Delegation of Power to Non-Judges in Child Custody Litigation: Informed Consent Is Not-Negotiable

by
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Introduction

For decades now, family law attorneys, scholars, researchers, and judicial reformers have been searching for ways to limit the intensity of child custody[1] conflict thorough various forms of alternative dispute resolution (ADR).[2] Unfortunately, and reflective of a certain level of zip code, race, and socio-economic biases, these solutions are often co-extensive with marriage and divorce despite demographics in the United States concerning hundreds

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1 The phrase "child custody" will be used even though the nomenclature may differ state-to-state. Child custody may include both physical (residence and access) and legal (major decision-making). This article will not explore all the various forms of family, which may include de facto parenting, guardianships, adoption, or other matters concerning non-biological or legal parents. A delegation of authority to determine parentage, for example, may raise other complex constitutional and statutory issues for arbitration. *See* American Academy of Matrimonial Lawyers, *A Report on the Uniform Parentage Act (UPA 2017): Developments in State Law Regarding the Rights of Children*, 37 J. Am. Acad. Matrim. Law. 1 (2024); Douglas NeJaime & Courtney G. Joslin, *The Legal Recognition of Multiparent Families: Findings from an Empirical Study*, 38 J. Am. Acad. Matrim. Law. 457 (2026).

2 *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 Yale L.J. 2804, 2806 (2015) ("Yet the two practices—adjudication and arbitration—are coming to be styled as fungible options on a 'dispute resolution' (DR) spectrum.").

of thousands of children whose parents never married but who are exposed to equivalent risks.[3] While much of the list of ADR mechanisms described in this article may be imposed on nonmarried parents and their children, the language of divorce is too limiting and, to the extent possible, will be avoided here.

Forms of ADR that are not an adversarial trial in a courtroom before a constitutionally-appointed or elected trial judge exist on a long and varied continuum from mediation to arbitration.[4] As intended by policymakers, scholars, and advocates, ADR is generally *not* the *delegation* with the power to sanction or reward parents—it is the very opposite of being a judge.[5] This does not mean an

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[3] For a compilation of demographic data, see *America's Families and Living Arrangements: 2023*, U.S. Census Bureau (Nov. 2023); *Number of Children Living in a Single Mother or Father Family in the United States from 1970 to 2025*, Statista (Mar. 27, 2026), https://www.statista.com/statistics/252847/number-of-children-living-with-a-single-mother-or-single-father/.

[4] Parent Coordination (PC) is not included within the definition here for an arbitrator, which may include, for example, various professional disciplines such as forensic psychologists. *See* American Psychological Association, *Guidelines for the Practice of Parenting Coordination*, 67 Am. Psychol. 63, 64 (2011) ("Parenting coordination is a non-adversarial dispute resolution process that is court ordered or agreed on by divorced and separated parents who have an ongoing pattern of high conflict and/or litigation about their children."). The hybrid nature of a PC may be viewed in the context of a quote a few sentences later in the same article: "Arbitration is a central component of the practice of parenting coordination, where permitted under state law, local rule, or by court order." *Id*. An interesting recent article collecting research is Asunción Tejedor Huerta et al., *Scoping Review of the Scientific Production on Parenting Coordination*, 35 Anuario de Psicología Jurídica 53, 54 (2025) ("In addition to the psychosocial damage to those involved, all this causes great frustration for the professionals who attend to them, and for this reason various methods have been sought to help them, with parental coordination being described as the most appropriate in these circumstances.").

[5] These delegated ADR responsibilities may not differentiate among guild-specific codes of ethics or state laws for lawyers, psychologists, and social workers, which define the scope of authority when acting as an agent of ADR. These distinctions are discussed too little in the law and social science literature when seeking to design and implement what are argued as neutral interventions. *See* Bernard C K Choi & Anita W P Pak, *Multidisciplinary, Interdisciplinarity and Transdisciplinary in Health Research, Services, Education and Policy: 1. Definitions, Objectives, and Evidence of Effectiveness*, 29 Clinical & Investigative Med. 351, 359 (2006); *but see* Anna Gercas, *The Universal Declaration on Bioethics and Human Rights: Promoting International Discussion on the Morality of Non-Therapeutic Research on Children*, 27 Mich. J. Int'l L. 629, 645 (2005)

arbitrator or referee[6] is without ADR skills, but the presumptive role is that of a trial judge bound, even if more flexibly, by the judicial canons.[7] To the contrary, most forms of ADR are intended, and often mandated by state law or rule, to empower parents to control the process and outcome (mediation, co-parenting therapy, parent education).[8]

From that perspective, child custody ADR also includes observations and opinions by specially qualified child custody evaluators or guardians *ad litem* (GALs), who are court-required by

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("Non-therapeutic research involving children should be prohibited for two main reasons. First, individuals who lack the capacity to consent should not be treated as instruments for the service of society. Second, parental consent, "minimal risk" limitations, and ethics committee discretion do not provide adequate protections for children.").

