RESPONDENT'S BRIEF

Appellant ["Ann"] appeals from two orders which grant Respondent ["Jeff"] sole legal custody over educational and psychotherapy issues regarding their young son Nathan. (The orders additionally grant Ann primary responsibility over certain other aspects of Nathan's care, but these rulings are not on appeal.) Ann also challenges the trial court's order imposing a $10,000 sanction on her pursuant to Family Code section 271.

In his Order After Trial the trial judge (Tigar, J.) wrote that "[t]his is an extremely high conflict parenting relationship...." (A.A. 1041) Judge Tigar found from the evidence that "...Ann is willing to place her own interest in front of Nathan's." (Ibid.) He explained this particular finding in detail. (A.A. 1041-1043) The judge concluded that "[u]nfortunately under the circumstances existing in this family, it is not possible for basic decisions concerning Nathan's schooling, health care, and so forth to be made jointly, even if joint decisions for most children would be in the child's best interests." (A.A. 1043)

In explaining the reasons for the $10,000 sanction

award Judge Tigar wrote that Ann's continuing course of inappropriate conduct had impeded settlement of this matter. (A.A. 1045)

Substantial evidence supports each of the trial court's rulings, and each falls well within the range of permissible discretion. The orders should be affirmed.

INTRODUCTION

Ann and Jeff have a child named Nathan, born October 3, 1999. (A.A. 17)

In September, 2003 Ann and Jeff stipulated to the appointment of Dr. Christine Pigeon as their Special Master. (A.A. 1-9) The September 8, 2003 Stipulation and Order broadly granted Dr. Pigeon the power to decide "[a]ll future disputes regarding the minor child..." should the parties fail to reach agreement between themselves. (A.A. 1-2) The Stipulation and Order listed a series of disputes that the Special Master is empowered to resolve, by way of example only. The last phrase of the stipulation was "...all issues affecting the child's health, education and welfare..." (Ibid.) The stipulation covered such matters as:

> [M]odification of visitation arrangements, vacation and holiday schedule; education and schooling, including assistance with homework; child care, daycare and baby-sitting; religious training, affiliation and church attendance; bedtime, diet, clothing, recreation after school and enrichment activities, discipline and other parenting issues, health care and management (including psychotherapy); transportation arrangements between the parties; and all issues affecting the child's health, education and welfare....

Both parties and their attorneys signed the stipulation. (A.A. 8)

The Special Master process worked well until Ann disagreed with Dr. Pigeon's recommendations regarding Nathan's school placement. (A.A. 98) Then, Ann ceased cooperating with the process. Instead, she had her trial attorney send Dr. Pigeon a number of unauthorized single-spaced letters which contained various contentions, demands and threats. (Ibid.) She also deluged Dr. Pigeon and Jeff with written messages of her own. In April, 2004 Dr. Pigeon wrote: "In the last 5 months I have received approximately 34 faxes from [Ann] to me or [Jeff] on a variety of issues." (A.A. 766)

In her opening brief Ann contends that the September, 8, 2003 stipulation for appointment of the Special Master was not legally authorized and should be

deemed void ab initio. (A.O.B. 2, 25-35) This contention is improper because: (1) Ann and her attorney expressly agreed to the terms of the September, 2003 Stipulation and Order; (2) Ann and her attorney repeatedly attempted to procure favorable recommendations from the Special Master; (3) Ann never made any motion before the trial court seeking to set aside the Stipulation and Order; and (4) Ann purports to raise her challenge to the 2003 stipulation for the first time on appeal, only after the Special Master made her recommendations and Judge Tigar adopted them. Under settled principles of appellate review, and as a matter of fundamental fairness, Ann is barred from attempting to bring her untimely and improper legal challenge to the Special Master process before this Court. [See, e.g., In re Marriage of Ilas (1993) 12 Cal. App.4th 1630, 1640; In re Marriage of Broderick (1989) 209 Cal. App.3d 489, 501-502 (applying the doctrines of estoppel, waiver and invited error in family law appeals)] Furthermore, Ann's complaints are not only procedurally barred, but they are substantively baseless.

Ann additionally claims that Judge Tigar received insufficient evidence to make his orders and that the

judge failed to address Nathan's best interests. (A.O.B. 4, 41-43) The record starkly contravenes these assertions and overwhelmingly sustains the decision. Judge Tigar found that he needed to bifurcate legal custody in order to save Nathan from further harm due to the parents' inability to work together. Not only are Ann's contentions utterly without merit, but Ann also fails to meet her appellate burden of showing both a "'"clear case of abuse"'" and a "'"miscarriage of justice."'" (Blank v. Kirwin (1985) 39 Cal.3d 311, 331) It is evident that Judge Tigar committed no such abuse or miscarriage. Ann simply does not like the trial court's ruling.

Finally, the award of $10,000 in attorneys' fees as a sanction constituted a proper exercise of judicial discretion. (In re Marriage of Bugard (1999) 72 Cal. App.4th 74, 82; In re Marriage of Quay (1993) 18 Cal. App.4th 961, 969; and In re Marriage of Green (1992) 6 Cal. App.4th 584, 589) The myriad documents in the record attest to Ann's regrettable propensity to take confrontational stances, to refuse to cooperate with the stipulated resolution processes in place, and to litigate disputes regarding Nathan's school placement and therapy needs.

STATEMENT OF FACTS

The parties were married on July 21, 1996, and they separated on November 29, 2002. (A.A. 17)

A. Highly contested nature of the proceedings. From the outset, this case has involved a very high level of inter-personal confrontation. The Appellant's Appendix which Ann has submitted to this Court reflects only a portion of the disagreements, contests, and trial court proceedings which have taken place, as well as the reams of paperwork which have been generated.

At the initial hearing in January, 2003, for example, Ann requested that Jeff's visitation with Nathan be limited. (A.A. 43) The parties resolved this matter in court, only after the Office of Family Court Services had issued a 5-page report with detailed information regarding the temporary custodial arrangement. (Ibid.)

In mid-February, 2003 Ann and Jeff could not agree to set a vacation and holiday schedule. (A.A. 43) Jeff filed a notice of motion, and the Office of Family Court Services issued a recommendation. (Ibid.) On the court date the parties finally agreed to accept the Family Court Services recommendation. (Ibid.)

In April, 2003 the parties disputed whether Ann should undergo a vocational evaluation. (A.A. 43) That dispute proceeded to court as well. (Ibid.)

The parties also contested matters involving the trial date, discovery, and a series of other issues which the trial judge was called upon to adjudicate. (See A.A. 44)

B. Dr. Jacobs' report. On April 9, 2003 the trial court appointed Dr. James J. Jacobs to conduct a full custody evaluation. (A.A. 684) The primary issue at the time involved Ann's demand to relocate with Nathan to Virginia. (Ibid.) Dr. Jacobs recommended that the court deny this demand. (A.A. 684)

In the course of his evaluation Dr. Jacobs found that within the last two years Ann had "...experienced significant periods of delusional thinking of psychotic proportions...." (A.A. 706) He stated that "[a]lthough Ann is not currently expressing delusional beliefs, her communication is at times difficult to follow, and she is prone to misinterpreting the motives of others." (Ibid.) He believed that Ann's request to relocate to Virginia was an attempt to replace the loss of her marriage "...with control of Nathan and his access to his father." (A.A. 707)

Following Dr. Jacobs' recommendation Ann dropped her relocation demand.

