a school. [App.I/51]. At Pigeon's suggestion [App.I/55], they stipulated that child custody evaluator Margaret Lee, Ph.D. (Lee), be appointed per Evid. Code §730 [App.I/67-73],

> ... for purpose of a school assessment in this proceeding. The school assessment will include which school the child will attend in the fall of 2004, whether it will be a developmental program (pre K) or a kindergarten program and which parent is better suited to be the "school parent" (the parent in whose home the child will, by necessity, spend the majority of the school week) and any other school related issues that emerge during the course of the assessment.

Jeffrey initially opposed Lee's appointment. [RT/10-29-04/36]

Lee undertook to answer the question of which parent is better suited to be the "school parent" in the course of assessing school choice and performing a very limited evaluation focusing only on school issues. [RT/10-20-04/4; RT/10-20-04/24-26] She said that adapting the residential schedule was outside the scope of her appointment. [App.I/157]

During the course of the evaluation, Nathan experienced a number of episodes of bullying at the CSC preschool. Many of the incidents took place while Nathan and the older children who bullied him were outside of the visual supervision of any staff members. On one occasion, Nathan was punched. On two others, an older child secured scissors and cut into the clothing Nathan was wearing – the second time seriously cutting up the shirt, up and down the middle. The child cut other items belonging to Nathan, Jeffrey observed the boy threaten to kill Nathan.. While Nathan was napping, the boy hit him on his back with a bat. Ann became concerned that the lack of staff supervision compromised Nathan's physical safety and that the atmosphere of bullying compromised his psychological well-being. She asked the CCSM to investigate those concerns. When the CCSM didn't take her concerns seriously, Ann lost confidence in her. [App.I/161-162, 222-223; App.III/766-768; RT/10-20-29/58; RT/11/3/04/29, 62, 70; App.IV./773-780, 787] Before the incident, CSC advised parents that it was having staff scheduling problems. [RT/10-20-04/60-61] Ann was concerned because the school had been cited for prior incidents, including one in which a child gained access to scissors and another in which they lost a child. [RT/11-3-04/69]

A tense exchange of correspondence between Ann's lawyer and the CCSM ensued, with Ann's counsel sharing information about the incidents, asking the CCSM to follow up, and ultimately asking the CCSM to resign. In turn, the CCSM accused Ann and her lawyer of litigiousness by virtue of not acquiescing to all of her recommendations and findings. [App.I/83-87, 121-133, 921-924; App.IV./789-796, 830-844] Ann refused to meet further with Pigeon, communicating primarily through counsel. [RT/10-29-04/36-38;] Further difficulties arose when Pigeon recommended against Nathan's participation in a

summer program at the school she was proposing for kindergarten. [RT/10-29-04/39-40]

Lee was unaware of the history of repeated bullying. She concluded that the incident was not atypical for preschools, than Ann overreacted and that the school had handled it in a way that taught the children a good lesson. [RT./8-12-04/40/1-20].It was reasonable to be concerned about supervision, but noted the degree of Ann's concern. [RT/10-20-04/16] The Court found that "Jeff did not fail to give adequate attention to the incident at CSC in which Nathan's shirt was cut or to any other incidents involving S.E. ... The court does not express approval of CSC's actions leading up to the cutting of Nathan's shirt, but the court does agree with the conclusions of those witnesses who testified that the incident was not beyond the realm of the ordinary and that the school's solution to it was satisfactory.' [App.V, 1041] Pigeon had instructed Ann not to discuss the shirt incident with Lee during the evaluation. [App.V./1074].

Lee concluded that Nathan should attend school in the East Bay, and live with his father on most school days [App.I/155],

> In thinking about the long term plan and reviewing all the collected data, two major factors become prominent. The first involves my concurrence with Dr. Jacob's assessment that Nathan needs access to both of his parents. He is attached to both of his parents, and their strengths and weaknesses tend to balance each other. The only way for Nathan to retain strong connections with both of his parents, is for him to attend school in the East Bay. Jeff has a demanding job that although he has some flexibility, restricts his time. If Nathan were in school in San Francisco, it would be very difficult for him to be involved in the school, take part in school activities, or deal with issues and incidents that might arise. Ann has more flexibility and could more reasonably have involvement in the school even if the school is at a distance. A second factor involves Jeff's more logical

> decision making. Jeff has shown in his school choices a reasonable, if conventional, approach. He has found the best schools in the area to apply to, he has been accurate and consistent in his view of Nathan's needs and has utilized the feedback from appropriate professionals. His choice of Step One is a good match for Nathan's level of functioning and his needs It is a program designed for children similar to Nathan. In the program, Nathan will have the opportunity to develop the academic preparation he needs for kindergarten in addition to the opportunity to mature socially and develop better interpersonal tools. Nathan's weak areas dovetail very well with the focus of the program that promotes skill learning with independent play and an emphasis on social-emotional growth.

Lee departed from the scope of her assessment concluding that the parties should define the process for choosing a kindergarten be put in place "now." She recommended that if Jeff moved to Piedmont, Nathan attend public school there, and that he otherwise attend private school in the East Bay. She said the only factor that gave her pause about this recommendation was separating Nathan from his older brother. She went on to recommend that Jeff make school selection decisions, and that he choose either the Piedmont public schools or a private school in the East Bay. [App.I, 155-158]

Pigeon adopted Lee's recommendations and expanded upon them. [App.I/159-163, App.IV/933-936] She noted [App.I, 161]

> the parents have been utilizing a Special Master Process relatively successfully until the advent of the elementary school recommendation ... Ann's investment in the Special Master process had been hesitant at best. Since the advent of her disappointment she has been unable to participate productively and has requested directly and through her attorney that the Special Master resign. She has come to litigate many (if not all) of the recommendations of the Special Master over the last several month, even ones that she had currently agreed to in the past.

