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Alameda County Superior Court Case No. 852570-1

In the Court of Appeal
State of California

FIRST APPELLATE DISTRICT
DIVISION ONE

BETTY ANN HARRISON, *Appellant*

v.

JEFFREY BOKOR, *Respondent*

APPELLANT'S REPLY BRIEF

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

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1. INTRODUCTION
COURT MUST BASE CUSTODY DECISIONS UPON INDEPENDENT BALANCING OF ALL BEST INTERESTS FACTORS, WITHOUT REFERENCE TO CHILD CUSTODY SPECIAL MASTER PROCESS, OR CONSIDERATION OF FINDINGS OR OPINIONS OF CHILD CUSTODY SPECIAL MASTER

In recent years, the family law community has experimented in child custody cases with a novel form of alternate dispute resolution not authorized by statute or court rule. The model has various names – child custody special master, parent coordinator and parenting plan coordinator. Here the parties stipulated to the appointment of a psychologist as a Child Custody Special Master (CCSM), who would mediate, evaluate, case manage, and referee all issues relating to childrearing until the child (who was in preschool at the time of her appointment) reached majority.

California's legislature and Judicial Council have not adopted this model – even in the form of pilot projects to study the risks and benefits of the model. One interdisciplinary (encompassing judges, lawyers, forensic mental health professionals, researchers, mediators, and parent educators) organization, Association of Family and Conciliation Courts,[1] has promulgated preliminary guidelines for

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[1] Jeffrey's brief includes a motion to strike Ann's reference to the Association of Family and Conciliation Court's 2005 Guidelines for Parent Coordination (www.afccnet.org/pdfs/AFCCGuidelinesfor Parentingcoordinationnew.pdf). [RB/36-37]

Ann cites the AFCC Guidelines as a secondary source for use in construing the CCSM appointment order, not as evidence. Citing those guidelines is akin to citing model codes, uniform acts, American Bar Association standards or other reference material. See Jessen, *California Style Manual* (4th Ed) (2000) ''2:49-2:50.

this experimental model., noting "the newness of the field of parenting coordination and the difficulty of coming to consensus in the United States and Canada on "standards" at this stage in the use of parenting coordination."

In the absence of statutory authority for the experimental CCSM model, what role do the parent's work with the CCSM and the decisions and opinions of the CCSM play when a judge must decide a child custody case? To answer that question, this Court must construe the statutes used to support components of this experimental process, and it must construe the stipulation and order that invoked the experimental process. When does the process facilitate collaborative parenting and when is it coercive? What safeguards must be in place for the protection of children's best interests? What safeguards must be in place for the protection of parents' due process rights?

The purpose of family courts in child custody matters is to provide a fair and legitimate forum to make decisions allocating parental responsibility according to governing law. That purpose is defeated when the Court reduces its independent adjudicative role to ratifier of decisions arising out of experimental non-statutory ADR processes based upon standards other than the governing law.

This case presents five focused questions about the role of the

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The Model Guidelines are intended (see their Forward) for consideration by court systems in the form of Rules of Court. If California's Legislature ever adopts a Parent Coordinator/Custody Special Master statute, these guidelines would be considered by the Judicial Council in developing court rules for the CCSM process.

experimental ADR process Child Custody Special Master (CCSM) in a post-judgment child custody proceeding:

1. What weight may a family court give to the decisions, and opinions of a CCSM appointed under a stipulated order that purports to empower her to decide any childrearing and custody issues whatsoever over the child's lifetime, using any means and procedures whatsoever based upon her subjective beliefs about the child's best interests rather than the governing legal standards?
2. May a family court substitute the subjective best interests criteria selected by a CCSM for the governing legal standards?
3. May a family court consider a parent's withdrawal from a CCSM process and her decision to invoke her right to have custody issues adjudicated with due process according to the governing legal standards as a basis for restricting her legal and physical custody?
4. May a family court determine school choice issues without considering all factors bearing on physical custody, where it is understood that school choice will determine which parent has physical custody during the school week?
5. May a family court require a parent to contribute to the other parent's attorneys fees and costs to punish her from withdrawing from the CSSM process and exercising her right to have custody determined under the governing legal standards in a proceeding with due process protections?

Ann appeals from a post-judgment modification of legal and physical custody of the parties' young son, Nathan based upon the findings and opinions of a Child Custody Special Master. The order

appointing the CCSM [App.I/1-7) "cherry-picked" aspects of three statutorily-created processes, mediation (Evid. Code §§1115 et seq.), child custody evaluation (Fam. Code §3111, California Rules of Court, rule 5.220[2]) and reference (Code of Civil Procedure §638), while disregarding essential safeguards of each model. Under the terms of the appointment order, the decisions of the CCSM become court orders unless one party objects.

There is no provision in California law for appointment of a Child Custody Special Master or Parent Coordinator. There is no authority for the proposition that a family law court may give any weight to the decision or opinions of a CCSM. There is no authority for the proposition that a family law court may consider conflict between a parent and a CCSM or a parent's withdrawal from an experimental ADR process as a basis for modifying a child's physical or legal custody.[3]

Ann has no quarrel with the decisions that the parents reached while working with the CCSM as a mediator. Ann has no quarrel with the decisions of the CCSM that the parents agreed to accept and confirmed by stipulation. The dispute of this case is over the role of the CCSM when one parent does not accept some decisions of the

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[2] Rule 5.220 expressly brings child custody evaluations ordered under Evid. Code §730 within its ambit, and that of Fam. Code §3111. Before the enactment of §3111, family courts used the general expert appointment provision of §730 to appoint private child custody evaluators.

[3] "[W]hether courts will enforce agreements calling for *nonbinding* ADR procedures as a prerequisite to litigation (for example, an agreement "to obtain mediation" or "to conduct a mini-trial" before filing suit) is presently *unclear*. Knight, Chernick, Haideman, & Bettinelli, C*al. P*r*ac. G*u*ide*: A*lternate D*ispute R*esolution* (The Rutter Group 2005) ¶¶ 3:269, p. 3-58.

CCSM and the other parent asks a family court to adopt those decisions.

Here the family court "completely" adopted the findings and recommendations of the CCSM, failing to follow the legal standards defined by statutes and case law for child custody proceedings. [App.V/1044/19] Ann's conflicts with the CCSM, and her decision to invoke her right to have the court independently determine Nathan's best interests became the basis for the Court to modify physical and legal custody, reducing Ann's role in childrearing. [App.V/1038-1051] In other words, the CCSM process, rather than Ann's parenting, became the key factor when the Court ruled on Jeffrey's modification OSC. Courts may not base decisions about children's custody on the fact that a parent exercises her right to ask the Court to consider serious questions about her child's well-being.

Review of the custody order requires this Court to construe the statutes upon which the CCSM order is allegedly based, and construe the CCSM order itself.