C. Stipulation and Order for appointment of Special Master. Dr. Jacobs recommended the appointment of a Special Master. (A.A. 708) The parties followed this recommendation, and on September 8, 2003 Judge Tigar signed a Stipulation and Order Re: Appointment of Expert Pursuant to Evidence Code section 730. ["September 8, 2003 Stipulation and Order"] (A.A. 1-9) The parties and their attorneys executed the stipulation. (A.A. 8)

The September 8, 2003 Stipulation and Order appointed Dr. Christine Pigeon as Special Master with the power to decide "[a]ll future disputes regarding the minor child..." should the parties fail to reach agreement between themselves. (A.A. 1-2) The Stipulation and Order delineated, by way of example only, a broad series of disputes that Dr. Pigeon was empowered to resolve if the parties were unable to do so by themselves, including "...all issues affecting the child's health, education and welfare..." (Ibid.):

> [M]odification of visitation arrangements, vacation and holiday schedule; education and schooling, including assistance with homework; child care, daycare and baby-sitting; religious training, affiliation and church attendance;

> bedtime, diet, clothing, recreation after school and enrichment activities, discipline and other parenting issues, health care and management (including psychotherapy); transportation arrangements between the parties; and all issues affecting the child's health, education and welfare....

The parties gave the Special Master the authority to "...determine in each instance the appropriate dispute resolution process..." and ultimately "...the power to make binding decisions within the scope of the Stipulation and Order." (A.A. 3) Either party has 15 days to challenge a recommendation of the Special Master. (A.A. 3-4)

D. Stipulation & Order re Pre-School. The parents were able to resolve Nathan's placement in pre-school with the Dr. Pigeon's assistance. (R.T. 10/20/04, p. 34) On September 9, 2003 Judge Tigar signed a Stipulation & Order re Pre-School, which provided that beginning August 18, 2003 Nathan would attend the Child Study Center [CSC] affiliated with the University of California at Berkeley 4 days a week. (A.A. 10-12)

E. Judgment of Dissolution of Marriage. On October 24, 2003 the trial court filed a stipulated Judgment of Dissolution of Marriage. (A.A. 13-33) The Judgment reserved jurisdiction over the issues of child

custody and visitation. (A.A. 19) The Judgment indicated that the parties were working with Dr. Pigeon and that the September 8, 2003 Stipulation and Order delineated how the parties would proceed "...in the event they fail to resolve any disputes that may arise in connection with their rights to custody and visitation of Nathan...." (Ibid.)

F. Stipulation and Order re Custody and Visitation. On October 27, 2003 Judge Tigar signed a Stipulation and Order re Custody and Visitation. [October 27, 2003 Stipulation and Order"] (A.A. 34-37) The October 27, 2003 Stipulation and Order largely adopted the most-recent recommendations of Dr. Jacobs regarding child custody. (A.A. 34, 37-38) Among these recommendations were that the parties should share joint legal and physical custody of Nathan. (A.A. 37)

G. Jeff's ex parte application and Ann's affirmative invocation of the Special Master stipulation for resolving the school placement issue. The parties were unable to agree on Nathan's school placement for the year 2004-2005. On May 5, 2004 Jeff filed an ex parte application, requesting that the court schedule future hearings in this case before Judge Tigar. (A.A. 38-47)

As part of her response to the application, Ann affirmatively invoked the Special Master process with respect to the selection of Nathan's school for the coming year. Thus, Ann requested "...that the provisions for dispute resolution before the Special Master be followed before a hearing is scheduled on the issue of school selection for our child Nathan (age 4) in 2004-2005." (A.A. 51)

H. Stipulation and Order Re: Appointment of Court's Expert for School Assessment. The parties agreed to a school assessment. On May 26, 2004 Judge Tigar signed a Stipulation and Order Re: Appointment of Court's Expert for School Assessment. ["May 26, 2004 Stipulation and Order"] (A.A. 67-76) Under the terms of the parents' stipulation, the court appointed Dr. Margaret Lee. (A.A. 67) The scope of Dr. Lee's agreed authority included ascertaining "...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'...and any other school related issues that emerge during the course of the assessment." (Ibid.)

The May 26, 2004 Stipulation and Order specified

that "Dr. Lee shall formulate her recommendations based on what is perceived by her to be in the best interest of the child[] in order to promote the development, emotional adjustment and psychological well being of the child[]." (A.A. 68)

I. Special Master recommendation regarding Nathan's 2004 summer schedule, and Ann's letter regarding the "shirt cutting" incident. On May 21, 2004 Dr. Pigeon filed her recommendation regarding Nathan's summer custodial and vacation schedule for 2004. (A.A. 65-66) Ann opposed the recommendation. (A.A. 78-88) As part of her filed opposition Ann's trial counsel, Mr. Thorpe, included a single-spaced letter that he had sent to Dr. Pigeon. (A.A. 83-86) The letter described an incident that had occurred at the CSC. (A.A. 83-84) This incident was one of the focal points of Ann's stance at trial.

Mr. Thorpe wrote that sometime during the week of May 17, 2004 a boy named Sven Eric had cut the bottom part of Nathan's shirt. (A.A. 83-84) He had used scissors with rounded tips. (A.A. 84) He apparently did not hurt Nathan, since no one made an "ouch report." (Ibid.) The staff at CSC had handled the matter by requiring Sven Eric to give his own Spiderman

shirt to Nathan. (Ibid.) Sven Eric's mother told Ann that she hoped Nathan would enjoy the Spiderman shirt and that "...she hoped all the kids would learn something from this incident." (Ibid.) Moreover, at circle time at CSC, the teacher, Marilyn, told the children not to play with scissors. (Ibid.)

J. Ann's failure to abide by Dr. Pigeon's recommendation regarding her request for Nathan to attend Adda Clevenger school for two weeks during the summer. Ann requested that Nathan attend a two-week orientation at Adda Clevenger school during the summer of 2004. (See A.A. 94) Jeff opposed the request. (A.A. 93-129) Dr. Pigeon recommended against the request, finding instead that "[i]t would be detrimental to the minor child to be abruptly removed from his current preschool, placed in a temporary preschool this summer, and then placed in a third school this fall." (A.A. 90)

Despite Dr. Pigeon's recommendation and a subsequent court order which confirmed it, Ann proceeded to enroll Nathan in Adda Clevenger for the summer session without informing either the Special Master or Jeff. (A.A. 1042)

K. Further break-down of the Special Master process due to Ann's conduct. In a declaration Jeff

wrote that the Special Master process had worked until Ann disagreed with Dr. Pigeon's school recommendations. (A.A. 99) He noted that Ann's attorneys began to communicate with the Special Master in a manner that was often threatening. (Ibid.) He attached a copy of two unsolicited letters that Ann's attorney, Mr. Thorpe, had written to the Special Master, as well as a memorandum which Dr. Pigeon had written in reply. (A.A. 121-131)

In his letter of April 16, 2004 Mr. Thorpe demanded that Dr. Pigeon "...immediately call CSC and speak with Ms. Hansel [the director]..." regarding the shirt-cutting incident and other matters. (A.A. 123) Mr. Thorpe threatened that if Dr. Pigeon failed to make this call Ann would file an ex parte motion to have Dr. Pigeon removed as Special Master and to have Nathan removed from CSC. (A.A. 123) In his letter of June 7, 2004 Mr. Thorpe peremptorily insisted that Dr. Pigeon remove Nathan from CSC. Mr. Thorpe argued "...that a simple, common sense approach be taken toward Nathan's pre-Kindergarten care at the moment. Ann would like him to be taken out of CSC and placed in a different and hopefully better facility." (A.A. 126)

Mr. Thorpe also sent Dr. Pigeon an unsolicited

letter on April 19, 2004. (A.A. 789-793) In that letter he passed along Ann's memorandum which "...detailed the most recent events regarding Nathan and one child at CSC, Sven Eric Said...." (A.A. 789) At the end of the letter Mr. Thorpe wrote: "Dr. Pigeon, I trust this refreshes your recollection about Ann's reports to you and corrects your suggestion this morning that you have concerns Ann was 'delusional.'" (A.A. 793) Mr. Thorpe once again demanded "...that a change be made in Nathan's pre-kindergarten, effective immediately." (Ibid.)

In a memorandum to Mr. Thorpe, Dr. Pigeon expressed concern over Ann's "...inability to use the Special Master process productively..." since the time of the recommendations regarding Nathan's summer school schedule and preschool placement. (A.A. 130) Dr. Pigeon also decried Ann's "...propensity to litigate when disappointed...." (Ibid.) [1]

In another memorandum, dated April 20, 2004, Dr.