6 State nomenclature uses different terms. For purposes of this article, the terms are interchangeable if the delegation transfers the power to make decisions regarding legal or physical custody of a child.

7 For an excellent article for lawyers considering arbitration and the use of hybrid models, see Richard Fullerton, *The Ethics of Mediation-Arbitration*, 38 Colo. Law. 31, 39 (May 2009) ("Traditional mediation and arbitration processes, each with its proven history and ethical standards, have long been accepted. The risks of combining these practices into mediation-arbitration, however, are several, both to the parties and to the neutrals. Med-arb sometimes has been misunderstood to offer the best of both practices with little downside, but their combination challenges the integrity of each in ways that are mutually exclusive. Although practice variations may allow greater ethical protection, none does so without ethical or procedural obstacles.").

8 An excellent treatise is Mediation: Law, Policy, & Practice (vols. 1-3) § 2:2 at 9 (Sarah R. Cole et al., eds. 2024) ("With some exceptions, the evolving definition of 'fairness' in legal choices toward and commentaries about mediation is the preservation of party choice. That is, a mediation process is fair if it preserves choice, and an outcome is fair if the parties freely select it. The notion of free choice or knowing consent has come to be known as party self-determination."); *but see* Boston Coll. Legal Servs. Lab: Fam. Just. Litig. Clinic, Boston Coll. L. Sch., Court Ordered Parenting Classes in Massachusetts Probate and Family Court 32 (2024), White-Paper-Parenting-Classes-in-Probate-and-Family-Court.pdf ("As courts continue to focus their 'regulatory' energy and emphasis on parenting, they must show care in the interventions they deploy. Given that parenting programs lack clear evidence of efficacy, and given the worrisome procedural and substantive blindspots the use of the classes can create, it is critical that the Probate & Family Court develop an understanding of what courses their judges are relying on and then think critically about if, how, and when, being ordered into such programs to help litigants navigate their co-parenting relationships.").

design, desperation, or a blend of both, to share information concerning individual traits of the parents and family dynamics under complex-system stress.[9] One of the themes as well is that many interventions, which may be remedial, are perceived as "sanctions" by parents and occur too late in the process. As one of the authors has stated as a mantra in many legal and mental health environments: "prevention, not intervention" should be the aspiration for any form of ADR. What is addressed in this article, however, is *judicially-delegated* decision making power and authority to a third party licensed lawyer and what that may mean for a lawyer who encourages that choice of trial structure for clients.[10]

The Journal of the American Academy of Matrimonial Lawyers (AAML) has recently published articles by Carolyn Zack and Amy Amundson proposing important reforms concerning the

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9 In the interests of full disclosure, one of the authors of this article is a co-author of Benjamin D. Garber et al., A Family Law Professional's Field Guide to High Conflict Litigation: Dynamics, not Diagnoses (2022). The Journal of the AAML has welcomed scholarship concerning the debate over child custody evaluations. *See* Benjamin D. Garber & Premela Deck, *Advance Orientation: Preparing Parents to Participate in a Court-Ordered Parenting Plan Evaluation*, 38 J. Am. Acad. Matrim. Law. 39, 40 (2024) ("Given the simplicity of this logic, it is startling to realize that the legal and mental health professionals who work in the family courts have seldom addressed the question of the ecological validity of PPE, that is, the degree to which an artificially engineered observation is representative of natural behaviors."); Benjamin D. Garber & Robert A. Simon, *Individual Adult Psychometric Testing and Child Custody Evaluations: If the Shoe Doesn't Fit, Don't Wear It*, 30 J. Am. Acad. Matrim. Law. 325, 327 (2018) ("We submit that a CCE report that includes intimidating and invalid means, percentile ranks, and alpha coefficients risks mis leading consumers and harming the children whom we intend to serve. This risk is compounded when evaluators blindly rely exclusively on computer-generated scoring and interpretations."); Sol R. Rappaport et al., *Psychological Testing Can Be of Significant Value in Child Custody Evaluations: Don't Buy the Anti-Testing, Anti-Individual, Pro-Family Systems Woozle*, 30 J. Am. Acad. Matrim. Law. 405, 415 (2018) ("In the context of child custody evaluations, the ideographic interpretation of psychological test data entails the integration of information from multiple sources that describe the parents, the children, and parent-child interactions.").