The CCSM appointment order did not require the CCSM to apply California law in making child custody decisions that would become court orders. Instead, the CCSM order substitutes an unknowable and highly subjective standard, "The Master/Expert shall formulate her decisions based 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." [App.I/2/7-9)

Under the order, the CCSM has no obligation to meet any procedural or due process standards in conducting proceedings. Instead, the CCSM has unlimited discretion over the form

proceedings, including determining who to interview and "the protocol of all interviews and sessions, including in the case of meetings with the parties, to determine who attends such meetings; same can include ex parte contact with either party and ex parte contact with either attorney as it relates to their respective client. [App.1/2/17-20]

2. Trial Court Improperly Based Custody Modification on Ann's Relationship with the CCSM, Rather Than Ann and Jeffrey's Parenting and Nathan's Best Interests

The trial court modified Nathan's legal and physical custody, adopting the findings and decisions of the CCSM. Neither the CCSM, nor the Court, balanced the factors that go into a best interests determination of child custody. The process by which the CCSM obtained evidence, heard arguments and rendered decisions provided no statutory or due process protections, and failed to meet the standards for child custody evaluations. Those defects in the CCSM process were fatal – the trial court could not properly give any weight to the CCSM's decisions. The court could not use Ann's conflict with the CCSM, her rejection of the CCSM's decisions, or her withdrawal from the process as grounds for modifying custody.

The rights and interests at issue in a custody case are those of the child, not the parents. "The principle of the best interests of the child is the sine qua non of the family law process governing custody disputes." B*anning v*. N*ewdow* (2004) 119 Cal.App.4th 438, 447.

Every decision that a trial court makes in a custody case must be based upon the trial court's independent balancing all of the factors bearing upon the child's best interests, without consideration of any improper factors.

In modifying Nathan's physical and legal custody, the family court followed the red herring of Nathan's mother's rejection of several of the CCSM's decisions, gave great weight to the opinions of the CCSM and failed to consider multiple best interests factors governing modification of Nathan's legal and physical custody. In other words, the trial court gave great weight to impermissible factors (Ann's rejection of the CCSM's decisions), while failing to balance the factors required by law. The Court failed to independently determine Nathan's best interests according to the governing legal standards.

The Court entered findings and orders, over Ann's objections, making the father the school week custodial parent and stripped Nathan's mother of major decisionmaking authority because Nathan's mother did not accept several decisions of the CCSM. [App.V/1038-1051) The trial court improperly used modification of Nathan's custody to punish Ann for rejecting the CCSM's decisions and exercising her right under section seven [App.I/3-4] of the CCSM order to prevent automatic adoption of the CCSM decisions. This is precisely the kind of coercion that Evid. Code §1121 was adopted to bar (see discussion below).

If a child's custody can be decided based upon a parent's rejection of a CCSM's decision, and upon her request that a trial court address her concerns about her child's welfare de novo, then parents will be chilled from using the only legislatively-approved

process for determination of a child's best interests. The CCSM process provides none of the due process protections of a Code Civ. Proc. §638 reference, none of the quality control and standards of a Fam. Code §3111/Cal. Rules of Court, rule 5.220 evaluation, and none of the confidentiality or other protections of Evid. Code §1115 et seq. mediation.

Ann never agreed that the CCSM's decisions would be final or binding. She never waived her right to have a due process in the event that Jeffrey went to court to modify custody. She never waived her right to have the Court apply the governing legal standards to any child custody modification proceedings. The CCSM appointment order [App.I/4/3-6] provides,

> 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.

Thus, even by its own terms, the CCSM appointment order preserved the duty of the trial court to make an independent best interests determination at the request of either parent. By treating Ann's exercise of her rights to have the Court independently adjudicate custody under Paragraph 7 of the appointment order as the basis for modifying custody, the Court effectively nullified that right.

The family court's improper reliance on the findings and opinions of the CCSM, and on evidence Ann's withdrawal from that process in lieu of conducting a true, fair best-interests hearing and considering all factors bearing on Nathan's best interest deprived

Ann of her fundamental due process rights, while depriving Nathan of a true best interests determination of his custody.

Parents are free to use any process they want for out-of-court resolution of custody issues. Courts must use statutorily authorized procedures and criteria.

So long as both of Nathan's parents found the CCSM's services helpful, there is no reason why they could not work with the CCSM. Courts have greater constraints. When asked to modify physical or legal custody, trial courts are limited to procedures and factors authorized by law. Ann's appeal focuses on the role of the CCSM and the CCSM process in the Court's decisions about Nathan's physical and legal custody.

In this case, the Court's Order After Trial/Statement of Decision (OAT) identifies the ten factors that *this* trial court considered in making decisions about Nathan's legal and physical custody. [App.V/1041-1045] Each of those ten factors derived from the findings and decisions of the CCSM, and several of them focused on the impermissible factor of Ann's withdrawal from the CCSM process.[4] [5]

The Court's decision was based in large part on Ann's

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[4] Jeffrey's Statement of Facts [RB/8] quotes at some length from an earlier child custody evaluation conducted by Dr. Jacobs. The trial court expressly noted that it did not rely upon Dr. Jacobs' evaluation in the post-judgment proceedings. [App.V/1044].

[5] Jeffrey asserts that Ann's Opening Brief fails to adequately cite the evidence supporting Jeffrey. [RB/47] Although this Court must base review on the Statement of Decision incorporated into the trial court's Order After Trial, Ann's Opening Brief does, in fact, quote extensively from Jeffrey's declarations, the CCSM's reports and testimony, the limited scope evaluator's report and testimony, and other evidence favorable to Jeffrey.

withdrawal from the boundary-less, unauthorized CCSM process [App.V/1041],

> The special master process is designed to resolve and reduce the parents' conflicts in a way that promotes Nathan's best interest. Ann failed to participate in the special master process without good cause. Her failure to participate in this process exacerbated the conflict between the parents.

Unless and until the Legislature adopts CCSM statutes, courts may not require a parent to continue working with a CCSM over the parent's objection. Nothing in the Fam. Code gives the Court jurisdiction to order parents to participate in any form of alternate dispute resolution other than mandatory, court-connected mediation (Fam. Code §1841) or outpatient counseling (for a period no longer than one year[6]) (Fam. Code §3091). It follows that courts may not base a decision about a child's best interests upon his parent's withdrawal from an experimental, ill-defined and unauthorized form of alternate dispute resolution.

Similarly, the trial court relied on an impermissible factor when it adopted the CCSM's conclusion that Ann's withdrawal from the CCSM process was evidence that she placed her own interests over Nathan's needs [App.V/1041-1042],

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[6] The CCSM order requires the parents to participate in any proceedings demanded by each other or the CCSM until further order of Court or Nathan's eighteen birthday. [App.I/1-2), at considerable expense. The CCSM has unlimited and unconditional power to "order the parties and the minor to participate in adjunct services, including physical and psychological examinations and assessments, and psychotherapy; alcohol and drug monitoring/testing ..." [App.I/2/21-23]

> The court finds that Ann is willing to place her own interest in front of Nathan's. One example of this was her refusal to engage in the special master process when she became convinced that the process would not go her way. The court accepts that Ann believed, as she testified in *court*, that the process was biased against her. The court did not receive evidence to suggest that her feeling was well-founded, and Ann did not return to court to initiate another process. Ann simply withdrew from the process, and her decision increased the likelihood of conflict between these parties when it is a fact that the parties both know that such conflict hurts Nathan.