Pigeon's concluded that Ann was unable to separate Nathan's needs from hers based on Ann's failure to recognize the harm of changing preschools, attending school late, missing school, and enrolling him in summer activities at her preferred school. [RT/10-29-04/48] Nathan had been late to school due to illness, and due to traffic and weather delays commuting from San Francisco. [RT/11-3-2004/67-68]

The parents had cooperated around health care decisions. [RT/11-3-2004/53-54]. Pigeon's recommendations concerning Jeffrey being the point person for medical care and Ann being the point person for dental, orthodontic and vision care were intended to apply to routine and minor appointments, not the "big ticket" items. [RT/10-29-04/52] Many small issues were resolved in mediation. [RT/10-29-04/53]

Ann had coparented cooperatively with her older son's father for many years without litigation or conflict. [RT/11-3-04/59]

Pigeon never observed Nathan in Ann's presence [RT/10-29-04/66] She had a release to speak with Ann's therapist but did not do so [RT/10-29-04/69]

Although she set forth no facts indicating that the parents express their conflicts in Nathan's presence, Pigeon speculated that Nathan might be affected by the conflict and recommended play therapy. The report contains no diagnosis of any condition requiring treatment, no prognosis, and no proposed treatment plan. [App.I/162-163]

She cited Ann's "inability to participate meaningfully and

productively in the special master process"[3], that Jeffrey should make educational, psychotherapy and medical decisions, Ann should make dental, orthodontic and vision care decisions, Each parent was to consult the other when making decisions, and to offer the other an opportunity to attend appointments. She spelled out guidelines for each parent to make decisions about activities and child care when Nathan was in their homes, and made recommendations about how the parents should share information. The only decisions that had been submitted to Pigeon for decision were school selection for the 2004-2005 school year, and the residential schedule for that period.

Ultimately Ann and Jeffrey accepted Lee's recommendation that Nathan attend First Step, and stipulated to the residential schedule Pigeon recommended. [RT/8-12-04/3/14-28 to RT/8-12-04/4/1-4; RT/8-12-04/30, [App.I/242]]

Ann accepted most of the recommendations but filed objections to the uninvited decisions about legal custody and school after pre-kindergarten. [App.I, 211-242]. Jeffrey, on the other hand, was eager to see them implemented. [App.I/169, 196-202] After all, the stipulation appointing Lee noted that Nathan would have to spend the majority of the school week with the parent who lived closest to his school. Pigeon's unauthorized decision would have the real-world effect of permanently making Jeffrey Nathan's primary custodial parent. In a supplemental declaration to his OSC regarding choice of schools, He reiterated the views voiced by Lee and Pigeon. Jeffrey tacked on a request for $10,000 fees as sanctions "associated with litigating the recommendations of Dr. Lee and Dr. Pigeon" as a sanction, [App.I/196; App.IV/974-987].

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[3] Contradicting her earlier observation that all went well until the school issue arose and Ann lost confidence in Pigeon.

Ann's declaration observed that after separation, she and Jeffrey worked successfully in mediation with a private mediator and the court-connected mediator. She accepted the recommendations of the child custody evaluator, abandoned her relocation request, and agreed to a 50-50 custody plan. She agreed to the CCSM process with Pigeon, but grew concerned that it became increasingly one-sided. She observed that some of the difficulties related to Jeff's desire for stepparent visitation with Kam, who did not want to see Jeff. [App.I, 214] She noted that while Pigeon consulted with Jeff's therapist, and with the child custody evaluator who made recommendations favorable to Jeff, Pigeon refused to consult with Ann's therapist, or with Ann's expert witness. Ann concluded that "continuation with the Special Master process will affect Nathan adversely by perpetuating the conflict between Jeff and me ... I believe that the Special Master process resulted in providing a forum for contention between Jeff and me, without appropriate restraint ..." [App.I/215]

Ann noted that she made a point of not discussing future schools with Nathan, or saying anything critical about his father. She said Nathan told her that he would be going to kindergarten where Daddy lives. She said that if Nathan was to participate in therapy, both parents should be involved, and that they could obtain a referral from Nathan's pediatrician, who has cared for him since birth. [App.I/219]

Ann observed that much of the conflict had arisen from vague court orders regarding scheduling, and that it would disappear with a detailed court order. [App.I/220] Ann detailed further ways in which Pigeon's management of the CCSM process had exacerbated conflict. [App.I/220-222].

The Special Master submitted her unsolicited decisions to the trial court. Ann objected and the Court conducted Code Civ. Proc. §643(c) hearing. The CCSM's reasoning focused only on the comparative wisdom of each parent's school decisions – not on the factors to be considered in modifying physical custody. The Court advised counsel and parties that it would base its decision on comparative parental litigiousness. [RT/8-12-04/55/2-7]

Court: "I think Ms. Gibbs' point about the negative effect of continued litigation on Nathan is well-taken, and I intend on making a decision in this case to consider, to the extent that I'm able to reach any conclusion on this point, whether one or the other party has put the party's own interest ahead of Nathan's in conducting litigation."

The Court's oral Statement of Decision was incorporated as findings in the November 30, 2004 Order After Trial (OAT), entered over Ann's detailed objections [App.V/1000-1027]. A separate order regarding therapy was entered over Ann's objections. [App.V,/1054-1062]

The ten findings in the OAT [App.V, 1038-1051] focused on placing blame for conflict between the parents on Ann as a basis for stripping her of decisionmaking authority over schooling, medical care and child therapy, and ordering her to pay $10,000 in attorneys fees as Fam. Code §271 sanctions.

The Court concluded that Ann put her interests over Nathan's interests by withdrawing from the CCSM process after Pigeon discounted her concerns about the bullying and lack of supervision at CSC, by asking the Court not to adopt the decisions of the Special Master, and by enrolling Nathan in a few weeks of summer session at the school she hoped would be selected.