10 In some states, parents must agree to the delegation and, in other states, the judge may impose over objection or applying a test such as "exceptional circumstances." *See, e.g.*, Me. Rev. Stat. tit. 19-A § 252 (1), (A), (B) ("The court may appoint a referee in any proceeding for paternity, divorce, judicial separation or modification of existing judgments brought under this Title: A. When the parties agree the case may be tried before a referee; or B. Upon motion demonstrating exceptional circumstances that require a referee.").

Uniform Family Law Arbitration Act ("UFLAA"),[11] to the more radical argument employing "hot tub" trials with experts asking questions of each other.[12] These ADR designs, broadly considered, mean that child custody litigation is addressed in private, non-courtroom settings. In an arbitration environment, conventional adversarial methods may become more inquisitorial,[13] such that the delegated "judge" is less umpire and more, well, inquisitive ("find out what they want to know") and, thereby, less reliant on lawyers and parties to produce and transform information that is relevant or admissible under procedures that are technical or arcane. [14]

This article concerns a framework for advising parents of what it means to leave a judicial system familiar mostly through television, movies, and social media. Clients who are surprised by the delegation and arbitration process, much less an outcome that they may

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11 *See* Amy J. Amundsen & Carolyn Moran Zack, *Family Law Arbitration—A Guide for Providing Sound Counsel to Litigants*, 37 J. Am. Acad. Matrim. Law. 49, 49 (2024) ("Achieving resolution of family law disputes privately, more quickly, more cheaply, and with less adversarial posturing, are goals shared by family lawyers and their clients. Family law arbitration, which is the process by which parties voluntarily submit their claims for adjudication to a third-party neutral, allows parties to effectuate these goals.'"). For a reminder of that scholarship, see Rebecca Aviel, *Why Civil* Gideon *Won't Fix Family Law*, 122 Yale L.J. 2106, 2120 (2012) ("This is a painfully glancing treatment of the fact that the adversarial model fits poorly with most pressing goals of family court, but the truth is that this disconnect is not news to scholars and reformers who study private custody disputes.").

12 Dana E. Prescott & Tim Fadgen, *Adversarial Systems and Forensic Experts in Child Custody: How About Adding a Hot Tub*?, 32 J. Am. Acad. Matrim. Law. 117 (2019).

13 Brian M. Barry, How Judges Judge: Empirical Insights into Judicial Decision-Making 208 (2020). The search by legal scholars to find an empirical and rule-based system for judicial decision-making is many generations old but worth a reminder. *See* Jerome Frank, *Mr. Justice Holmes and Non Euclidean Legal Thinking*, 17 Cornell L.Q. 568, 571 (1931) ("[T]raditional jurisprudence is founded upon the erroneous notion—sometimes expressed but more often implicit—that there are self evident truths about the judicial process which must not and cannot be questioned, from which self evident truths a legal system can be worked out logically as the ancient geometers had worked out their system from self-evident geometrical axioms.").

14 *See* Sandra Fredman, *Allies or Subversives—The Judiciary and Democracy*, 32 Isr. L. Rev. 407, 426 (1998) ("[N]o attempt has been made to adapt the traditional adversarial bipolar litigation to one more suited to human rights litigation.").

reject, may create a risk for the lawyers who advise them and the arbitrators performing those functions.[15] And, of primacy with any discussion of any form of ADR, the potential exists for supporting and exacerbating exploitation and risk to a parent and child from interpersonal violence that is physical, emotional, and economic.[16]

Part I explores delegation of judicial authority in the context of custody disputes, focusing on the common forms of delegation, the players frequently involved, and how those factors impact the validity of the delegation. In Part II, the article examines

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15 A discussion of case and statutory law will only be summarized as there are many excellent articles providing analysis, some of which are cited in the footnotes. Whether immunity is qualified, absolute, or quasi-judicial for arbitrators should be answered clearly by any lawyer embarking on that role or a recommendation for a client to proceed. For a policy discussion generally, see Jenny Brown, *The Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion*, 2009 J. Disp. Resol. 225, 236 ("In essence, the current policy of granting absolute immunity to arbitrators is not fair to arbitration participants and should be reexamined. It is irrational for states and organizations to continue to support policies such as arbitral immunity if those policies are not equally concerned with maintaining the integrity of the process."); *see also* Feichtinger v. Conant, 893 P.2d 1266, 1267 (Alaska 1995) ("Arbitral immunity encourages the settlement of disputes by arbitrators. It protects the integrity of the arbitration process from reprisals by dissatisfied parties. It enhances the impartiality and independence of arbitrators. It lends finality to decisions of arbitrators. And it makes it easier to recruit arbitrators. Exposing arbitrators to personal liability would weaken the effectiveness and attractiveness of arbitration as an alternative to litigation.") (footnotes and citations omitted).