There's an inherent logical fallacy embedded in that finding. When the parents had no disagreements or conflicts, there was no cause to use either the CCSM process or the Court to resolve the conflict. There was no evidence that Nathan was aware of the CCSM process or the litigation. The choice of the only forum authorized by law, rather than an experimental forum, would have no impact on the child's experience of parental conflict. Courts simply cannot base children's custody upon the decision of a parent to ask the Court to resolve a custody dispute.

3. Statement of Decision Entered Over Ann's Objections Precludes Searching Record for Other Bases for Trial Court Decision; Order "Must Stand or Fall on the Finding Expressly Made"

Ann unsuccessfully objected to the findings, alleging *inter alia* that they were ambiguous and failed to set forth the required legal factors for a best interests determination of legal and physical custody.

[App V/1000-1028]. Even after Ann's motion for reconsideration was heard, the trial court declined to modify its findings and orders. [App.VI/1445]

This Court cannot draw inferences that the family court considered all relevant facts necessary to support the decision in favor of Jeffrey. An appellate court is precluded from drawing inferences favorable to a prevailing party on issues attacked by requests for special findings where the trial court did not make findings on all facts necessary to support the judgment or the findings made are ambiguous or conflicting. L*eiter v.* E*ltinge* (1966) 246 Cal.App.2d 306.

Ordinarily, where a statement of decision sets forth the factual and legal basis for a decision modifying a prior order, any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the trial court's decision. However, where a request is made by a party for clarifications of, and additions to, a statement of decision (Code Civ. Proc., §634), and it is denied, the judgment must stand or fall on the finding expressly made unless the evidence on the issue in controversy is undisputed, is of such a nature that it reasonably cannot be disbelieved, and no conflicting inferences can be drawn from it. I*n re* M*arriage of* H*offmeister* (1987) 191 Cal.App.3d 351, 358-360. Consequently, the Court's decision

> ... must stand or fall on the finding expressly made unless the evidence on the issue in controversy is undisputed, is of such a nature that it reasonably cannot be disbelieved, and no conflicting inferences can be drawn therefrom. [Citations.]
>
> I*bid*

The trial court's focus (as documented by its formal findings) on Nathan's mother's interactions with the Child Custody Special Master (CCSM) and rejection of the CCSM's decisions to the virtual exclusion of most other best interests factors was erroneous as a matter of law. Where a trial court considers an improper factor, or fails to consider all required factors, its decision must be reversed. *Rita L. v. Superior Court* (2005) 128 Cal.App.4th 495, 505 (reversal where dependency court improperly considered child's relationship with foster parents when adjudicating reunification with legal parent). The trial court never considered Nathan's psychological attachments, the quality of Ann's caregiving in her home, Nathan's relationship with his older brother, her protection of his physical health and well-being, his need for stability and continuity of care, or any other dimension of the mother-son relationship.

The trial court treated the order appointing the CCSM as valid and enforceable and conducted a proceeding to ratify the decision of the CCSM rather than a true custody modification proceeding. Consequently, review of the trial court decision requires this Court to construe the order appointing the CCSM. In turn, construction of that order requires construction of the statutes[7] that purportedly provide a basis for a court to make such an order. This Court must *determine the legal effect of the order appointing the* CCSM.

The appellate court reviews issues of statutory construction de novo. *Grahm v. Superior Court* (2005) 132 Cal.App.4th 1193, 1197.

Nathan's parents simply cannot stipulate to orders that deprive

[7] Code Civ. Proc. '638, Evid. Code '730, Fam. Code '3111, California Rules of Court, rule 5.220; Evid. Code ''1115 et seq.

Nathan of the protection of the statutory best interests standard. The Court lacks jurisdiction to enter or enforce orders that purport to narrow or change the criteria by which subsequent decisions about Nathan's custody are made.

4. Courts Cannot Enter or Enforce Stipulated Orders Depriving Child of the Protection of the Best Interests Standard

Parental stipulations that prejudice child's rights and interests are void. "Although collateral attacks on judgments are disfavored [citation], in some cases, if the court has awarded relief ... the law declares cannot be granted ... that judgment may be collaterally attacked." I*n re* M*arriage of* J*ackson* (2006) 136 Cal.App.4th 980, 988.

Nathan and the state share an overriding interest in having decisions about Nathan's custody decided in proceedings governed by due process. Nathan and the state share an overriding interest in limiting expert opinion about best interests to experts whose work meet the standards of California Rules of Court, rule 5.220. Nathan and the state share an overriding interest in having Nathan's custody based upon a balancing of the factors recognized in law as essential elements of a best interests determination. (See, inter alia, I*n re* M*arriage of* L*a*M*usga* (2004) 32 Cal.4th 1072; I*n re* M*arriage of* M*elville* (2004) 122 Cal.App.4th 601; I*n re* M*arriage of* C*arney* (1979) 24 Cal.3d 725.)

The Rutter Group ADR treatise notes that there are public policy

limitations on agreements to arbitrate child custody and child support disputes,

> ... agreements to submit *child custody* disputes to *binding* arbitration (preempting court authority to intervene) may be unenforceable. [See M*arriage of* G*oodazirad* (1986) 185 CA3d 1020, 1026-1027, 230 CR 203, 206-207 — parties cannot, by agreement, oust court of child custody jurisdiction; and A*rmstrong v.* A*rmstrong* (1976) 15 C.3d 942, 947, 126 CR 805, 807 — parents' statutory child support obligation is "unaffected by any agreement" between them and child support orders are modifiable despite parent's agreement to the contrary.
>
> Knight, Chernick, Haideman, & Bettinelli, C*al.* P*rac.* G*uide*: A*lternate* D*ispute* R*esolution* (The Rutter Group 2005) ¶5:260, p. 5-145.

The authors comment,

> O long as the "arbitrator" is bound to apply governing law (e.g.) the mandatory statewide uniform child support guideline, Fam. Code '4050 et seq.), and the arbitration agreement preserves normal rights of appellate review and does not foreclose judicial intervention by way of subsequent modification proceedings, there arguably is no sound reason why child custody and support disputes should not be arbitrable. T*he only real public policy concern is that courts not be foreclosed from exercising their role as "parens patriae" to protect the rights of minor children.*
>
> Id. at ¶5:260.1

Parents cannot enter into stipulations that interfere with the Court's jurisdiction or power to make custody decisions under the best interests standard,

> The entire scheme underlying custody decrees is that primary consideration must be given to the welfare of the child. (I*n re* M*arriage of* R*usso* (1971) 21 Cal.App.3d 72, 85, 98 Cal.Rptr. 501.) The ultimate aim of the court is to serve the best interests and welfare of the minor children. (S*mith v.* S*mith* (1948) 85 Cal.App.2d 428, 434,

193 P.2d 56.) Based on these strong policy reasons, stipulations between parents involving the minor children which attempt to divest the court of jurisdiction are void and the doctrine of estoppel does not apply.