Ann brought a Motion for Reconsideration based on new evidence of CSC's discipline by the Department of Social Services for

the incidents involving Nathan and other incidents. The Court granted reconsideration, admitted the evidence concerning the disciplinary violations by CSC, but declined to modify the OAT. [App.VI/1445]

4. CCSM Process Fatally Flawed

> The use of Special Masters in the context of child custody cases is quite recent and raises questions concerning the appropriate relationship between the Special Master and the court, the appropriate qualifications a professional should have to function as a Special Master and raises a myriad of ethical considerations in such diverse areas as informed consent, dual role relationships and general standards of care.
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> S. Margaret Lee, *Special Masters in Child Custody Cases* (1995) 14 Association of Family and Conciliation Courts Newsletter, No. 2

Ten years of experimentation later, most of those questions remain unresolved. While the model borrows the legal term associated with a traditional reference under Code Civ. Proc. §§638-639, CCSM's are far from pure fact-finders, or subordinate adjudicators,

> In California there is no code that accurately describes the functioning of a Special Master which also addresses issues such as the more flexible gathering of evidence, the informality of the hearing process, and the mixed, functional role encompassed within this work. The Special Master concept as viewed within the family court system is a hybrid having some similarity to those roles defined in the codes pertaining to arbitrators, mediators, expert witnesses and guardian ad litem. The solution to this absence of an appropriate code has been for courts to modify existing codes in stipulated orders.
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> *Id.*

This case illustrates the risks associated with using a form of Alternate Dispute Resolution that is not authorized by statute or rule

of court, and that has no firm ground rules, standards for adequate judicial oversight or means to ensure fairness.

> … The power to make decisions in addition to the protection of the court are the factors that make this new role for mental health professionals both one of great influence and potential benefit as well as a role where professionals are, rightfully, vulnerable to having their work closely inspected and monitored for ethical practices. The experiences of professionals working as Special Masters in Marin County, California indicate that this process addresses an important need and can be tailored for a segment of the divorcing population that has not been adequately served by existing methods of conflict resolution. This powerful role must, however, be performed by those with excellent training and an eye towards the highest level of professional responsibility.
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> *Id.*

4.1 ORDER APPOINTING CCSM COMBINING ROLES OF MEDIATOR, EVALUATOR, AND REFEREE VOID; NO STATUTORY AUTHORITY

The stipulation and orders appointing Pigeon as a CCSM described her role as combining mediation, evaluation and decisionmaking. The appointment order cited Evid. Code §730 and Code Civ. Proc. §638 and purports to structure a court-endorsed dispute resolution process.

AFCC[4] recently promulgated model standards for Parent

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[4] Association of Family and Conciliation Courts. AFCC is a nonprofit interdisciplinary organization comprised of family court judges, lawyers, mental health professionals, researchers and parent educators working in court, private practice, community agency and academic settings.

Coordination.[5] AFCC, Guidelines for Parenting Coordination (2005) www.afccnet.org/pdfs/AFCCGuidelinesforParentingcoordinationnew.pdf. Those standards describe the purposes and hybrid nature of the model,

> Parenting coordination is a child-focused alternative dispute resolution process in which a mental health or legal professional with mediation training and experience assists high conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a timely manner, educating parents about children's needs, and with prior approval of the parties and/or the court, making decisions within the scope of the court order or appointment contract.
>
> The overall objective of parenting coordination is to assist high conflict parents to implement their parenting plan, to monitor compliance with the details of the plan, to resolve conflicts regarding their children and the parenting plan in a timely manner, and to protect and sustain safe, healthy and meaningful parent-child relationships. P*arenting coordination is a quasi-legal, mental health, alternative dispute resolution* (ADR) *process that combines assessment, education, case management, conflict management and sometimes decision-making functions*. [Emph. added.]

California law provides no basis for such a quasi-legal, hybrid expert witness/mediator/referee to be appointed by stipulation or otherwise. The roles of each of these different roles are defined by statute and are mutually incompatible. Because California's statutory schemes for mediation, child custody evaluation, and reference have specific and mutually exclusive requirements, they cannot be merged to create a new model.

[5] The terms Child Custody Special Master, Parenting Plan Coordinator, Parenting Coordinator and Parent Coordinator are used in various jurisdictions and regions to describe the same model that the order in this case attempted to create.

Parents are free to use parenting coordination or any other model to reach mutually agreeable co-parenting decisions. Nathan's parents found the process helpful in reaching consensus about a series of major parenting decisions. The AFCC Guidelines treat decision-making authority as an optional component of the parenting coordinator model. Nathan's parents found Pigeon's recommendations persuasive as they made important co-parenting decisions. Without her assistance, they may well have litigated some of those issues. No doubt they benefited from a structured, child-centered setting in which a psychologist facilitated their information gathering, discussions and decisionmaking as co-parents. Nothing in California law bars parents from working with CCSM's to privately resolve disputes, and nothing bars those special masters from making recommendations *to the parents.*

However, California courts may not compel participation in the process, punish parents who withdraw from the process, conduct proceedings initiated by a CCSM rather than a party, consider the decisions that a CCSM makes, or conduct hearings to review, adopt or reject CCSM decisions. There simply is no legal basis for California courts to do so until the Legislature enacts enabling legislation and the Judicial Council establishes clear guidelines and judicial oversight for the process. The AFCC Guidelines caution that jurisdictions using the parent coordination model must develop clear guidelines before implementing a program,

> The Parenting Coordinator (hereinafter referred to as "PC") role is most frequently reserved for those high conflict parents who have demonstrated their longer term inability or unwillingness to make parenting decisions on their own, to comply with parenting agreements and orders, to reduce their child-related conflicts, and to protect their children from the impact of that conflict.

> Because the PC makes recommendations and/or decisions for the parties and possibly reports to the court, the PC should be appointed by and be responsible to the court. *This delegation of judicial authority is a serious issue and courts should only appoint qualified professionals. The power and authority inherent in the role of the* PC *are substantial whether stipulated by the parties or assigned by the court. Therefore, it is important that any jurisdiction implementing a parenting coordination program adopt and adhere to guidelines for* PC *practice and programs.* [Emph. added.]

California law contains no provisions for CCSM's. California's Judicial Council has not promulgated rules of court governing the use of CCSM's.

In the absence of statutory authority, a family court lacks jurisdiction to enter CCSM orders. A family court may not delegate any portion of its judicial authority without specific statutory authorization. *In re Marriage of Matthews* (1980) 101 Cal.App.3d 811, 816-817; *Ruisi v. Thieriot* (1997) 53 Cal.App.4th 1197.