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[1] Ann had threatened to litigate any recommendation that Dr. Pigeon made on the assessment of Nathan's pre-school needs. (A.A. 166) In a subsequent declaration Jeff's trial attorney wrote that "[t]he pattern in this case has been to litigate every issue, and when a settlement is reached it is usually in the court hallway preceding a scheduled hearing." (R.A. 3)

Pigeon reported to Jeff and Ann's counsel that she had met with Nathan in her office, observed him at his preschool, and met with the director of CSC. (A.A. 794) She concluded that "[t]he bottom line is that Nathan does not appear in any sort of danger relative to his preschool experience and in particular from Sven Eric." (Ibid.) With respect to the shirt-cutting incident, Dr. Pigeon stated that "[t]he incident...did occur, Nathan was not injured, the staff rose to the occasion immediately, it was handled and is being managed superbly by the staff." (Ibid.)

In a June, 2004 memorandum to Mr. Thorpe Dr. Pigeon wrote in pertinent part: "What I find particularly troubling is that once again Ann has escalated a relatively commonplace situation into a reason to remove Nathan from his preschool....Her actions of late to threaten (and then instigate) legal action when she does not receive the recommendation she would like results in a de facto inability to co-parent and to use the Special Master process productively. This inability to manage her disappointment and to work with Jeff on the issues argues against joint legal custody as it is currently configured." (A.A. 796)

L. Dr. Lee's evaluation. On July 14, 2004 Dr.

Lee filed her evaluation. (A.A. 139-158) Dr. Lee recommended that Nathan attend Step One pre-school in the 2004-2005 academic year. (A.A. 157) The parties stipulated to this recommendation. (R.T. 8/12/04, p. 3)

Dr. Lee further recommended that "...Jeff be empowered to make the decision regarding elementary school with input from Ann." (A.A. 158) Dr. Lee wrote that although Ann was a devoted parent, she had "...quite idiosyncratic perceptions that can result in poor decisions." (A.A. 152) On the other hand, Dr. Lee found that "Jeff presents in a logical manner and has a perspective that appears thought through." (A.A. 153)

M. Dr. Pigeon's Report. On July 26, 2004 Dr. Pigeon filed her Report on the designation of legal custody regarding Nathan's educational, medical, dental and psychotherapeutic needs. (A.A. 159-163; see A.A. 195) Dr. Pigeon concurred with Dr. Lee's assessment and recommendations. (A.A. 159)

Dr. Pigeon described the especially intractable nature of the parents' disputes involving Nathan. She wrote that the parties had "...participated in all available family law interventions: psychotherapy, private and court mediation, child custody evaluation, special master, school assessment and litigation...."

(A.A. 162) None of these processes had been effective in settling their differences. (Ibid.) Dr. Pigeon identified Ann as being the chief source of the problem (Ibid.):

> At each juncture, Ann has not been able to imagine that each successive neutral family law professional (evaluator, special master and now school evaluator) could possibly see things differently than she does. It is as if she can not grasp the reality of her situation. With each new professional the cycle begins again: hope, a vigorous campaign to undo the previous professional and finally, bitter disappointment again.

Dr. Pigeon wrote that "...without some understanding on [Ann's] part as to how she contributes to the problem, failed attempts at conflict resolution will continue to the detriment of Nathan." (A.A. 162)

Dr. Pigeon concluded that since no more interventions remained, the only viable alternative to continued litigation was "...to bifurcate the areas of legal custody and allow each parent to have decision making in the case of an impasse." (A.A. 162) Once again, Dr. Pigeon found that Ann was largely responsible for the parents' inability to cooperate with each other regarding Nathan (Ibid.):

> Ann has demonstrated an almost phobic response to all things Jeff. It is this response set that

> appears to be driving her current request to completely bifurcate Nathan's world into a "weekend and holiday parent" and a "school parent". She has further requested that Nathan not be allowed (for a period of 2 years) to participate in any organized activities or sports that would cross over custodial periods. She does not comprehend how this approach could be problematic for her son.

Dr. Pigeon continued (Ibid.):

> [Ann] has not been able to comprehend how her perception of Nathan's preschool as a dangerous place has compromised his adjustment to that school environment. Her demonization of another preschooler and her demands to have Nathan removed from his school environment [are] extremely troubling. Same demonstrates an inability to see her child's needs as separate from her own.

Dr. Pigeon wrote that the high level of parental conflict and Ann's behavior pattern may have compromised Nathan's emotional adjustment (A.A. 162):

> It is entirely possible that Nathan's adjustment has already been compromised by the parental conflict. He could benefit from having a safe and neutral place to work through the inevitable issues that will ensue as a result of being a small child in a high conflict divorce and having to deal with the inability of his mother to allow him the integration of his experience across relationships.

Because of "...Ann's inability to participate meaningfully and productively in the Special Master process...," Dr. Pigeon made a series of

recommendations. (A.A. 162) The first two recommendations are the main subject of this appeal (A.A. 163):

> 1. Jeff have sole legal custody over educational issues involving Nathan. Same to include choice of elementary school (as defined by Dr. Lee's report), choice of after school activities associated with his school, tutoring and remedial services (including Speech therapy, etc.) Ann's input should be solicited and given significant weight.
>
> 2. Jeff to have sole legal custody over the issue of Nathan's psychotherapy. Same to include selection of a therapist. Ann's input to be solicited and given significant weight.

N. Trial. The trial took place on portions of three different days in August, October and November, 2004. At the outset of the trial the parties reached agreement that Nathan would attend Step One School. (R.T. 8/12/04, p. 3) Mr. Thorpe announced that Ann had accepted many other recommendations of Dr. Pigeon. (Ibid., p. 4)

The court received all of the exhibits in evidence by stipulation of the parties. (R.T. 10/20/04, p. 1) The judge also received all of the parties' declarations in evidence. (Ibid., pp. 2-3)

Jeff summarizes the testimony of the witnesses as follows:

1. Dr. Lee. Dr. Lee testified that Nathan is a sweet boy who evidences some weaknesses in his development. (R.T. 8/12/04, p. 36, 37) He lacks the level of social skills that one would expect at the kindergarten level. (Ibid., p. 37)

Dr. Lee stated that she had reviewed materials relating to the conflict between Nathan and Sven Eric at the CSC pre-school. (R.T. 8/12/04, p. 38) She described Sven Eric as an "alpha male" but stated that "...Nathan very much wanted to be around this kid and near this kid, and so there was a sense that he could provoke some of this, so there seemed to be a dynamic between the two of them." (Ibid., pp. 38-39)

The day after the shirt-cutting incident Dr. Lee visited the school and observed the two boys playing together happily. (R.T. 8/12/04, p. 39) Nathan was wearing Sven Eric's Spiderman shirt. (Ibid.) Dr. Lee described what she saw (Ibid.):

> [T]he two of them were playing around and having a good time, and at one point it was really just so striking. Nathan got up on this kind of pillow thing, and he was showing off his shirt because it was a Spiderman shirt, and it had...webbing...And he was clearly proud of having this, and I thought it was a very good solution on the school's part to kind of teach kids what to do when they have done things that were potentially naughty or mischievous or damaging, and you have a responsibility, and you need to take that

responsibility, and there are consequences.