I*n re* M*arriage of Goodarzirad* (1986) 185 Cal.App.3d 1020, 1026 [Emphasis added.]

A court has no power to enter or enforce a parental stipulation that compromises the interests of the children and the state,

"... A judgment is conclusive only to the extent that it is made so by law, and the court has no power to give conclusive effect to a judgment which is declared by statute to be subject to modification, especially where it involves the interests of children and the state, which are superior to the rights of the parties litigant." (L*ucachevitch v.* L*ucachevitch* (1945) 69 Cal.App.2d 478, 484-485, 159 P.2d 688.) "While parents have a right to contract with each other as to the custody and control of their offspring and to stipulate away their respective parental rights [citation], this right so to stipulate is subject to the control of the court in which the matter affecting the child is pending, and the court is not required to award the custody in conformity with such stipulation." (I*n re* A*rkle* (1928) 93 Cal.App. 404, 409, 269 P. 689.) "Where the welfare of children is involved as it is in divorce cases, parents cannot by contract so bind themselves as to foreclose the court from an inquiry as to what that welfare requires." (A*nderson v.* A*nderson* (1922) 56 Cal.App. 87, 89, 204 P. 426.) "The children are not parties to the action for divorce, and the jurisdiction which the statute confers on the court, to be exercised, from time to time as changed conditions or circumstances may require, in protecting their interests, cannot be limited or abridged by the contract of the parties made pending the divorce litigation which the decree follows, or by the action of the court in originally approving and adopting it." (B*lack v.* B*lack* (1906) 149 Cal. 224, 226, 86 P. 505.)

I*d.* at p. 1027

Where the terms of a dependency court mediation agreement

purported to bind the Court (interfering with the Court's duty to act in the child's best interests) and where that mediation agreement required the child's caretakers to agree to one outcome where they believed a different result "would be in the child's best interests would be manifestly unreasonable and unjust", the agreement was not enforceable. I*n re Jason* E. (1997) 53 Cal.App.4th 1540, 1547. The Court of Appeal noted that whether an aunt and uncle who repudiated the agreement had good cause to do so was irrelevant, stressing that the governing "abiding principle" in dependency and custody cases is the child's welfare and best interests. I*d.* at p. 1548. By contrast, the result in this case turned on the trial court's adoption of the CCSM's opinion that Ann did not have good cause to withdraw from the CCSM process. Ann should not have been forced to accept the CCSM's opinions about Nathan's best interests, either directly or indirectly. The CCSM appointment order purported to provide for de novo review.

Nathan's parents were free to agree among themselves to try any creative process, including resort to Ouija board, for reaching agreement about how to share parental responsibilities. However, at the point where either parent brought a custody modification request to the courthouse, the Court was obligated to follow the law and preserve all safeguards to ensure that the resulting decision reflected Nathan's true best interests.

5. MEDIATION PROCESS CONFIDENTIAL; WAIVER OF CONFIDENTIALITY DOES NOT APPLY TO MEDIATION PROCESS UNDER CCSM APPOINTMENT ORDER

Ann is not collaterally attacking the CCSM order, she is questioning the legal effect of the order, and the use of CCSM's decisions and opinions in the adjudicative process. The appointment order specifically provides for the CCSM to act as a mediator. [App.I/3/13-24] Mediation is governed by statute. (Evid. Code §1115 et seq.) Absent an express waiver, mediation is confidential. (Evid. Code §1119)

The only valid and enforceable provisions of the CCSM order are the provisions for voluntary mediation. Ann consistently stipulated to orders carrying out the agreements reached when the CCSM was acting in her capacity as mediator. However, the CCSM's reports and testimony failed to separate communications made in the course of mediation (which are confidential) from communications made in the CCSM's evaluator and decision-making roles (not confidential). Because of the strong public policy in favor of the confidentiality of mediation, the Court could not consider the CCSM's reports and testimony where the parties did not reach agreement. It simply was impossible to distinguish what information the CCSM acquired when acting as a confidential mediator, and what information she acquired when playing evaluator and referee roles.

This, in fact, is the inherent fatal flaw in the CCSM order — it purports to have a single person perform different and inconsistent statutory roles. There simply were no checks and balances.

The CCSM wore all the hats and held powers far exceeding

those of the Court. She even had authority to set her own fees and allocate responsibility for payment of those fees (more space is devoted to fee arrangements than to any other component of the order). [App.I/4/7 to App.I/6/11]

1. She could act as a party by raising issues *sua sponte* ("Any party of the Master/Expert may initiate..."). [App.I/3/6].
2. She could mediate the dispute. [App.I/3/13-24].
3. She could serve as a case manager, ordering family members to psychotherapy, psychological testing, physical exams and other "adjunct services" of any nature, for any purpose and for any duration. [App.I/2/21-23]
4. Then she could move to the role of child custody evaluator/expert witness [App.I/2/1-4; App.I/4/-6].
5. She could assume the roles of the Legislature, appellate courts and the profession of psychology, creating her own undisclosed standards and criteria upon which she would base decisions about custody. [App.I/2/7-9]
6. Finally, she could determine the weight and sufficiency of her own opinions, and issue decisions about child custody as as a referee. [App.I/1-2]

The order provides that the CCSM will attempt to resolve most disputes through mediation before undertaking a decisionmaking role. [App.I/3/13-24]. It is impossible to determine which portions of the CCSM's report and testimony are based on the mediation process and which are based on the decision-making process, even though the appointment order treats them as separate procedures.

Mediation proceedings are confidential. (Evid. Code §§1119-

1122). Last week the Court of Appeal refused to find an exception to the mediation privilege in I*n re* M*arriage of* K*ieturakis* (2006) --- Cal.Rptr.3d ----, 2006 WL 786802 — even where application of the privilege prevented the wife from litigating her fraud, duress, and lack of disclosure claims. Citing D*oe* 1 *v.* S*uperior* C*ourt* (2005) 132 Cal.App.4th 1160, the appellate court concluded that "drawing fine lines" in order to make some material admissible is counter to the public policy prohibiting disclosure in the absence of an express waiver of the statutory mediation privilege.