Ruisi overturned a nonconsensual reference to a CCSM under Code Civ. Proc. §689 of "any and all issues" re custody was overbroad and unauthorized by statute. The Court held that the scope of nonconsensual reference per Code Civ. Proc. §639(c) must be limited to factual questions on existing controversies.

> In family law matters, especially where the parties are unable to curb their animosity toward each other, the trial court may well find it advantageous to designate a separate forum to resolve the parties' differences. (In re Marriage of Olson (1993) 14 Cal.App.4th 1, 5, fn. 2, 8.) However, the authority of the trial court to do so is constrained by the basic constitutional principle that judicial power may not be delegated. (Cal. Const., art. VI §1; [Citations]
>
> The trial court has no authority to assign matters to a referee or special master for decision without explicit statutory authorization. [Citations] An invalid reference

> constitutes jurisdictional error which cannot be waived. *Ruisi v. Thieriot, supra*, 53 Cal.App.4th at pp. 1207-1208.[6]

See also *Jovine v. FHP, Inc.* (1998) 64 Cal.App.4th 1506, 1523.

The purported reference or delegation of judicial authority is also void on public policy grounds. Courts have independent duties to protect children's best interests in child custody matters under the parens patriae doctrine. Because a child custody matter involves the child's interests (in a sense, the child is always the "real party in interest,") the court cannot permit the parents to stipulate away the child's rights. Consequently, a stipulation to deprive a court of its authority to modify custody and visitation orders in a family law proceeding is void. *In re Marriage of Goodarzirad* (1986) 185 Cal.App.3d 1020, 1026-1027.

4.1.1 HYBRID (MEDIATOR/PARENT EDUCATOR/EVALUATOR/REFEREE) CHILD CUSTODY SPECIAL MASTER NOT AUTHORIZED BY VOLUNTARY REFERENCE STATUTE

Code Civ. Proc. §638 provides for voluntary delegation of judicial fact-finding or decisionmaking functions to a referee. Under the statute,

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[6] Dictum in *Ruisi* suggests that a voluntary reference under §638 might be permissible, Language used in any opinion is to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered. *Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, 118.

the referee hears evidence and issues a Statement of Decision[7]. California Rules of Court, rule 244.1 governs voluntary private references. Nothing in the record suggests that the CCSM and the parties intended to be governed by those rules, or governed themselves according to those rules. The order ignores the requirements and formalities associated with a voluntary reference, suggesting the order gives lip service to §638 to give a veneer of legitimacy to an unauthorized practice without honoring the requirements.

The order appointing the CCSM fails under rule 244.1(a).[8] It does not state Pigeon's contact information or whether she is a member of the State Bar. More importantly, it does not contain Pigeon's certification that "she is aware of and will comply with applicable provisions of canon 6 of the Code of Judicial Ethics and these rules." The Court was without jurisdiction to refer the matter to Pigeon without that certification. Nothing in the record suggests that Pigeon is aware of

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[7] See M*arriage of Demblewski* (1994) 26 Cal.App.4th 232, 236 holding that the statement of decision must meet the requirements for court trials set forth in Code Civ. Proc. §632.

[8] **[Reference pursuant to Code of Civil Procedure section 638]** A written agreement for an order appointing a referee pursuant to section 638 of the Code of Civil Procedure must be presented with a proposed order to the judge to whom the case is assigned, or to the presiding judge or supervising judge if the case has not been assigned. The proposed order must state the name, business address, and telephone number of the proposed referee and, if he or she is a member of the State Bar, the proposed referee's State Bar number. If the proposed referee is a former California judicial officer, he or she must be an active or inactive member of the State Bar. The proposed order must bear the proposed referee's signature indicating consent to serve and certification that he or she is aware of and will comply with applicable provisions of canon 6 of the Code of Judicial Ethics and these rules. The written agreement and proposed order must clearly state whether the scope of the reference covers all issues or is limited to specified issues.

or will comply with the canon 6 of the Code of Judicial Ethics.

California Rules of Court, rule 243(c) requires that papers submitted to the referee under a §638 reference are official court records. They must be filed with the court clerk, with copies for the referee. The word "referee" and the name of the referee must be shown on papers filed per rule 201(f)(8).

The order appointing Pigeon purports to compel the parties' participation during Nathan's entire minority. However, rule 244.1(g) permits either party to move for leave to withdraw its stipulation for appointment of a referee based on good cause and thereby to terminate the reference.

The rules of evidence applicable in a court trial apply in trials before a referee. Evid. Code §300. See *Rice v. Brown* (1951) 104 Cal.App.2d 100, 103 ("it would seem axiomatic that a referee cannot make decisions based upon information or findings that would be inadmissible before court").

One of the troubling things about the CCSM appointment order in this case is the absence of any disclosures, waivers or indicia of informed consent to a process that will continue until this pre-schooler's 18th birthday and in which major decisions can be reached without due process of law. By contrast, the model stipulation developed and promulgated by the Los Angeles County Bar Association Family Law Section contains extensive disclosures and waivers.[9]

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[9] See Strachan, *Using Special Masters to Resolve Post Divorce Conflicts*, LACBA Family Law News and Review, Spring 1997, 16-17 (www.lundstrachan.com/forms/SM_03-20t_new.pdf). Strachan and his partner have adapted the LACBA appointment order (primarily by including their compensation requirements) and posted it on line at www.lundstrachan.com/forms/SM_02-20s.pdf. The form requires the parent to initial each waiver.

In fact, the stipulation itself discloses, *inter alia*, that California law contains no authority for the entry of such an order.

Nothing in §638 authorizes a referee to also assume expert witness, mediation or parent educator duties, or to combine any other function with the duties of a referee. Just as a judge or court commissioner cannot serve multiple roles in a case, a referee appointed under the statute must be constrained to a single role. In fact, rule 244.1(b) expressly bars mediation under a reference,

> **(Purposes of reference]** A court must not use the reference procedure under Code of Civil Procedure section 638 to appoint a person to conduct a mediation. Nothing in this subdivision is intended to prevent a court from appointing a referee to conduct a mandatory settlement conference or, following the termination of a reference, from appointing a person who previously served as a referee to conduct a mediation.