Dr. Lee discussed the shirt-cutting incident with the CSC director, Christine Hansel. (R.T. 10/20/04, p. 5) [2]

Dr. Lee believed that the incident fell "...within the zone of normal mischief..." and that Ann had overreacted. (R.T. 10/20/04, p. 2; R.T. 8/12/04, pp. 39-40) Dr. Lee felt that it was appropriate for Ann to have been concerned about the supervision at the pre-school, but she was troubled by Ann's "...degree of concern..." and "...the reaction or the suggestion of what should be done about it." (R.T. 10/20/04, p. 16)

In her report Dr. Lee recommended that Jeff decide what school Nathan will attend for kindergarten. (R.T. 8/12/04, p. 40) Dr. Lee felt that there was a need to end the parental conflicts over the choice of Nathan's school. (Ibid., p. 41) She stated that the parents have a great deal of difficulty communicating, and they are unable to "...sit down, stay child focused, and make a decision together about school." (Ibid., pp. 43-44; see also R.T. 10/20/04, p. 27) She believed that Jeff had a good read on Nathan's developmental needs

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[2] Throughout the reporter's transcript Dr. Hansel's name is spelled "Hensel." In this Brief Jeff will use the correct spelling: Hansel.

and trusted that Jeff would "...make a conventional, good educational choice...." (R.T. 8/12/04, p. 42) She did not share the same level of confidence that Ann would make a good decision about Nathan's school. (Ibid., p. 43)

Dr. Lee further testified that it was important for Jeff to remain involved with Nathan. (R.T. 8/12/04, p. 44) She stated that Ann "...is not very supportive of dad's relationship to Nathan." (Ibid., p. 45)

2. Dr. Pigeon. Dr. Pigeon testified that she had worked with the family for a little over a year. (R.T. 10/20/04, p. 30) The parents were co-operative with her until she made a recommendation regarding Nathan's school placement. Ann was very disappointed in that recommendation, "...and then a series of things began to happen that escalated the conflict and the tension in the case." (Ibid., p. 33)

With respect to Ann's complaints about CSC prior to the shirt-cutting incident, the parties agreed that Dr. Pigeon would visit the school, speak with the teachers there, and observe Nathan. (Ibid., pp. 34-35) Dr. Pigeon did so, and afterward she concluded that Ann's concerns were not well-founded. (Ibid., p. 35) Dr. Pigeon elaborated (Ibid.):

> I saw a child who enjoyed himself at preschool. There was a student who was identified as his nemesis and a bully to him. I didn't observe that the child was bullying to Nathan. In fact, Nathan wanted to be around that kid quite a bit. He would actually try to provoke this child, and the child didn't at least during my observation, was not provoked.

Following the shirt-cutting incident Dr. Pigeon contacted the CSC director, Ms. Hansel. (Ibid., p. 36) Ms. Hansel told her the steps that had been taken to resolve the matter between the two children. (Ibid.) Dr. Pigeon believed that the resolution had been good from the children's point of view. (Ibid.)

Another issue the parties discussed was whether Ann could enroll Nathan in a summer program at Adda Clevenger school. (Ibid., p. 39) Ann wanted him enrolled there because she hoped that Dr. Lee would recommend that he attend there permanently. (Ibid.) Jeff objected, and Dr. Pigeon did not believe the summer enrollment was a good idea. (Ibid., pp. 39-40) The matter went to court, and the judge ruled against Ann. (Ibid., p. 48) Nevertheless, Ann enrolled Nathan in Adda Clevenger for the summer program without telling either Jeff or Dr. Pigeon. (Ibid., p. 52, 67)

Dr. Pigeon characterized Ann's interaction with Jeff as in some ways "emotionally disorganizing."

(Ibid., p. 43) She stated that it was very difficult for Ann to work with Jeff. (Ibid., p. 44) Ann evidenced a need "...to find ways to paint him as a villain." (Ibid.) Ann also demonstrated an inability to see Nathan's needs separate from her own. (Ibid., pp. 49-50)

On the other hand, Dr. Pigeon stated that Jeff "...shows a potential for incorporating [Ann]'s view points into his thinking...." (Ibid., pp. 46-47) She recommended that Jeff have sole custody over the issues of education so that there would be no repetition of what had occurred the previous year. (Ibid., p. 47) She further recommended that Jeff have sole legal custody over issues of psychotherapy for Nathan. (Ibid.) She strongly felt that psychotherapy was in Nathan's best interest, but Ann was opposed to it. (Ibid.)

Ann had obtained a private assessment from Dr. William B. Goodheart for use in this litigation. (Exhibit 7; A.A. 629-674) Dr. Pigeon stated that she had factored out that assessment because Dr. Goodheart had never met with Jeff. (R.T. 10/20/04, p. 42) In any event, Dr. Pigeon testified that Dr. Goodheart (as well as Dr. Jacobs) seemed to agree that Ann would make

judgments at times that were not in Nathan's best interests. (Ibid., pp. 42-43)

3. Jeff. Jeff stated that he and Nathan are very close. (R.T. 11.3.04, p. 14)

Jeff confirmed that he and Ann have had many disputes in the last two years. (Ibid., p. 16) They have tried a series of different dispute resolution processes, but none of them has worked. (Ibid., pp. 15-16) Jeff asked for sole legal custody over educational issues in order to avoid disruption for the whole family, and particularly for Nathan, regarding schooling choices. (Ibid., pp. 19-20) He also explained why he was seeking sole legal custody over psychotherapy. (Ibid., pp. 20-21)

4. Ann. Ann complained about Dr. Pigeon. She stated that she had participated in over 11 meetings with Dr. Pigeon but had refused to continue after July 19, 2004. (Ibid., pp. 48-49) She asserted that "[t]he process of working with Dr. Pigeon had become very adversarial." (Ibid., p. 49)

Ann also contended that Dr. Jacobs' report had been biased against her. (Ibid., p. 60)

5. Dr. Goodheart. Dr. Goodheart was Ann's private forensic psychiatrist. He testified that he

had performed a psychiatric assessment of Ann. (Ibid., p. 79) In addition, he had referred Ann for psychological testing to Dr. Helaine Rubenstein. (Ibid., pp. 79-80 Goodheart and Dr. Rubenstein prepared reports, and the court received each report in evidence. (Exhibit 7; A.A. 629-674, 675-679)

In his report Dr. Goodheart concluded that Ann suffered from "partner relational problem." (A.A. 630) He felt that Ann did not meet the criteria for mental illness. (A.A. 669) Dr. Rubenstein reported that her testing of Ann revealed "...a fundamental narcissistic-histrionic stance in a basically well-adapted, emotionally mature individual who customarily modifies the less charitable of her essential propensities with an overlay of obsessive compulsive defenses." (A.A. 678)

On cross-examination Dr. Goodheart acknowledged that he had never contacted Jeff. (R.T. 11/3/04, p. 88) Nor had he ever contacted the parties' marriage therapist, Dr. Swope. (Ibid.) In fact, Dr. Goodheart admitted that he had not made any third party contacts apart from Dr. Rubenstein. (Ibid., p. 89)

6. Oral statement of decision. At the conclusion of the trial Judge Tigar gave an oral

statement of decision. Since the formal Order After Hearing repeats the court's findings, Jeff will summarize them momentarily.

O. Order After Trial. Judge Tigar directed Jeff's counsel to prepare a formal Order. His counsel did so.

Ann submitted lengthy objections to the proposed Order. (A.A. 1000-1025) She characterized some of Dr. Pigeon's assessments as being "...speculative, irrational, and without any logical justification." (A.A. 1002) She asserted that there was no evidence that Nathan's emotional health was being impaired, apart from "guesswork, supposition and speculation by Dr. Pigeon...." (Ibid.) She classified the court-appointed experts' finding that the parental conflict was contrary to Nathan's best interest as being an "...irrational and nonexistent relationship." (A.A. 1004) The remainder of her objections were in a similar vein.

At one point in her objections Ann actually criticized Judge Tigar for wanting to diminish the level of the parents' custody litigation over Nathan. (A.A. 1018) Ann asserted (Ibid.):

The finding that it is against Nathan's

> interests in the abstract, to have the parties conduct litigation, even characterized as "bruising and expensive" (although not bruising to Nathan and not expensive except to the parties), focuses solely on the court's interest in having this matter removed from its calendar by limiting mother's decisional rights which inherently prevents her from raising issues to the court or the financial interests of the parties as being superior to the best interests of Nathan. These princip[le]s, once identified, are abstractions that are not proven, justified, or supported by any evidence in this case that considers the facts of Nathan's best interests.