The disclosure provisions [App.I/3/19-24] of the CCSM appointment order are not sufficient "express" waivers of the confidentiality of the mediation portion of the process. The disclosure language does not expressly refer to the mediation privilege, nor does it expressly refer to communications made during the course of mediation. The appointment order clearly contemplates a *separate* mediation phase of dispute resolution before the CCSM shifts over into a fact-finding and decision-making role. Under the order, the CCSM chooses the dispute resolution process, most often beginning with mediation. [App.I/3/12-24] The order differentiates between agreements (arising from mediation) and decisions (arising from the CCSM's purported decisionmaking/referee functions).

Public policy requires that the CCSM order be construed to preserve the confidentiality of the mediation phase of the proceedings. In F*oxgate* H*omeowners' Ass'n*, I*nc. v.* B*ramalea California*, I*nc.* (2001) 26 Cal.4th 1, the Supreme Court refused to find an exception to statutes mandating confidentiality of mediation to permit reporting to court that party or attorney had disobeyed court order governing

mediation process or belief that party acted intentionally with apparent purpose of derailing court-ordered mediation. The Court held that the Legislature decided that policy of encouraging mediation by ensuring confidentiality was promoted by avoiding threat that frank expression of viewpoints during mediation could subject participant to motion for sanctions.

While parties to mediation may expressly waive the mediation privilege, in the absence of sufficient express waivers, mediators may not make reports, nor may they give opinion testimony. Evidence Code §1121 provides,

> Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118.

The 1997 Law Revision Commission Comment to §1121 explains that confidentiality preserves the voluntariness of agreements and protects parties against the kind of coercion that this record demonstrates the CCSM and the Court placed on Ann,

> ... the focus is on preventing coercion. As Section 1121 recognizes, a mediator should not be able to influence the result of a mediation or adjudication by reporting or threatening to report to the decisionmaker on the merits of the dispute or reasons why mediation failed to resolve it. Similarly, a mediator should not have authority to resolve or decide the mediated dispute, and should not have any function for the adjudicating

> tribunal with regard to the dispute, except as a non-decisionmaking neutral ...

The Court may not imply waiver of the mediation privilege. E*isendrath v. Superior Court* (2003) 109 Cal.App.4th 351.

At best, the disclosure language in the CCSM order is ambiguous. Any ambiguities must be resolved in favor of the mediation privilege because of the strong public policy favoring confidential mediation and the "express" waiver requirement. Because the disclosure language in the CCSM order does not expressly refer to the mediation process and the mediation privilege it is insufficient as a matter of law to waive the statutory mediation privilege. In other words, it is not an "express" waiver within the meaning of the code.

The public policy in favor of the mediation privilege is so strong that waivers may not be implied. Only express written or oral waivers of the mediation privilege are permissible. (Evid. Code §§1121-1122). Consequently, Ann's failure to assert the mediation privilege in the trial court proceedings here was insufficient to meet the "express waiver" requirements of Evid. Code §1121 and §1122.

In K*ieturakis*, this District reiterated that there are no exceptions to the mediation privilege, citing F*oxgate*,

> The Supreme Court concluded, contrary to the Court of Appeal, that there were "no exceptions" to the confidentiality of mediation communications (§ 1119), or the statutory limits on the content of mediator's reports (§ 1121). (F*oxgate*, *supra*, 26 Cal.4th at p. 4, 108 Cal.Rptr.2d 642, 25 P.3d 1117.) The court noted the strong legislative policy of promoting mediation and other alternatives to judicial dispute resolution, and found that the applicable statutes "unqualifiedly bar[ ] disclosure of

> communications made during mediation absent an express statutory exception." [Citations] and while those sections allow a party to reveal noncommunicative conduct in a mediation [Citations], they preclude disclosure of mediation communications or a mediator's assessment of a party's conduct [Citations]. T*he sections reflect a legislative decision that parties should be able to frankly express their views during mediation without fear of being sanctioned on the ground that those views evidenced bad faith failure to participate in the mediation*. (Ibid.) Whether the benefits of mediation confidentiality were outweighed by a policy that might have better encouraged good faith participation in the mediation process was a matter for the Legislature to determine.
>
> Id. at p. 17 [Emph. added]

Justice Reardon's opinion relied on E*isendrath* to conclude that there can be no implied waiver of the mediation privilege. Husband's conversations with wife during the course of mediation, but outside the presence of the mediator, were protected by the mediation privilege,

> The appellate court concluded that the mediation privilege, unlike the privileges provided in section 910 et seq. (e.g., the attorney-client privilege (§ 950), the confidential marital communication privilege (§ 980), the physician-patient privilege (§ 990), and the psychotherapist-patient privilege (§ 1010)), cannot be impliedly waived. Whereas section 1122 provides only for express waivers of the mediation privilege, section 912, subdivision (a) states that the other privileges can be waived "by any statement or other conduct of the holder of the privilege indicating consent to the disclosure...." (Italics added.) Some of the other privileges are also expressly subject to the "in issue" doctrine, which creates an implied waiver when the holder of the privilege raises an issue involving the substance of protected communications. (See E*isendrath*, *supra*, 109 Cal.App.4th at p. 363, 134 Cal.Rptr.2d 716.) The court declined to "extend these waiver provisions beyond their existing limits." (Ibid., citing R*oberts v. City of* P*almdale* (1993) 5 Cal.4th 363, 373,

20 Cal.Rptr.2d 330, 853 P.2d 496 [courts cannot imply unwritten exceptions to statutory privileges].)

The court found it unnecessary to imply a waiver of the mediation privilege to avoid an unacceptable or unfair result. The conversations on which the husband based his motion were made "in the course of" and "for the purpose of" the mediation, and were thus covered by the privilege, even though they occurred outside the mediator's presence. (E*isendrath*, *supra*, 109 Cal.App.4th at p. 364, 134 Cal.Rptr.2d 716, quoting § 1119.) Consequently, evidence of the conversations could not be admitted without express waivers from the husband and the wife. (E*isendrath*, *supra*, 109 Cal.App.4th at p. 365, 134 Cal.Rptr.2d 716; see § 1122, subd. (a)(2).) The court "recognize[d] that this conclusion gives [the wife] a substantial measure of control over [the husband's] ability to present evidence in support of his motion," but that result was not materially different from the one in F*oxgate*, which "effectively [gave] control over evidence of some sanctionable misconduct to the party engaged in the misconduct," and the wife had in any event indicated her willingness to waive the privilege if the husband also did so. (Id. at p. 365, 134 Cal.Rptr.2d 716.)

Nor could the mediator's testimony be taken absent waivers by the parties and the mediator of their confidentiality rights. (E*isendrath*, *supra*, 109 Cal.App.4th at p. 366, 134 Cal.Rptr.2d 716.) The court noted that a mediator is incompetent to testify to what transpires during a mediation (ibid., citing § 703.5), and refused to apply the R*inaker* or O*lam* decisions to find an exception to that rule ... Even if the parties in E*isendrath*, like those in O*lam*, both waived the privilege, the court thought that applying O*lam* in the case before it "would authorize mediator testimony in virtually every dispute over a mediated agreement," and thus impermissibly "gut" section 703.5. (E*isendrath*, *supra*, 109 Cal.App.4th at p. 366, 134 Cal.Rptr.2d 716.)