The provisions of the CCSM order run counter to the plain language of the rule, which makes no exception for child custody cases. "Whether there should be one or not is within the discretion of the Judicial Council under its rule making authority; we are not empowered to embroider an exception upon a rule the Council has adopted." *In re Marriage of Freeman* (2005)132 Cal.App.4th 1, 9. This observation rings true for all aspects of the CCSM order – whether or not the Legislature or the Judicial Council should create a statute or rule permitting the use of child custody special masters, trial and appellate courts may not make law, or create exceptions to directory provisions.

References under §638 are either general or special. Code Civ. Proc. §644 differentiates between the effect of decisions resulting from a general reference and those resulting from a special reference. The failure of the CCSM order to state whether it intends a general or special reference is another indicator that the drafters of this and

similar stipulations did not really rely on §638 to confer jurisdiction to make the order, or intend that the process comply with the statutes, court rules and precedent governing references. Absent such compliance, a Court may not enter the order, give any weight to the decisions that emerge from the process, or compel a party to participate.

A general reference transfers the entire case to the referee to decide, and the referee's decision must be entered as the decision of the Court. There is no provision by which a party can ask the trial court to consider the matter de novo. The CCSM order does not qualify as a general reference because it refers only the child custody issues to the CCSM, leaving economic and other post-dissolution matters to the Court. However, the order also fails as a special reference to the extent that it purports to make any decisions of the CCSM binding. Decisions made pursuant to a special reference are only advisory. Code Civ. Proc. §644(b).

Other than the citation to §638, little in the order or the conduct of the participants supports a finding that Pigeon functioned as a statutorily-authorized referee.

The trial court lacked jurisdiction to take any actions based on the void CCSM order.

4.1.2 Provisions and Protocols for CCSM Process Conflict With Evid. Code §730, Fam. Code §3110 and CRC, rule 5.220; Order Void as Purported Appointment of Expert Witness or Child Custody Evaluator

The statutes and rules governing appointment of child custody evaluators do not permit the kind of hybrid role appointment spelled

out in the CCSM order, despite the order's citation of Evid. Code §730.[10] The Court could not treat the CCSM as an evaluator or consider her recommendations.

The CCSM order, and the procedures authorized by it differ dramatically from the requirements for child custody evaluations embodied in rule 5.220 setting forth uniform standards for child custody evaluations . By contrast, paragraphs 3 and 6 of the CCSM order gave Pigeon unlimited discretion to determine her own procedures and protocols with out regard to law, rules of court, or professional standards. Under paragraph 7, although Pigeon need not adhere to the requirements of rule 5.220 her findings and recommendations "shall be entitled to the same weight given any other evaluation report or Family Court Services' recommendations..." The detailed requirements rule 5.220 are *mandatory*. Courts may not rely upon evaluations that do not comport with those standards. Pigeon never even saw Nathan with his mother. She failed to use equivalent procedures to assess each parent, and deviated almost completely from the standards for child custody evaluations. The CCSM order requiring that her recommendations be treated as if she was an evaluator represents an end-run around mandatory standards.

[10] Historically, child custody evaluators were appointed under the general expert witness provisions of the Evidence Code. Fam. Code §§3110 et. seq. contain more specific provisions governing all persons appointed to conduct child custody evaluations. The process is closely regulated by California Rules of Court, rule 5.220, which expressly includes "governs both court-connected and private child custody evaluators appointed under Family Code section 3111, Evidence Code section 730, or Code of Civil Procedure section 2032."

5. UNDER APPOINTMENT ORDER, CCSM HAD NO AUTHORITY TO CREATE DISPUTES AND THEN ISSUE DECISIONS

Nathan's parents entered into stipulations adopting the CCSM's decisions for each of the disputes that they presented to her. The litigation ensued when the CCSM made sua sponte decisions, where no dispute on those matters had been submitted to her. Assuming, arguendo, that the appointment order is not void on its face, it clearly does not make the CCSM minor's counsel (Fam. Code §3150) or a party who has standing to raise issues and submit them (to herself, wearing another hat) for decision. Yet that is precisely what Pigeon did. Lee's concerns about the risks of future disputes led her to make recommendations outside the scope of her appointment order. Based upon those recommendations, Pigeon issued decisions broadly modifying legal (and, consequently, physical custody) which the Court deemed nonmodifiable without a change of circumstances. In so doing, she assumed the powers of minor's counsel, despite the fact that the CCSM order did not purport to give her such powers.

There was no present dispute between the parents

- about the 2005-2006 school year,
- continuing joint legal custody,
- continuing joint physical custody, or
- about child therapy

until the CCSM *decided those issues on her own*. Under a voluntary reference, the issues presented to the referee are limited to those expressly provided in the order of reference. That order limits the CCSM to resolving disputes. It does not give her standing to raise and resolve issues not presented by the parents.

Because the CCSM had no power to formulate decisions or

recommendations concerning matters not presented to her for decision by the parents, the Court's order ratifying those decisions is void.

6. Ann's Objection to the SM Decisions and Resulting Litigation Is Not Basis for Reducing Her Physical Custody Time or Decisionmaking Authority

Ann's refusal to accept the void decisions of the CCSM and the ensuing litigation cannot be the basis for modifying legal and physical custody. Even under paragraph 7 of the order, the CCSM's decisions were to be treated as mere recommendations. In consenting to the CCSM process, the parents clearly relied on the Court to hear any disputes *between them* about Nathan's custody on the merits, treating any decisions of the CCSM as mere recommendations. If the fact of questioning the CCSM's decisions can be grounds for losing legal and physical custody rights, then the provisions of the reference order providing for independent determinations by the trial court become meaningless. The risks of asking the Court to do its job would chill most parents from challenging any decision of the CCSM.

Here, the Court's Statement of Decision represents the judicial equivalent of NIMBY (Not In My Backyard). The Court appears to believe that it protects children best by preventing or deterring their parents from asking the Court to consider their best interests. Ann's positions were not frivolous. The existing parenting plan was based upon the pre-judgment finding of the child custody evaluator that Nathan needed the active involvement of both parents in his daily

care, and in making decisions.[11] Nathan's parents made good use of the CCSM process to voluntarily resolve the parenting issues that arose between them. Litigation arose when the CCSM expanded her role and acted sua sponte. Ann's reaction to the CCSM's recommendation that her role in raising her son be dramatically curtailed then became the basis of the Court's decision to adopt the recommendation of the CCSM.