Instead of bifurcating legal custody between the parties, Ann instead argued that the parties should "...simply utilize, like every other litigant, the procedures of this court [which] enables the court to see firsthand the nature of the conflicts...." (Ibid.)

Judge Tigar filed an Order which reflected that he had considered Ann's objections but had not sustained any of them. (A.A. 1038) On November 30, 2004 the judge issued a formal Order After Trial. (A.A. 1040-1051) The following portions of the Order After Trial are particularly significant in this appeal:

1. Judge Tigar found this case to involve "...an extremely high conflict parenting relationship..." and wrote that he "...consider[ed] this case to be in the category of the highest conflict of more than a thousand cases that the court has

presided over." (A.A. 1041) He stated that "[t]he evidence demonstrates that the parties' conflict, both in court, and out is detrimental to Nathan's best interest and is detrimental to his emotional and psychological welfare." (Ibid.)

2. The court found "...that Ann is willing to place her own interest in front of Nathan's...." (Ibid.)

3. The judge wrote that Ann had refused to engage in the Special Master process "...when she became convinced that the process would not go her way...." (Ibid., pp. 1041-1042) Her withdrawal from the process "...increased the likelihood of conflict between these parties when it is a fact that the parties both know that such conflict hurts Nathan." (Ibid., p. 1042)

4. Judge Tigar held that "[a]nother example of Ann's willingness to place her own interest in front of Nathan's is Ann placing Nathan at the Adda Clevenger school during the summer without the knowledge or approval of [Jeff] or the special master and in violation of, at least, the spirit of this court's order over the summer." (Ibid.)

5. Judge Tigar concluded that the parties

were incapable of maintaining joint legal custody.

(A.A. 1043) He explained:

> Unfortunately under the circumstances existing in this family, it is not possible for basic decisions concerning Nathan's schooling, health care, and so forth to be made jointly, even if joint decisions for most children would be in the child's best interest. Based on the history of this family, it seems clear that such decisions if attempted to be made jointly either will not be made at all or will be made only after bruising and expensive litigation. Repetitive litigation is not in Nathan's interest and is not in the interest of these parties.

Judge Tigar continued (A.A. 1043-1044):

> Ann's testimony this afternoon acknowledges this inevitability. Ann said she anticipates if the parties were to make decisions jointly, they would wind up mediating the issues with Family Court Services and submit the issues to the court for decision. It is clear to the court that if the court does not today make an order specifying which parent or parents would make the important educational, medical, dental and therapeutic decisions for Nathan that the parties would return to this court almost as frequently as this court's calendar would allow.

6. The court found it "...necessary to select one of the parents to make fundamental decisions about each of the important areas of Nathan's health and welfare." (A.A. 1044) The judge determined that Dr. Pigeon's allocation of responsibilities was "...reasonable in light of their demonstrated aptitudes

and actions to date." (Ibid.)

7. Judge Tigar found Dr. Pigeon's recommendations to be in Nathan's best interests and adopted them entirely. (Ibid.) He made the following orders regarding legal custody that are relevant to this appeal:

a. Jeff will have sole legal custody over educational issues concerning Nathan. Ann's input "...should be solicited and given significant weight before a determination is made." (A.A. 1045)

b. Jeff will have sole legal custody over the issues of Nathan's psychotherapy. Anne's input is "...to be solicited and given significant weight." (A.A. 1045)

8. The judge found that Ann's conduct had "...frustrated the legislature's policy of promoting settlement as reflected in Family Code [s]ection 271." (A.A. 1045) He ordered Ann to pay sanctions of $10,0000. (A.A. 1046)

P. Ann's motion for reconsideration. On December 9, 2004 Ann filed a notice of motion for reconsideration. (A.A. 1063-1091) Jeff opposed the motion. (A.A. 1093-1148)

On February 14, 2005 Judge Tigar heard the motion

for reconsideration, granted it, and then retained all of his original rulings. (A.A. 1145) On March 10, 2005 the trial court filed a formal order. (R.A. 4-6) Among other findings, Judge Tiger wrote that Ann's allegations of bias against him, and her claim that he "...has a preference for parentectomies...[i.e., the severance of a child's relationship with his parents]..." were "...inflammatory and untrue...." (R.A. 6)

Q. Notice of appeal. On March 8, 2005 Ann filed a notice of appeal, apparently from the minute order regarding her reconsideration motion. (A.A. 1446)

ARGUMENT

In her opening Brief Ann raises five arguments. None of them is meritorious.

Standard of review. The abuse of discretion standard applies to appellate review of a child custody order such as the one in this case. (In re Marriage of Lamusga (2004) 32 Cal.4th 1072, 1087-1088; In re Marriage of Burgess (1996) 13 Cal.4th 25, 32; Ragghianti v. Reyes (2004) 123 Cal. App.4th 989, 996) In Burgess the Supreme Court wrote as follows with

respect to the review standard (Ibid.):

> The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test. (Gudelj v. Gudelj (1953) 41 Cal.2d 202, 208...). The precise measure is whether the trial court could have reasonably concluded that the order in question advanced the best interests of the child. We are required to uphold the ruling if it is correct on any basis, regardless whether such basis was actually invoked. (Davey v. Southern Pacific Co. (1897) 116 Cal. 325, 329....)

It is insufficient for Ann to argue that another result would have been better. Instead, she must prove that the trial court, in fashioning its order, "'exceed[ed] the bounds of reason, all circumstances before it being considered.' [Citations.]" (Denham v. Superior Court (1970) 2 Cal.3d 557, 556.)

Furthermore, "'[w]hen two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.'" (Walker v. Superior Court (1991) 53 Cal.3d 257, 272) Rather, the trial court's order is presumed correct. (Continental Casualty Co. v. Royal Insurance Co. (1990) 219 Cal. App.3d 111, 121) An appellate court does not presume error. (In re Marriage of Behrens (1982) 137 Cal. App.3d 562, 575)

The substantial evidence rule applies with respect

to appellate review of Judge Tigar's factual findings. (See, e.g., In re Marriage of Edlund & Hales (1998) 66 Cal. App.4th 1454, 1473-1474) In Osgood v. Landon (2005) 127 Cal. App.4th 425, 435-436, the appellate court explained the broad operation of the substantial evidence rule in a child custody case as follows:

> In reviewing the sufficiency of the evidence, we consider the record in the light most favorable to the prevailing party, giving that party the benefit of every reasonable inference, and resolving all conflicts in his or her favor. (In re Marriage of Mix (1975) 14 Cal.3d 604, 614....) The testimony of a single witness, even a party to the dissolution, may be sufficient to sustain the trial court's findings. (Ibid.)...

Substantial evidence supports each of Judge Tigar's factual findings.

I.
THE PARTIES' LONG-FINAL STIPULATION FOR A SPECIAL MASTER WAS NOT VOID AB INITIO

Ann spends a large portion of her opening brief claiming that the September 8, 2003 Stipulation and Order was allegedly void ab initio. (A.O.B. 26-35) She is barred from raising this contention, and it is without merit in any event.

A. Motion to strike improper reference to

documents that are not in the record. In the course of making her arguments in this subsection Ann improperly quotes from, and continuously refers to, "model standards" of an organization known as "AFCC," as well as some other documents. (A.O.B. 25, 26, 27, 28, 29, 32) None of these items was a part of the trial court record. For this reason, Jeff moves to strike all of Ann's improper references to these documents. (Eisenberg, Horvitz & Wiener, California Practice Guide: Civil Appeals and Writs, The Rutter Group, Chapter 9-C, section 9: 131, citing, inter alia, Rule 14 (a)(2)(C), California Rules of Court; Banning v. Newdow (2004) 119 Cal. App.4th 438, 453; and C.J.A. Corp. v. Trans-Action Fin'l Corp. (2001) 86 Cal. App.4th 664, 673) Alternatively, he asks this Court to disregard the improper references.