Id. at pp. 18-19

The First District next turned to R*ojas v. Superior Court* (2004) 33 Cal.4th 407, as further evidence of the strength of the mediation privilege. In R*ojas*, the Supreme Court applied §1119(b) to preclude

discovery or admission of writings prepared for use in mediation, including "nonderivative material" such as raw test data, photographs, and witness statements, and "derivative material," such as charts, compilations, and expert reports. The Supreme Court rejected a"good cause" exception for derivative material. The K*ieturakis* court went on to look at D*oe* 1 *v*. S*uperior* C*ourt* (2005) 132 Cal.App.4th 1160, in which the Second District enforced mediation confidentiality to bar public disclosure of information concerning priests accused of child sexual molestation. The Court noted,

> In so deciding, the D*oe* 1 court echoed R*ojas* on the strong legislative policy favoring mediation and the need to safeguard mediation confidentiality. (D*oe* 1 *v*. S*uperior* C*ourt*, *supra*, 132 Cal.App.4th at p. 1165, 34 Cal.Rptr.3d 248.) The court recognized that the Archdiocese was trying to release its own admissions, and noted that such a disclosure might not "jeopardize the policy behind mediation confidentiality because disclosure is sought by the party against whom the admission might be used. However, section 1122 does not make such a distinction. Instead, it prohibits the disclosure of any admission, without qualification. Given our Supreme Court's insistence on preventing disclosures absent an express statutory exception (R*ojas*, *supra*, 33 Cal.4th at pp. 415-416, 15 Cal.Rptr.3d 643, 93 P.3d 260), we believe section 1122, subdivision (a)(2) prevents the disclosure of admissions even by the party who made them. We can imagine that in some situations a party's purported 'admission' might be a disguised accusation of another's misconduct. Drawing fine lines in this area seems counter to the policy embodied in R*ojas*." (D*oe* 1 *v*. S*uperior* C*ourt*, *supra*, 132 Cal.App.4th at p. 1168, fn. 9, 34 Cal.Rptr.3d 248.)
>
> Id. at p. 19

The only valid component of the CCSM appointment order was the provision for mediation. The order failed as an appointment of a

child custody evaluator (it failed to comply with Fam. Code §3111 and Cal. Rules of Court, rule 5.220) and failed as a reference (no due process, rules of evidence or requirement to follow governing law). Consequently, the strong Legislative policy of preserving the mediation privilege in order to prevent use of coercion and promote free expression in mediation must apply here. There was no express waiver of confidentiality for the mediation. The record contains no evidence that the CCSM ever formally moved from the role of mediator to the role of referee until she started issuing decisions sua sponte. Rather, it appears that all factual investigation (with the exception of the Fam. Code §3111 limited scope evaluation on the issue of school choice) took place for purposes of having information for the parents' use in mediation to make collaborative childrearing decisions.

6. CCSM Opinion Did Not Constitute Adequate Investigation of Child's Best Interests

Even when parents stipulate, a trial court simply may not enter a child custody order without conducting an adequate investigation into the children's best interests. I*n re Marriage of Jackson, supra*. 136 Cal.App.4th at p. 992. No adequate investigation of Nathan's best interests took place.

California's Judicial Council has adopted California Rules of Court, rule 5.220 to ensure that custody decisions are based upon adequate investigation. The trial court could not treat the CCSM as a

child custody evaluator, and rely on her opinions as if they were the result of a full forensic child custody evaluation. The CCSM model simply cannot provide relevant, reliable assessments for child custody evaluations. When a court must make decisions about child custody, it needs more complete and reliable information about the child's needs, and about parental competencies.

> Reliability and relevance can be illustrated by the multi-trait/ multi-method model of assessment. Forensic assessment is predicated upon the idea of convergent validity, or the idea that particular issues should be investigated from a variety of viewpoints and with a variety of methods. Addressing the same issue via a number of different data sources will likely increase the reliability of the information gathered, since the evaluator can then look for consistent trends across the data. Hence, competent forensic evaluation utilizes multiple sources of information to assess multiple aspects of a situation; this is referred to as the multi-trait/ multi-method model of assessment. This model of obtaining convergent data from multiple sources for a CCE has achieved increasing professional consensus over the past five years, and has been described as the model that best serves the evidentiary needs of the court. [Fn.] Furthermore, this model is included in almost all recommended ethical standards and professional practice guidelines for conducting forensic evaluations, including the American Psychological Association, [Fn.] the Association of Family and Conciliation Courts, [Fn.] and the Specialty Guidelines for Forensic Psychologists. [Fn.] Hence, the objective of a CCE is to assess functional parenting competencies in a reliable and relevant manner. Currently, there exist a number of different CCE models; [Fn.] no requisite set of procedures or tests has been defined. However, there is an emerging consensus in the behavioral science literature regarding the manner in which CCEs should be conducted and the procedures that are most likely to ensure the assessment's reliability and relevance. Gould

> [Fn.] has proposed a five-part methodological framework that synthesizes the legal and behavioral science literature, [Fn.] empirical research, [Fn.] ethical guidelines, [Fn.] and model standards of practice [Fn.] regarding CCEs. This framework for CCE incorporates five core data-gathering components:
>
> (1) a definition of the scope of the evaluation;
> (2) the use of forensic interview techniques;
> (3) psychological testing with objective and self-report measures;
> (4) direct behavioral observations of parent-child interactions; and
> (5) interviews with collateral sources and review of relevant records.
>
> Baerger, Galatzer-Levy et al, A M*ethodology for* R*eviewing the* R*eliability and* R*elevance of* C*hild Custody* E*valuations* (2002) 18 J. of the Amer. Acad. Of Matrimonial Lawyers 35, 48-49

The CCSM's "evaluation" entirely ignores this framework. There was no definition of the scope of the evaluation, no use of forensic interview techniques, no psychological testing, no direct behavioral observations of parent-child interactions, and only limited use of collaterals (about limited issues).

California's Judicial Council adopted rule 5.220 to establish minimum standards for child custody evaluations in our state, so that parents and courts receive objective, reliable, relevant assessments of functional parental competencies. Hence subsection (d)(2)(A) adopts the governing statutory standards for child custody (reiterating Fam. Code §3020) by requiring that an evaluator "[c]onsider the health, safety, welfare, and best interest of the child within the scope and purpose of the evaluation as defined by the court order." Here the CCSM appointment order did not include direction as to the scope and purpose of any evaluations the CCSM might conduct, and

substituted a subjective standard for the governing legal standard.