The gravamen of the decision is that a parent's exercise of her statutory and constitutional rights to have a court decide a request by the other parent (or, in this case, the CCSM) to reduce her role in childrearing can, itself, be the basis for reducing her role in childrearing. The reasoning is reminiscent of R.D. Laing.[12]

Here the actual conflict that triggered the modification was between Ann and the CCSM, not Ann and Jeffrey.

A review of the totality of the record suggests that Ann voiced reasonable concerns about Nathan's safety following the multiple instances of inadequate supervision, physical assaults and bullying, and felt responsible as a parent to bring those concerns to Court if

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[11] The limited scope evaluator also opined that Nathan needed both parents' involvement. She concluded that placing Nathan in school in Jeffrey's community would be best because she believed that Jeffrey's job was so demanding that he would play a lesser role if Nathan was in a school near Ann. She felt that Ann would be motivated to stay involved, even with the challenge of the commute. She did not compare and contrast the parents' situations or the priority that they gave to parenting. Unlike Jeffrey, Ann had a career and an older son.

[12] Scottish psychiatrist and author. See R.D, Laing, Knots (London: Tavistock Press, 1970). The most famous example of Laing's knots is,

> They are playing a game. They are playing at not
> playing a game. If I show them I see they are, I
> shall break the rules and they will punish me.
> I must play their game, of not seeing I see the game.

they were not taken seriously in the CCSM process. In turn, the CCSM though Ann's concerns were overblown, and became more focused on the fact that Ann was considering litigation over the issue. In the CCSM's eyes, the fact of litigation presented a risk of harm to Nathan. In Ann's eyes, the lack of supervision at the school, and the ongoing pattern of bullying presented a risk of harm to Nathan. There was no evidence that Nathan had any awareness of the litigation.

Ann's backing off from the CCSM process was triggered by Pigeon's dismissive and defensive response to Ann's legitimate concerns. A more skilled CCSM would have observed that any parent would have the concerns Ann voiced, determine whether the school had remedied the supervision problem (there is no indication in the record that Pigeon did so), and still could have concluded that the risks associated with a second school change on the eve of yet another school change outweighed the concerns about bullying. Instead, the CCSM used harsh language to describe Ann's reaction., and declined to investigate the bullying because Ann was not fully participating in the process. Her defensive, dismissive, disrespectful manner utterly destroyed the therapeutic rapport necessary for success as a CCSM. Ann's loss of confidence in Pigeon then became Pigeon's rationale for reducing Ann's role as a parent. [App.I/130-133]

Assessing the issue of conflict entailed balancing Jeffrey's history against Ann's history. The Findings look only at Ann's conduct. Although the record amply demonstrates similar conduct by Jeffrey. It was the CCSM's reaction to Ann's complaints about the process that led the CCSM to scapegoat Ann. See Friedman, T*he So-Called* H*igh-Conflict Couple*: A C*loser Look* (2004) 32 Am. Journal of Family Therapy 101-117 (www.afcc-cal.org/Articles/HCC_Article.pdf/file_view) for a more sophisticated view of the dynamics of parental conflict.

Moreover, parental conflict in the years immediately before and after separation is not predictive of long term conflict, it is a reaction to the trauma of divorce. Kelly, J. B., & Emery, R. E. (2003). *Children's adjustment following divorce: Risk and resiliency perspectives.* Family Relations, 52, 352-362. (http://www.familymediationscotland.org.uk/main/adjustment.pdf); Hetherington & Clingempeel, (1992). *Coping With Marital Transitions; A Family Systems Perspective.* 57 Monographs of the Society for Research in Child Development 227.

Pigeon's speculation about the possible impact of parental conflict on Nathan cannot be the basis for a court order. *Marriage of Heath, supra.*, 122 Cal.App.4th 444. The Court made no findings that the parents had failed to protect Nathan from awareness of the litigation, or the disputes between them.[13] It made no findings about the history of reaching stipulations through the special master process. The Court failed to note the numerous times that Ann had accepted decisions of the special master, including decisions to move Nathan from his original preschool in San Francisco to one at Jeffrey's workplace for Jeffrey's convenience (creating a commuting nightmare for Ann, whose older son attends school in the City), to place him in pre-kindergarten rather than kindergarten, to choose a pre-kindergarten program in the East Bay, and to modify the residential schedule. Ann and Jeffrey had used the special master process to gather information, and discuss their preferences as co-parenting decisions approached. Ann accepted virtually all of the Special Master's recommendations. Ann only balked when the

[13] See Kelly, Joan B. (1993). "*Current Research on Children's Postdivorce Adjustment: No Simple Answers.*" 31 Family and Conciliation Courts Review 29, 35. (conflict need not have negative consequences if parents "avoid direct, aggressive expressions of their conflict in front of the child or use compromise styles of conflict resolution").

Special Master reached into the future, and sua sponte made decisions to consolidate power in Jeffrey to make most parenting decisions, and to make Jeffrey the primary school week parent once kindergarten began.

7. COURT USED WRONG LEGAL STANDARD; FAILED TO CONDUCT REQUIRED BEST INTERESTS BALANCING; TAIL-WAGGING-DOG PROCESS FOCUSED ON SINGLE FACTOR

> While an alteration of legal custody may not necessarily be as disruptive as an alteration of physical custody, nevertheless, any change in parental involvement will perforce have an impact upon the maintenance of "a stable physical and emotional ambient...." (*Cochran v. Cochran* (1966) 240 Cal.App.2d 418, 421, 49 Cal.Rptr. 670.) Thus, in exercising its discretion, the trial court must duly evaluate all the important policy considerations at issue in any change of custody and make its ultimate ruling based upon a determination of the best interests of the child. [Citations]
>
> *In re Marriage of McLoren* (1988) 202 Cal.App.3d 108, 113

A well-established body of law governing decisions modifying physical and legal custody. Trial courts must find a change of circumstances and then balance multiple factors bearing on a child's welfare. *In re Marriage of Carney* (1979) 24 Cal.3d 725, *Marriage of LaMusga*, *supra*, 32 Cal.4th 1072; *Enrique M. v. Angelina V.* , *supra*, 121 Cal.App.4th 1371; *Marriage of Heath*, *supra*, 122 Cal.App.4th 444; and *Marriage of Melville*, *supra*,) 122 Cal.App.4th 601.