B. Ann is barred from raising her arguments. Ann is procedurally barred from attempting to challenge the September 8, 2003 Stipulation and Order as being void ab initio for a series of different reasons:

1. Ann and her attorney agreed to the September 8, 2003 Stipulation and Order. Ann and her attorney expressly consented to the terms of the September, 2003 Stipulation and Order. They both

signed the stipulation. Ann did not contend, nor does the record remotely suggest, that the Stipulation and Order was tainted by fraud, duress, or undue influence. Accordingly, Ann is bound by the terms of her agreement. (See, e.g., In re Marriage of Hopkins (1977) 74 Cal. App.3d 591, 601-602)

2. Ann has waived her right to contest the September 8, 2003 Stipulation and Order, and/or she is estopped from attempting to do so. Before she became dissatisfied with the school recommendation Ann actively participated in the Special Master process under the terms of the September 8, 2003 Stipulation and Order. After she unilaterally decided to terminate her cooperation with the process, she nonetheless had her attorney, Mr. Thorpe, send Dr. Pigeon a series of letters in an attempt to change certain recommendations and to obtain more favorable rulings for herself. Thus, she again invoked the Special Master process that she now wishes to invalidate. Even at the outset of the trial Mr. Thorpe suggested that the court receive input from Dr. Pigeon on an unresolved issue. (R.T. 8/12/04, p. 5) Mr. Thorpe also asked Judge Tigar to have Dr. Pigeon work on attempting to settle Nathan's summer schedule. (Ibid., p. 21)

Having agreed to the Special Master procedure until she became dissatisfied with some of the recommendations, and having continued afterward through her attorney to press additional demands, Ann has waived her right to challenge the September 8, 2003 Stipulation and Order. Alternatively, her trial conduct estops her from seeking to invalidate the agreement before the Court of Appeal. [See, e.g., In re Marriage of Ilas, infra, 12 Cal. App.4th 1630, 1640; In re Marriage of Broderick, infra, 209 Cal. App.3d 489, 501-502 (applying the doctrines of estoppel, waiver and invited error in family law appeals)] Ann cannot agree to a process in the trial court, invoke the process to seek benefits for herself, and then attempt to repudiate the process for the first time before the appellate court.

3. Ann is barred because she did not bring her objections to the attention of the trial judge. Ann never appealed from the September 8, 2003 Stipulation and Order, nor did she ever make any motion before the trial court seeking to set it aside. Even in her lengthy objections to the proposed Order and Statement of Decision in the present proceeding, she did not claim that the September 8, 2003 Stipulation

and Order was void ab initio. Therefore, Ann is barred from contesting the matter before the Court of Appeal. [See, e.g., In re Marriage of Arceneaux (1990) 51 Cal.3d 1130 (holding that the failure to object to a finding before the trial court precludes a party from challenging the adequacy of that finding on appeal)]

In In re Marriage of Maxfield (1983) 142 Cal. App.3d 755, 759 the Court of Appeal explained why a party who stipulates to an order is precluded from bringing a collateral appellate attack on the order at a later time, particularly if the person fails to seek relief directly before the trial judge:

> Doctrines of waiver and invited error will generally bar even direct attack upon an order or judgment entered pursuant to stipulation. Here, husband did not appeal the order or make a timely motion under Code of Civil Procedure section 473 to set it aside. The stipulated [order] thereby became res judicata. (In re Marriage of Buckley (1982) 133 Cal. App.3d 927, 934-936...; see also In re Marriage of Mahone (1981) 123 Cal. App.3d 17, 21-22....)

4. Ann is barred from raising her argument for the first time on appeal. Finally, Ann purports to raise her challenge to the 2003 stipulation for the first time on appeal, only after the Special Master made her recommendations and Judge Tigar adopted them. Under settled principles of appellate review, and as a

matter of fundamental fairness, Ann should be precluded from making her argument before this Court. [See, e.g., In re Marriage of Hinman (1997) 55 Cal. App.4th 998, 1001-1002; In re Marriage of Ostler & Smith (1990) 223 Cal. App.3d 33, 52-53 (disallowing appellants from advancing arguments on appeal which they did not raise before the trial court)]

C. Ann's argument is without merit. If the Court decides to hear Ann's argument, it is entirely without merit. Ann fails to distinguish between the statutory power of Courts to impose a Special Master on parties in litigation and the ability of parties to reach their own agreements to resolve their custody disputes.

In the absence of statutory authority, a family law court may not delegate its judicial authority to a third party, including a Special Master. (Ruisi v. Theriot (1997) 53 Cal. App.4th 1197; In re Marriage of Olson (1993) 14 Cal. App.4th 1, 5; In re Marriage of Matthews (1980) 101 Cal. App.3d 811, 816-817) Couples may, however, develop their own agreements to assist themselves in resolving family law problems, apart from the statutory procedures and dictates which the law would otherwise impose on them. (In re Marriage of Cream (1993) 13 Cal. App.4th 81, 91) As Justice King

wrote in Cream: "Experienced family judges and lawyers know that the best resolution of marital disputes is reached by agreement of the parties themselves." [Ibid.; see also In re Marriage of Assemi (1994) 7 Cal.4th 896, 909 (noting "[t]he strong policy of settling litigation..." as an important reason for approving stipulated non-statutory resolution procedures in family law)]

In re Marriage of Olson, supra, 14 Cal. App.4th 1, 7 Justice King applied this same principle to special masters. He wrote that "...absent a stipulation by the parties, the special master could not be empowered to make binding findings or judicial determinations...." On the other hand, "...if the reference is made by agreement of the parties, the parties can stipulate to the special master making determinations which otherwise would be an unlawful delegation of judicial authority." (Ibid.) In a footnote Justice King explained that "[t]he best and least expensive method of resolving disputes..." is for the parties to vest the special master with broad authority to determine issues. (14 Cal. App.4th 1, 7, fn. 5) In the present case Dr. Pigeon was empowered only to make recommendations, which in turn were

subject to the right of either party to obtain judicial review.

At A.O.B. 31-33 Ann contends that the September 8, 2003 Stipulation and Order violates the specified requirements for a voluntary reference under Code of Civil Procedure section 638 and Rule 244.1, California Rules of Court. In fact, the September 8, 2003 Stipulation and Order substantially complies with these provisions, since it identifies Dr. Pigeon as the Special Master, includes Dr. Pigeon's signed consent, and thoroughly delineates the scope of her authority. In any event "...a reference lacking the requisite form of consent is not a jurisdictional error. As an act in excess of the trial court's jurisdiction, the erroneous reference is simply voidable." (Hogoboom & King, California Practice Guide: Family Law, The Rutter Group, Chapter 5-D, section 5:477b (2006), citing Jovine v. FHP, Inc. (1998) 64 Cal.4th 1506, 1527, fn. 26) Moreover, "...an erroneous general reference should be subject to the doctrines of waiver and estoppel." (Ibid. at section 5:477c) Ann never complained about the structure of the September 8, 2003 Stipulation and Order until she submitted her opening brief to this Court.

Ann bears the burden on appeal to demonstrate that any errors she asserts are prejudicial. (Cal. Const. Art. VI, section 13; In re Marriage of Steiner and Hosseini (2004) 117 Cal. App.4th 519, 528) She has not shown how any deviation in the September 8, 2003 Stipulation and Order from the technicalities of Code of Civil Procedure section 638 and Rule 244.1, California Rules of Court resulted in a miscarriage of justice. Instead, Ann has engaged in her own deviation from requisite procedure through her improper attempt to launch an untimely collateral appellate attack on a long-final stipulation.

At A.O.B. 34-35 Ann argues that the September 8, 2003 Stipulation and Order violates Rule 5.220, California Rules of Court, because it does not fulfill "...the requirements for child custody evaluations...." (A.O.B. 35) Once again, Ann did not raise this objection at the time of the original stipulation, in any post-stipulation motion, or even in the hearing which has resulted in this appeal. Therefore, Ann has waived her objection.