Similarly, the California rule provides for the use of a fair, multimodal methodology. The rule (subsection (e)) contains detailed provisions governing methodology, requiring "Data collection and analysis that are consistent with the requirements of Family Code section 3118; that allow the evaluator to observe and consider each party in comparable ways and to substantiate (from multiple sources when possible) interpretations and conclusions regarding each child's developmental needs; the quality of attachment to each parent and that parent's social environment; and reactions to the separation, divorce, or parental conflict." The rule goes on to provide a partial list of methods. The CCSM's work product in this case ignores the required methodology and thus never even addresses most best-interests considerations. The CCSM's narrow focus, and preoccupation with Ann's relationship with the CCSM, left the court without much valid, relevant and reliable information about Nathan's "developmental needs; the quality of attachment to each parent and that parent's social environment; and reactions to the separation, divorce, or parental conflict." Ann's disenchantment with the CCSM is not the essence of her parenting, if anything, it is merely incidental to her parenting.

Here, the CCSM never conducted a true custody evaluation. The provision of the appointment order requiring that her opinions be treated as those of a custody evaluator is unenforceable. Parties cannot stipulate around the mandatory protocols and standards for custody evaluations. Here the CCSM never even saw the child in a conjoint session with his mother. Her incidental evaluative efforts,

combined with impressions formed in mediation are insufficient to meet the standards of any of the relevant professional organizations for child custody evaluations.

Family Code §3111 defines the role of a child custody evaluator, and requires that evaluations comply with the guidelines adopted by the Judicial Council.

Rule 5.220 contemplates evaluation of defined issues over a limited period of time, not an ongoing free form intervention continuing until the child's minority. The CCSM appointment order contains a laundry list of all possible custody-related issues that could arise during Nathan's childhood.

Neither the statute, nor the court rule permit a child custody evaluator to perform any function other than that of child custody evaluator. Role conflicts compromise evaluator objectivity and the ability of the evaluator to provide an unbiased evaluation.

> Few issues have generated the level of controversy that has accompanied discussions of role boundaries in child custody cases. There is a growing consensus among professional organizations that mental health professionals should generally avoid performing multiple and conflicting roles in forensic matters, particularly when the role conflict is likely to compromise the professional's objectivity and judgment (APA, 1992, 1994, 2002; AFCC, 1994). There may be unusual circumstances under which it is acceptable for a child custody evaluator to provide some other type of service after the evaluation is completed (e.g., when no one else is available who has the requisite skills to provide the service). There is, however, an emerging consensus that such additional roles should be undertaken with extreme caution. The AFCC child custody evaluation guidelines suggest that "if all parties, including the evaluator, wish the evaluator to change roles following an evaluation, it

> is important for the evaluator to inform the parties of the impact that such a change will have in the areas of possible testimony and/or reevaluation" (AFCC, 1994, p. 6). There also appears to be general agreement that a mental health professional should avoid undertaking a child custody evaluation if he or she has served in a prior role with any of the participants (APA, 1992, 1994, 2002; AFCC, 1994), as the prior role is likely to compromise the psychologist's objectivity and ability to provide an unbiased evaluation. likely to ensure the assessment's reliability.
>
> Greenberg, Martindale, et al., E*thical* I*ssues in* C*hild* C*ustody and* D*ependency* C*ases*: E*nduring* P*rinciples and* E*merging* C*hallenges* (2004) 1 J. of Child Custody 7, 21-22

The CCSM model, as implemented in this case, ignores critical role differences. The CCSM did not conduct a functional assessment of Ann and Jeffrey's parenting, she focused on Ann's relationship with the CCSM and speculated that Nathan might become aware of the litigation and be adversely affected. Hence her findings cannot support an order modifying Nathan's parenting plan,

> [F]orensic evaluation and therapeutic assessment differ in terms of conceptual parameters (e.g. purpose, nature of professional relationship) as well as structural parameters (e.g. identity of the client, limitations on confidentiality). [Fn.] Moreover, many commentators have noted that what makes forensic mental health evaluation particularly unique is its *functional approach*. [Fn.] E*ssentially, a functional approach to evaluation necessitates the assessment of actual* behaviors and skills; as such, a functional approach consists of the assessment of competencies. [Fn.] The objectives of a functional forensic approach include an assessment of a litigant's strengths and deficits in the areas defined by the relevant legal standard; an assessment of the reasons for any competency deficits; and an assessment of the ways in which these deficits affect behaviors relevant to the

> pending legal issue. [Fn.] In the context of a CCE, a functional approach requires that the assessment of parenting capacity address "what the caregiver understands, believes, knows, and is capable of doing" related to childrearing. [Fn.] The focus of such an assessment must be on the parent's competencies as a parent, and on the parent-child relationship. [Fn.]
>
> Moreover, because children will vary according to the demands they place on their caregivers, [Fn.] a functional assessment of parenting competency must also focus on each child's developmental needs. CCEs should therefore emphasize each parent's caregiving strengths and deficits, each child's developmental needs (and corresponding caregiving demands), and the resultant quality of fit between each parent and each child. Areas of parental competencies to be assessed include caregiving beliefs and values, disciplinary and behavior management strategies, methods of providing structure and support, methods of providing affection and nurturance, and developmental expectations and knowledge.
>
> Baerger, Galazater-Levy, et al, A M*ethodology for* R*eviewing the* R*eliability and* R*elevance of* C*hild Custody* E*valuations* (2002) 18 J. of the Amer. Acad. Of Matrimonial Lawyers at pp. 43-44 [Emph. Added]

Neither the order, nor the CCSM's actual procedures provided these parents with clear written notice of what issue the CCSM was evaluating at any given time, nor what procedures the CCSM would follow to evaluate that issue. Subsection (e)(1) requires evaluators to provide advance written explanations that include the "purpose of the evaluation;" and the "procedures used and the time required to gather and assess information and, if psychological tests will be used, the role of the results in confirming or questioning other information or previous conclusions." The CCSM appointment order authorizes the CCSM to address any issues whatsover, using any means

whatsoever and make decisions about custody and visitation based upon her subjective beliefs rather than the governing legal standards.

To comply with the written explanation requirement, the CCSM would have to provide such a written explanation each time she began to assess a new issue. By contrast to the requirements of the court rule, the CCSM appointment order gave the CCSM virtually unlimited discretion to use any procedure she chose (noting that mediation would usually be the first step), without any duty to provide a written explanation of purpose or method. In this case, that meant that the scope of the assessment was always shifting and expanding beyond the scope of issues that the parents brought to the process (see AOB, pp. 16-24, 36-37).