The focus on interparental conflict, Ann's concerns about the CSC incidents, and her loss of faith in the CCSM left the most significant factors best interests factors unaddressed. The Court

relied on the findings of a CCSM who was affronted when Ann didn't defer to her judgment, and who made wide-ranging assumptions and decisions about her parenting without ever seeing Ann with Nathan.

In modifying custody, the importance of stability and continuity in the life of a child, and the potential harm of disrupting bonds established when one parent has been the primary caretaker from birth. To disrupt that relationship requires a showing that overcomes the fact that a child has thrived with a caretaker; where no serious deficiency in care has been identified, the best interests of the child require justification for a change. *Burchard v. Garay* (1986) 42 Cal.3d 531, 541.

> Contemporary psychology confirms what wise families have perhaps always known-that the essence of parenting is not to be found in the harried rounds of daily carpooling endemic to modern suburban life, or even in the doggedly dutiful acts of 'togetherness' committed every weekend by well-meaning fathers and mothers across America. Rather, its essence lies in the ethical, emotional, and intellectual guidance the parent gives to the child throughout his formative years, and often beyond. The source of this guidance is the adults own experience of life; its motive power is parental love and concern for the child's well-being; and its teachings deal with such fundamental matters as the child's feelings about himself, his relationships with others, his system of values, his standards of conduct, and his goals and priorities in life.
>
> *In re Marriage of Carney*, *supra*, 24 Cal.3d at p. 739

The Court's order making Jeffrey the school-year parent separated Nathan from his brother, Kam. A trial court must find compelling circumstances before separating siblings. *In re Marriage of Williams* (2001) 88 Cal.App.4th 808; *Marriage of Heath*, *supra*, 122 Cal.App.4th 444; and *Marriage of Melville*, *supra*,) 122 Cal.App.4th 601. This Court failed to even consider that critical factor.

Like the court in *Craig L. v. Sandy S.*, *supra*, 125 *Cal.App.4th* 36, this trial court failed to engage in meaningful balancing of the relevant factors. The Findings focus almost exclusively on Ann and her response to the special master process, and Ann's contributions to inter-parental conflict. The Findings ignore all of the times that Ann accepted the Special Master decisions, and ignores the fact that the two decisions that Ann objected to where outside the scope of the special master's authority. The Court didn't note that the parties had resolved almost all custody issues by stipulation, following the recommendations of child custody evaluators and the special master. The findings don't look at Jeffrey's contribution to conflict (such as requesting disruption of Nathan's preschool experience to move him to the facility at Jeffrey's workplace). Most importantly, the findings don't take an in depth look at each parent's relationship with Nathan, the strengths and limitations of each as a parent, or the importance of both parents' active involvement in daily care.

8. ANN'S CHALLENGE TO INVALID AND UNFAIR DECISIONS NOT BASIS FOR FAM. CODE §271 SANCTIONS

The Fam. Code §271 sanctions order must be reversed. The arguments above demonstrate that the underlying premises for the Court's order were invalid. Moreover, §271 are reserved for egregious conduct – they are not a disguised form of prevailing party attorney's fees.

Here the trial court characterized Ann's conduct as placing her needs before Nathan's. In *In re Marriage of Abrams* (2003) 105 Cal.App.4th 979 (modified on denial of rehearing, review denied), the

trial court that found a father's opposition to the mother's relocation was putting his own interests about his children's interests and used that as the basis for 271 sanctions. The appellate court rejected the trial court's characterization of the father's actions, and held that even though he was unsuccessful in establishing that a move-away was not in his children's best interests, the father's efforts could not support an award of §271 sanctions. Cf. *In re Marriage of Freeman* (2005)132 Cal.App.4th 1, 6.

Cases approving §271 sanctions fall into three categories – frivolous actions (*In re Marriage of Burgard* (1999) 72 Cal.App.4th 74; cases where litigation tactics were unreasonable and created an unnecessary burden for the other side (*In re Marriage of Quay* (1993) 18 Cal.App.4th 961, or cases where litigation is used to harass or punish the other party (see, for example, *In re Marriage of Norton* (1988) 206 Cal.App.3d 53).

Section 271 may not be used to punish unsuccessful litigants – it is not a prevailing party attorneys fee standard. A parent who opposes the loss of joint legal custody and shared school week physical custody because she believes the child benefits from her active involvement in his care should not be punished with sanctions simply because an evaluator and CCSM recommend otherwise. Courts may not use §271 to deter parents from exercising their right to ask the court to make an independent determination of the child's best interests. It was also error to punish Ann for any conduct relating to the CCSM process, including withdrawing from participation and challenging the sua sponte decisions of the CCSM because the Court had no jurisdiction to appoint a CCSM in the first place. Nor can the parties confer jurisdiction by stipulation, where jurisdiction does not exist. *In re Marriage of Goodarzirad* (1986) 185

Cal.App.3d 1020. Here, Ann's willingness to try an experimental process at considerable expense and her repeated acceptances of the CCSM's decisions demonstrate clear efforts to cooperate, and reduce interparental conflict.

9. CONCLUSION

Family courts cannot "outsource" their paramount responsibilities to protect children's best interests by referring them to private practice mental health professionals using decisionmaking processes that do not comply with even the most rudimentary components of due process, or the reliability requirements of California Rules of Court, rule 5.220. It is the public policy of this state to assure that the health, safety, and welfare of children shall be the court's primary concern in determining the best interest of children when making any orders regarding the physical or legal custody or visitation of children. Fam. Code §3020.