Furthermore, even hypothetically assuming that Rule 5.220, California Rules of Court, were applicable to the Special Master appointment stipulation (and it

is inapplicable), the September 8, 2003 Stipulation and Order, and Dr. Pigeon's ultimate written recommendations, substantially complied with the requirements of Rule 5.220 (e). That rule requires an evaluation to include a written explanation of the process which the evaluator utilized, a data collection methodology that allows the evaluator to observe and consider each party in comparable ways, and written findings. Dr. Pigeon's written report substantially met all of these criteria. Once again, Ann has failed to demonstrate any prejudice or miscarriage of justice. (Cal. Const. Art. VI, section 13; In re Marriage of Steiner and Hosseini, supra, 117 Cal. App.4th 519, 528)

D. Summary. Ann is precluded from attacking the September 8, 2003 Stipulation and Order. The Order is procedurally and substantively proper.

II.
THE SPECIAL MASTER ACTED IN ACCORDANCE WITH THE SEPTEMBER 8, 2003 STIPULATION AND ORDER

At A.O.B. 36-37 Ann claims that Dr. Pigeon exceeded her powers under the September 8, 2003 Stipulation and Order. Ann is incorrect.

Ann alleges that the parents had no present

dispute about "...the 2005-2006 school year, []joint legal custody, []continuing physical custody; or [] ...therapy." (A.O.B. 26) She fails to supply record references to support these broad assertions, and the record belies them in large measure. Although the parties did not dispute the continuation of joint physical custody of Nathan (and Judge Tigar's Order did not change physical custody), they strongly disagreed on all of the other listed items, and many more.

Much of Dr. Pigeon's work involved determining the proper school for Nathan for a number of years into the future. This function was proper, since the September 8, 2003 Stipulation and Order gave the Special Master authority to make recommendations and determinations on "...education and schooling..." (A.A. 1) Another major dispute between the parties involved whether or not Nathan should have psychotherapy. The September 8, 2003 Stipulation and Order specified the Special Master's functions as covering "...health care and management (including psychotherapy)...." (Ibid.) Dr. Pigeon's ultimate recommendation for the bifurcation of joint legal custody occurred because the parties had been singularly unable to discuss and reach agreement on a series of important issues affecting Nathan's

well-being. Dr. Pigeon acted in accordance with the Stipulation and Order, which permitted her to address "...issues affecting the child's health, education and welfare...." (A.A. 2)

III.
SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S DETERMINATIONS

At A.O.B. 37-41 Ann attacks the factual basis for trial court's rulings. In this subsection of her brief she largely argues with the evidence and presents her own unique version of Dr. Lee's recommendation, the Special Master's recommendation, and Judge Tigar's decision following the trial. She does not fairly discuss the entire record. Instead, she chooses to employ heavily loaded words and expressions. [See, e.g., A.O.B. 37 ("Here, the Court's Statement of Decision represents the judicial equivalent of NIMBY (Not In My Backyard)"); A.O.B. 39 (claiming that Dr. Pigeon was insufficiently skilled, and characterizing Dr. Pigeon as having a "...defensive, dismissive, disrespectful manner....)"

Ann ignores an essential requirement of appellate review that appellants must "' set forth in their brief all the material evidence on point and not merely their

own evidence.'" (Foreman & Clark Corp. v. Fallon (1971) 3 Cal.3d 875, 881; see also Toigo v. Town of Ross (1988) 70 Cal. App.4th 309, 317) Accordingly, Jeff asks this Court to find that Ann has waived her arguments regarding the substantiality of the evidence by violating this rule. [Oliver v. Board of Trustees (1986) 181 Cal. App.3d 824, 834; Nwosu v. Uba (2004) 122 Cal. App.4th 1229, 1246 (when appellant's statement of facts does not fairly present evidence in favor of the judgment, the Court of Appeal may treat the question of substantial evidence as having been waived)]

At the outset of her brief Ann alleges that Judge Tigar "rubber-stamped" the "decisions" of the Special Master. (A.O.B. 2) She continues with the same general theme throughout A.O.B. 37-41. Her allegation ignores the fact that Judge Tigar took oral testimony from various witnesses over a period of three days. The allegation also ignores that fact that the Special Master made only recommendations, not decisions.

Ann complains that her "...refusal to accept the void decisions of the [Special Master] and the ensuing litigation cannot be the basis for modifying legal and physical custody." (A.O.B. 37) This language misstates

what occurred. The Order After Hearing did not modify the parties' joint physical custody. The basis for Judge Tigar's award of sole legal custody over specified issues was the inability of the parents to make "...basic decisions concerning Nathan's schooling, health care and so forth..., even if joint decisions for most children would be in the child's best interests...." (A.A. 1043)

Judge Tigar heard substantial testimony from Dr. Pigeon, Dr. Lee and Jeff which convinced him that Jeff was the more appropriate parent to make decisions concerning Nathan's school selection and psychotherapy, provided that "Ann's input should be solicited and given significant weight...." (A.A. 1045) In reaching this determination Judge Tigar had the right to weigh the credibility of all witnesses at trial, including Jeff and Ann. (In re Marriage of Lewin (1986) 186 Cal. App.3d 1482, 1492)

The trial court did not punish Ann for disagreeing with the Special Master's recommendations. Rather, Judge Tigar wrote that Ann's unilateral withdrawal from the stipulated process, after she received some unfavorable recommendations, was one of numerous factors which demonstrated that she was unable to work

collaboratively with Jeff in dispute resolution. There were other factors as well, including Ann's violation of the court's order regarding Nathan's non-enrollment in the Adda Clevenger summer program, her ongoing threats of litigation, her unusual level of hostility toward Jeff, and her continuing complaints about all of the court-appointed professionals, including Dr. Pigeon, Dr. Lee and Dr. Jacobs.

At A.O.B. 39-40 Ann argues that "[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 they were not taken seriously in the CCSM process...." In actuality, Dr Lee found Ann's concern about the children's supervision at CSC to be appropriate. (R.T. 10/24/04, p. 18) What Dr. Lee found inappropriate was the degree of Ann's concern and her demand that Dr. Pigeon remove Nathan from CSC. (Ibid.) Judge Tigar made clear that "...the shirt-cutting incident...was but only one part of the basis for the court's November 30th order...." (R.A. 1)

At A.O.B. 39 Ann writes that "[a]ssessing the

issue of conflict entailed balancing Jeffrey's history against Ann's history." Dr. Pigeon, Dr. Lee and Judge Tigar did just that. Judge Tigar found that with respect to the selection of a school and a psychotherapist for Nathan, Jeff presented a more balanced, reasonable, respectful and informed point of view.

At A.O.B. 40 Ann cites In re Marriage of Heath (2004) 122 Cal. App.4th 444 for the proposition that "[Dr.] Pigeon's speculation about the possible impact of parental conflict on Nathan cannot be the basis for a court order." In Heath, the appellate court reversed a trial court order which had split the custody of two siblings between two parents because the record was "...devoid of any evidence that the result was in the best interests of either child...." (122 Cal. App.4th 444, 447) One of the Heath children was severely disabled with autism. The panel held that the trial judge had "...failed to recognize the interest of the children in having a meaningful opportunity to share each other's lives, or the potential detriment of their separation." (122 Cal. App.4th 444, 450)

In the present case the parties have only one child together. Judge Tigar did not alter the parents'

joint physical custody of Nathan. Instead, the judge allocated legal custody on a number of different issues because the parents had proven that they could not agree on such matters. Their ongoing disagreements were contrary to Nathan's best interests. In short, Heath is entirely irrelevant to the instant controversy.

IV.
THE TRIAL COURT USED THE PROPER LEGAL STANDARD

At A.O.B. 41-43 Ann contends that Judge Tigar failed to balance all the factors involving Nathan's best interests and instead engaged in a "...tail-wagging-dog process focused on [a] single factor." (A.O.B. 41) This assertion is baseless, because Judge Tigar was strongly concerned about Nathan's best interests. Unfortunately, as the judge found, it was Ann who was "...willing to place her own interest in front of Nathan's...." (A.A. 1041)

Ann also suggests that Judge Tigar violated the change of circumstances rule for modifying custody. (See, e.g., Montenegro v. Diaz (2001) 26 Cal.4th 249, 256-267; In re Marriage of Carney (1979) 24 Cal.3d 724, 730) It was evident from the evidence, and Judge

Tigar found, that a material change of circumstances had occurred. The parties had demonstrated that they were incapable of continuing with joint legal custody, since they had proved themselves unable to make collaborative decisions regarding Nathan's education, health care, and development needs.