Greenberg, et al. warn about many of the unintended, but harmful effects when psychologists employ novel models in child custody cases. Their warnings have particular resonance when considered in the context of what happened in this case,

> Particularly in court-ordered child custody evaluation or treatment, the psychologist may be in a position of considerable authority. Parents may be ordered to participate in services and cooperate with the mental health professional.
>
> Parties are aware that the mental health professional's opinion may carry substantial weight with the court. Mental health professionals must remain aware of these dynamics, and use the authority of their positions responsibly. The psychologist must remain objective, particularly in a child custody evaluation. ... All forensic psychologists should avoid procedures that demean parents and families or inflict needless distress. ¶... Mental health professionals serve a critical role in assisting families; however, they may also inadvertently escalate conflict if they abandon the central ethical

> principles that underline all mental health practice in forensic cases (Emery, 1999; Gould, 1998; Greenberg & Gould, 2001; Johnston et al., 2001; Roseby & Johnston, 1998; Stahl, 1999; Sullivan & Kelly, 2001). These principles include establishing competence (including knowledge of relevant research, legal issues and court rules); explaining service models and role boundaries to clients; obtaining informed consent, explaining the limits of confidentiality, respecting the parties' rights to information and due process; and limiting reports and opinions to one's role and available data. These issues transcend specific service models and can provide a useful frame of reference for assessing the quality of forensic mental health services.
>
> Greenberg, Martindale, et al., E*thical* I*ssues in* C*hild* C*ustody and* D*ependency* C*ases*: E*nduring* P*rinciples and* E*merging* C*hallenges* (2004) 1 J. of Child Custody 25-26

Until the California Legislature and Judicial Council adopt enabling legislation, accompanied by clear guidelines, California courts must restrict the use of novel models to extrajudicial decisionmaking. At the point where a judicial officer must make a best interests determination in a particular case, that decision should not be based upon findings, opinions or decisions developed in processes not recognized by law, that are fraught with ethical conundrums. So long as the CCSM process helped Nathan's parents collaborate, it was of value. When it did not, the Court should have used established methods with clear guidelines, and based its decision solely on best-interests factors.

7. TRIAL COURT COULD NOT TREAT DECISIONS OF CCSM AS DECISIONS OF A CCP §628 REFEREE

The Court could not treat the CCSM as a referee.

A referee is "appointed by the court for the decision of particular matters inconvenient to be heard by the judge and such a reference is a quasi judicial proceeding. (22 Cal.Jur. 685.) It would seem axiomatic that a referee cannot make decisions based upon information or matters which would be inadmissible before court." R*ice v.* B*rown* (19510 104 Cal.App.2d 100, 103. The R*ice* court (at p. 107) held that a referee has no powers greater than those of the appointing court, observing that nothing in Code Civ. Proc. §§638-639 refers to

> vesting a referee with power to make findings not based on evidence regularly admitted at the hearing. It certainly cannot be maintained that a referee can be clothed with power not possessed by the court appointing him. 'We have repeatedly held, that a trial before a referee should be conducted in the same manner as though it was had before a court.' [Citation]

"A referee is someone who is not a sitting judge who is appointed to hear all or a portion of an action or proceeding." Knight, Chernick, Haideman, & Bettinelli, C*al. Prac. Guide*: A*lternate* D*ispute* R*esolution* (The Rutter Group 2005) ¶6:115. The CCSM never acted in a quasi-judicial role, and the procedures she used failed to provide even minimal due process safeguards.

The CCSM did not act as a referee, conducting due process hearings, considering only admissible evidence or bearing any of the other hallmarks of an adjudicative process. She did not follow the statutory Statement of Decision process. Counsel did not accompany

parties to the proceedings. Ex parte communications were welcome, and central to the process. The purported referee herself was the primary "witness." Proceedings under Code Civ. Proc. §628 closely resemble court hearings.

> The rules of evidence applicable in a court trial apply in trials before a referee. [Ev. Code §300] Thus, unless the parties' agreement and the order of reference provide otherwise, it is error for a referee to base findings on matters not in evidence.
>
> Knight, Chernick, Haideman, & Bettinelli, C*al. Prac. Guide: Alternate Dispute Resolution* (The Rutter Group 2005) ¶6:218

The CCSM was not appointed to provide an advisory opinion as to an identified factual question arising in an existing dispute – she was given virtually unlimited authority to decide any mixed questions of law and fact relating to child custody and childrearing for the entire minority of the minor child. Clearly the legislature did not have anything remotely resembling the CCSM process in mind when it enacted §628.

Here the parties expressly stipulated that the CCSM's decision would not be binding. However, by basing its ultimate decision about Nathan's best interests on Ann's rejection of the CCSM's opinions and decisions, the trial court essentially expanded the scope of the CCSM's authority. The trial court failed to make an independent best interests determination applying the governing legal standards.

8. Reliance on CCSM's Determinations Was Unconstitutional Delegation of Power — Process Provided No Safeguards; Decision Failed to Consider Established Legal Definitions of Criteria for Best-Interests Determinations

Here the trial court's reliance on the decisions of the CCSM amounted to an unconstitutional delegation of power. "The Legislature may provide for the appointment by trial courts of record of officers such as commissioners to perform subordinate judicial duties." West's Ann.Cal.Const. Art. 6, § 22. The roles assigned to the CCSM under the appointment order far exceeded those of the Court that appointed her. Because the child and the State have superseding interests in ensuring that child custody decisions serve children's best interests, the stipulation of the child's parents to an inchoate, and overbroad experimental ADR process must be seen as an impermissible delegation of judicial authority.

While the trial court could rely upon purely factual findings of a referee who used proper methodology to make such findings, it could not delegate the core duty to determine the mixed question of law and fact needed to decide whether the proposed modifications to the parenting plan would serve Nathan's best interests.

> The starting point in any discussion of the reference power is the constitutional prohibition against delegation of judicial power. The California Constitution, article VI, section 22, prohibits the delegation of judicial power except for the performance of subordinate judicial duties: "The Legislature may provide for the appointment by trial courts of record of officers such as commission-

> ers to perform subordinate judicial duties." (See Aetna Life Ins. Co. v. Superior Court (1986) 182 Cal.App.3d 431, 436, 227 Cal.Rptr. 460 ["Deciding a major legal issue in a case, which probably will determine liability, is not a subordinate judicial duty."].) This basic constitutional limitation, barring courts from delegating power, is at the heart of this case.
>
> *De Guere v. Universal City Studios, Inc.* (1997) 56 Cal.App.4th 482, 496

Ambiguities in the CCSM appointment order should be construed against treating the order as delegating authority to determine Nathan's best interests in a proceeding conducted with due process, under the governing legal standard. The appointment order attempts to consolidate very different and competing roles into a single person. That effort is fatally flawed, creating a process where decisions were coerced, and where adjudication of a child's future turned on the mother's relationship with a court-appointed neutral rather than on her parental competencies or her relationship with her son.

WORD COUNT

I certify that the text of this brief, exclusive of tables and word count, contains 10,078 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* April 3, 2006 *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, *Appellant*
v.
JEFFREY BOKOR, *Respondent*

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 April 3, 2006, I served the within document described as:

Appellant's Reply Brief

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

See Attached Service List

I served the document by placing it 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 April 3, 2006 at Los Angeles, California.

_____
Graeme Magruder

SERVICE LIST

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

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