One of the most shocking aspects of the CCSM order is that it authorizes the CCSM to "formulate her decisions on what is perceived by the Master/Expert to be in the child's best interests, and in order to promote the child's development and emotional adjustment," rather than requiring her to follow the criteria for determining best interests established by statute, rule of court and published appellate decisions.

Neither the Legislature, nor the Judicial Council has authorized the use of CCSM's to perform a combined mediator/referee/expert witness role. While parents are free to use any method of alternative dispute resolution outside the courthouse that they find helpful, there

is no legal basis for family courts to defer to, or give any weight to, decisions of a CCSM. Family courts must make independent best-interests determinations over the child custody issues parents, not third parties, bring to court. The Court's *parens patriae* responsibility precludes delegating responsibility for a child's best interests, even where the parents stipulate to the delegation. The CCSM order represents an unconstitutional delegation of judicial authority. Cal. Const., art. VI §1. They cannot be asked to ratify decisions made by private parties based on idiosyncratic criteria not authorized by law.

This Court employed an experimental CCSM process for diverting child custody litigants from the courthouse before the Legislature, the Judicial Council or even the Superior Court have developed authorizing statutes or rules, and guidelines for use of the process in a way that protects parents' rights and children's best interests. Until such statutes, rules and guidelines exist, Court cannot enforce stipulations to use the process, and cannot base decisions concerning children's custody on what transpires in the process. The opinions of a CCSM cannot be treated as those of a child custody evaluator. A CCSM cannot be treated as a minor's counsel with the power to initiate court proceedings in the child's best interests. A CCSM cannot be a referee entitled to deference, while not following any of the safeguards or requirements for referees and while maintaining other roles.

Parents are free to work with CCSM's to make co-parenting decisions. When they reach agreements to modify a parenting plan, Courts should treat them like any other stipulations. Where a parent proposes a modification to a parenting plan, and the other parent does not agree, the proposing parent must file an Order to Show Cause and meet his or her burden of proof.

When the question posed to the trial court is whether to ratify the decision of a CCSM, rather than whether particular parenting plan orders should be made, the question is no longer presented neutrally. The Court ends up reviewing the CCSM's decision, rather than making an independent determination of the child's best interests.

The Special Master process worked well for Nathan's parents for resolving most co-parenting issues that arose.

One of the advantages of the informal special master process is that it provides for incremental decisionmaking. Here the parents worked with the special master to make a series of co-parenting decisions, as those issues naturally arose. The process worked well to contain their conflict, encourage research and thoughtful decision-making, give them the benefit of the special master's child development knowledge, protect Nathan from awareness that his parents disagreed, and resolve conflicts as they arose. As parents develop a history of successful agreements, future agreement becomes more probable.

The process spun out of control when the CCSM failed to treat Ann's parental concerns with respect and dignity. The problem was less "what" Pigeon decided, and more one of "how" she expressed her views. Her letters and reports used harsh language, incompatible with maintaining therapeutic rapport, to characterize Ann. This illustrates the key flaw in combining mediation, evaluation and decisionmaking in a single person. Once the neutral begins stating unvarnished opinions, the neutral loses therapeutic rapport with one of the parents, and develops an alliance with the other parent. Hence wise mediators eschew making recommendations, and wise evaluators eschew making interim findings and recommendations. While some mental health professionals are skilled in diplomacy and

graceful communication styles, this CCSM took a defensive stance and became more aggressive towards one of Nathan's parents.

The Child Custody Evaluator and the Special Master reached out for issues not submitted to them by the parties, speculated about future conflicts that had not arisen and issued recommendations and decisions without a full best interests analysis. When Ann appropriately questioned those actions, the trial court should have approached the issues de novo upon application of one of the parties for modifications of the parenting plan that would have commenced when Nathan completed the pre-kindergarten program. Instead, the trial court impermissibly used the fact of Ann's recourse to the Court rather than be stripped of legal custody authority over schooling and child therapy as the grounds to strip her of that very authority.

Because of the Court's overriding responsibility for children's best interests it cannot chill parents from asking it to consider child custody modifications by using the fact of that request as the basis for its decision. If parents using the Special Master process must "go along to get along," they will be afraid to raise meritorious concerns about their children for fear that judicial recrimination will take the form of cutting back their legal rights, and awarding sanctions to the victorious parent.

WORD COUNT

I certify that the text of this Petition, exclusive of tables and word count and including footnotes, contains 13,063 words as calculated by Microsoft Word™.

I *declare under penalty of perjury that this declaration is true and correct and that it was executed on* December 21, 2005 *at* Los Angeles, California.

____
Leslie Ellen Shear, CFLS

PROOF OF SERVICE BY FIRST CLASS MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF ALAMEDA)

Case Name: BETTY ANN HARRISON, A*ppellant*
v.
JEFFREY BOKOR, R*espondent*

Court of Appeal Case Number: 1 Civ. A 109 595
Alameda County Superior Court Case Number: 852570-1

I am employed or reside in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My address is 16830 Ventura Blvd., Suite 347, Encino, CA 91436-1749.

On December 21, 2005, I served the within documents described as:

Appellant's Opening Brief and
Appellant's Appendix in Lieu of Clerk's Transcript

on each of the interested parties in this action by enclosing them in a package addressed as follows:

See Attached Service List

I served the documents by placing them for collection and mailing following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service at Los Angeles, California in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this declaration was executed on December 21, 2005, at Los Angeles, California.

____
Graeme Magruder

SERVICE LIST

Case Name: BETTY ANN HARRISON, A*ppellant*
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Clerk of the Court Hon. Jon S. Tigar, Dept. 21 Alameda County Superior Court County Administration Building 1221 Oak St Oakland CA 94612	Trial Court Appellant's Opening Brief: 1 copy
Office of the Clerk Supreme Court of California 350 McAllister St San Francisco CA 94102-4783	Appellant's Opening Brief: 4 copies
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Lorin B. Blum, Sharon M. Braz, Donna T. Gibbs Blum, Braz & Gibbs, LLP Park Plaza, 1939 Harrison St Ste 818 Oakland CA 94612-3511	Attorneys for Respondent Appellant's Opening Brief: 1 copy Appendix: 1 copy