16 *See* Ben Barlow, *Divorce Child Custody Mediation: In Order to Form a More Perfect Disunion*, 52 Clev. St. L. Rev. 499, 511 (2004) ("A primary concern of opponents of divorce and custody mediation is that it does not adequately deal with imbalances of power that are often immersed throughout the domestic dispute."); Holly Huber Gifford et al., *Intimate Partner Violence Predicting Outcomes in Specialized Mediation and Traditional Litigation*, 40 J. Fam. Violence 283 (2025) (investigating intimate personal violence (IPV) victimization level ever in the relationship, as reported by parents, as a predictor of outcomes within each of three different dispute resolution processes: traditional litigation, shuttle mediation, and videoconferencing mediation; within all three dispute resolution types, higher baseline IPV predicted higher levels of ongoing IPV and harassment at follow-up); Amy Holtzworth-Munroe, *Controversies in Divorce Mediation and Intimate Partner Violence: A Focus on the Children*, 16 Aggression & Violent Behav. 319, 323 (2011) ("Criticism of conducting mediation with cases involving IPV ignores a larger issue of who should make such decisions. For example, would families with a history of IPV fare any better if they went to court rather than mediation? Do traditional procedures and court decrees provide any greater protection to violent families?").

arbitration as a form of judicial delegation and its applicability to child custody determinations. It highlights the importance of informed consent in those instances and gives guidance on the appropriate scope of informed consent. Finally, we conclude in Part III that delegation to an arbitrator may offer a legally permissible and responsible means of improving the efficiency and efficacy within, and as part of, the judicial process to more securely protect the rights and needs of children. This support, however, requires more than a cursory explanation of consequences from lawyers and judges before clients walk through that portal.

I. Any Judicial Delegation Has Limits

In a manner that continues to foster intense debate depending upon the issue and political bent, the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution provides parents with a fundamental right to direct the care, custody, and control of their children as a family.[17] Accordingly, a state's power to affect, limit, terminate, and further control those rights is limited. One hundred years ago, the U.S. Supreme Court held that "the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[18] Through the date of this article, the Supreme Court has repeatedly affirmed and upheld the fundamental rights of parents to care for and control their children.[19] It is in this context that courts have

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17 The decisions cited here are from the past and pre-date recent U.S. Supreme Court jurisprudence. It is not clear if these procedural and substantive due process arguments concerning parental rights will survive or expand to diminish the rights of children concomitantly so the footnotes that follow may be moot soon. *See* Nan D. Hunter, *Family, Religion and the Constitution: Penumbras of Sovereignty*, 35 J. Am. Acad. Matrim. Law. 571, 580 (2023) ("The story of how family law was reconceptualized often begins and ends with this run of famous individual rights cases, most involving liberty and equality protections under the Fourteenth Amendment."); Martha Minow, *We, the Family: Constitutional Rights and American Families*, 74 J. Am. Hist. 959, 983 (1987) ("The sudden explosion of constitutional adjudication about the family that started in the 1960s has borrowed, as lawyers always do, from the past but reinvented the past's meanings in the process.").

18 Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

19 Stanley v. Illinois, 405 U.S. 645 (1972) (holding that an Illinois law that presumed unwed fathers to be unfit parents violated the Due Process and Equal

interpreted judicial delegation of those powers as potentially violating parents' otherwise sacrosanct rights.[20]

In all child custody matters across the United States, whether *pendente lite*, post-judgment, or at the time of a final determination on custody, the court must issue orders based upon the "best interests of the child standard."[21] Most jurisdictions provide a series, some much longer than others, of statutory "factors" or criteria that the court must consider when determining what custodial arrangement serves the best interests of the minor child(ren), though the court has the authority to weigh which factors, or matrix of factors, are specifically relevant to a given case.[22] As thoughtfully summarized

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Protection Clauses of the Fourteenth Amendment); Santosky v. Kramer, 455 U.S. 745, 753 (1982) (affirming the notion that parents have a fundamental liberty interest in their children which is derived from the Due Process Clause of the Fourteenth Amendment where the Court held that states must use at least a "clear and convincing standard" when permanently terminating parental rights); Troxel v. Granville, 530 U.S. 57 (2000) (finding that a Washington statute, which permitted "any person" to petition for visitation of a child "at any time" infringed on the rights of natural parents as granted to them by the Fourteenth Amendment's Due Process Clause).