At A.O.B. 41 Ann quotes a passage in In re Marriage of McLoren (1988) 202 Cal. App.3d 108, 113, for the proposition that a trial judge who changes legal custody must "...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." In McLoren the Court of Appeal reversed a trial court order which had changed a father's sole legal custody to joint legal custody, despite the mother's failure to prove any material change of circumstances to justify the modification. Significantly, Justice Arabian wrote in McLoren that the parents' "...severe hostility toward each other...," and "...a virtual absence of any communication between them..." largely foreclosed the possibility of joint legal custody. (202 Cal. App.3d 108, 114)

Here, the parties started with joint legal

custody. Then, they were unable to reach agreement on basic matters involving Nathan's education, health care, developmental and other needs, despite engaging in a string of alternate dispute resolution mechanisms. Judge Tigar concluded that in light of this history legal custody needed to be bifurcated. To paraphrase the above-quoted holding in McLoren, the judge determined that the parents' "...severe hostility toward each other...," and "...a virtual absence of any communication between them..." foreclosed the possibility of continued joint legal custody. Judge Tigar further concluded, with justification, that any continuation of the parents' high level of conflict regarding Nathan's education, health and social development would be contrary to the child's best interest.

At A.O.B. 42 Ann implies that the legal custody modification adversely affected Nathan's stability and continuity. Without referring to the joint physical custody order that remained in place, she asserts that Judge Tigar's order disrupted what she terms her primary caretaker status from the time of Nathan's birth. She does not explain how the modification of joint legal custody harmed Nathan in any way.

At A.O.B. 42 Ann also argues that the order which granted Jeff sole legal custody over Nathan's schooling separated Nathan from his half-brother Kam. Judge Tigar's order did nothing of the sort. Jeff and Ann continue to share joint physical custody of Nathan.

Finally, Ann claims that "[l]ike the court in Craig L. v. Sandy S. [2004] 125 Cal. App.4th 36 the trial court failed to engage in meaningful balancing of the relevant factors." (A.O.B. 43) Craig L. was a parentage case involving a man who had fathered a child while the mother was married to another man. The Court of Appeal reversed a trial court order quashing the paternity petition of the claimed biological father, since he contended he had received the child into his home and had held out the child as his own pursuant to Family Code section 7611 (d).

The conflict in Craig L. involved Family Code sections 7540, 7611 (a) and 7611 (b): a series of statutes which govern children born out of wedlock and which arise under the Uniform Parentage Act. These statutes have no bearing here because Jeff and Ann were married when Nathan was born. Nathan's parentage is not at issue.

V.
THE AWARD OF ATTORNEYS' FEES UNDER FAMILY CODE SECTION 271 WAS PROPER

Lastly, Ann attacks the trial court's award of $10,000 to Jeff under Family Code section 271. That award was entirely proper.

Family Code section 271 authorizes the family law court to award attorneys' fees and costs as a sanction based on the inappropriate conduct of a party or his or her attorney. Pertinent to this appeal, subsections 271 (a) and (b) state as follows:

> (a) Notwithstanding any other provision of this code, the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning the parties' incomes, assets and liabilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed. In order to obtain an award under this section, the party requesting an award of attorney's fees is not required to demonstrate any financial need for the award.
>
> (b) An award of attorney's fees and costs as a sanction pursuant to this section shall be imposed only after notice to the party against whom the sanction is proposed to be imposed and

opportunity for that party to be heard.

In the present case, Jeff requested sanctions, and Ann received the opportunity to respond and to be heard.

After considering the entire record in this case, Judge Tigar found that Ann was subject to a fee order under Family Code section 271 because she had engaged in a pattern of confrontation rather than cooperation with the Special Master, had wrongfully enrolled Nathan in the Adda Clevenger summer program despite a court ruling to the contrary, and had caused the prolongation of conflicts rather than resolution of essential matters involving Nathan's well-being. The judge wrote (A.A. 116):

> The court finds that Ann's conduct has frustrated the legislature's policy of promoting settlement as reflected in Family Code Section 271. The following are two examples of Ann frustrating settlement: (1) she unilaterally withdrew from the special master process and (2) she unilaterally placed Nathan at Adda Clevenger over Jeff's objections. Both of these examples are symptomatic of Ann's inability to compromise or to follow something other than her own desires until she receives a court order....

The record sustains these findings.

Family Code section 271 "...provides an *independent* basis for sanctions in family law actions and may in fact authorize sanctions in response to

reprehensible conduct that does not rise to the level of sanctionable conduct under another statute." (Hogoboom & King, California Practice Guide: Family Law, The Rutter Group, Chapter 14-A, section 14:233 (2005), citing In re Marriage of Melone (1987) 193 Cal. App.3d 757, 764 and In re Marriage of Norton (1988) 206 Cal. App.3d 53, 58; italics in original quotation) An award of sanctions under section 271 "...serves an entirely different purpose from a need-based award..." under Family Code sections 2030 and 2032. (Ibid., section 14:235) A party like Jeff "...is not required to demonstrate any *financial need* for the award." (Ibid., citing Family Code section 271 (a), In re Marriage of Quay, supra, 18 Cal. App.4th 961, 969 and In re Marriage of Daniels (1993) 19 Cal. App.4th 1102, 1108-1109)

The abuse of discretion standard governs appellate review of an order under Family Code section 271. (In re Marriage of Bugard, supra, 72 Cal. App.4th 74, 82; In re Marriage of Quay, supra, 18 Cal. App.4th 961, 970; In re Marriage of Green, supra, 6 Cal. App.4th 584, 589) In Green Justice King quoted from the Supreme Court decision of In re Marriage of Sullivan

(1984) 37 Cal.3d 762, 768-769 as follows: [3]

> As the Supreme Court explained in [Sullivan], "a motion for attorney fees and costs in a dissolution proceeding is left to the sound discretion of the trial court. In the absence of a clear showing of abuse, its determination will not be disturbed on appeal. '[T]he trial court's order will be overturned only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order made....'"

Citing In re Marriage of Freeman (2005) 132 Cal. App.4th 1, Ann accuses Judge Tigar of imposing the sanction as punishment for her opposition to the bifurcation of legal custody. Freeman, however, involved the timing, and not the merits, of a motion under Family Code section 271 for appellate fees following an unsuccessful appeal. The appellate court in Freeman ruled that a motion for 271 appellate fees is subject to the 40-day limitation in Rule 26 (d), California Rules of Court, following the issuance of a remittitur. Freeman has no bearing on Judge Tigar's decision, which dealt with trial, not appellate fees, and which took place prior to the commencement of this appeal.

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[3] Green addressed attorneys' fees as a sanction under former Civil Code section 4370.5. The current version of this statute is Family Code section 271.

Nor is it true that Judge Tigar punished Ann for merely taking a principled stance. Judge Tigar found that Ann's course of conduct throughout the case was intentionally and unnecessarily disruptive to the resolution of issues involving Nathan's well-being. The record amply supports this finding. [4]

[4] At A.O.B 43-44 Ann discusses In re Marriage of Abrams (2003) 105 Cal. App.4th 979. In Abrams the appellate court remanded a trial court award of sanctions under Family Code section 271, because the record failed to support two of the trial court's three findings justifying the sanctions. In the present case the record fully sustains Judge Tigar's findings with respect to the section 271 award.

CONCLUSION

Judge Tigar's rulings were appropriate and legally correct. The Orders should be affirmed in their entirety.

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WORD CERTIFICATION

I certify that the number of words in the foregoing brief is 11,544 words.

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