20 This statement requires thoughtful consideration today given recent U.S. Supreme Court decisions retrenching individual rights of privacy for some groups while encouraging weaponization by other protected groups. *See* Jonathan L. Marshfield, *State Constitutional Rights, State Courts, and the Future of Substantive Due Process Protections*, 76 SMU L. Rev. 519, 540 (2023) ("Despite the limited success of the new judicial federalism, it is a mistake to conclude that state constitutions have not advanced greater individual rights protections. There are at least two scenarios where this has occurred. First, some state court rulings expanding rights have gone unaltered by amendment or other political response. Second, states have adopted various amendments that affirmatively enlarge rights beyond those in the Federal Constitution.").

21 *See* Dale Margolin Cecka, *Don't Just Ask the Kids: Toward a More Deliberate Approach to Child Advocacy*, 85 Md. L. Rev. 696 (2026) [hereinafter, Cecka, *Don't Just Ask*]; Julia Halloran McLaughlin, *The Fundamental Truth About Best Interests*, 54 St. Louis U. L.J. 5 (2009).

22 *See* Dale Margolin Cecka, *Improper Delegation of Judicial Authority in Child Custody Cases: Finally Overturned*, 52 U. Rich. L. Rev. 181, 195 (2017) [hereinafter, Cecka, *Delegation*]; *see also* Brazzel v. Brazzel, 789 S.E.2d 626, 630 (Ga. Ct. App. 2016) ("Pursuant to OCGA § 19-9-1.1, the court's confirmation order incorporated the arbitrator's custody-related decisions and showed that the court considered the circumstances of the parents and children (as set forth in the arbitration decision's detailed factual findings) and found no basis to conclude that the decisions would not be in the best interests of the children."); Riemann v. Toland, 269 A.3d 229, 235 (Me. 2022) ("The referee articulated the specific best

in many treatises over the past half century, the "best interest of the child" (BIC) standard gained traction during the mid-twentieth century as a mechanism for addressing custody disputes.[23]

Though the BIC test attempts to provide defensible guidelines for evaluating very fact specific issues, this requires a great deal of subjective interpretation by the judge in each case. Accordingly, non-arbitrator delegation to assess the BIC factors may have the appearance, to the parent, of authority and power in some roles but that is not the same as an actual constitutional delegation of judicial authority. A few common and frequently appealed and public examples make this distinction clear.

Common forms of ADR with third parties include the child's therapist or an alternative mental health professional, who may be one and the same given the various licenses that professionals may hold.[24] Orders delegating authority to mental health professionals often are at risk of overbreadth because they frequently bind the parties to follow "all recommendations" of the professionals without sufficiently limiting the scope.[25] Across jurisdictions, authority varies depending on whether it is to a parent versus an "other," such as a mental health professional, family relations counselor, guardians *ad litem*, and parenting coordinators.[26]

The power to decide whether a parent has access to a child may be permissible because the BIC analysis is (in and of itself) a judicial determination that the parties were subject to

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interest factors that were important to this case, see 19-A M.R.S. § 1653(3)(A)-(B), (E)-(F), (H), (N), and made findings as to each that are supported by substantial record evidence, including expert testimony assessed and weighed carefully by the referee.") (citations omitted).

23 *Id*.

24 *See* Benjamin D. Garber, *The Dynamics of Enmeshed Family System Ten Years Later: Family Court and Contemporary Understanding of Adultification, Parentification, and Infantilization*, 34 J. Am. Acad. Matrim. Law. 97, 98 (2021) ("The field of family law is still in its infancy. Born of the awkward union between the legal system and mental health practice, its professionals have only just begun to recognize the blessings and burdens associated with its lineage. In fact, neither the adversarial courts nor the medical model of individual diagnosis and treatment fit the needs of the conflicted family system or the best interests of the child standard.").

25 *See* Cecka, *Delegation*, *supra* note 22, at 187.

26 *See generally Brief of the Connecticut Bar Associated as Amicus Curiae in* R.H. v. M.H., Connecticut Bar Association Family Law Section (Dec. 6, 2023) (on file with authors).

the scrutiny of the court, the court applied the statutory criteria, and thereafter found that it was in the children's best interests if one parent had the discretion to make certain post-judgment decisions.[27] The more cautious view is that the risk of improper motives by the parent awarded authority or unrestricted delegation to a third party such as a therapist must be restrained in most cases.

One common means of injecting a third-party is the appointment of a guardian *ad Litem* ("GAL"), whose task is to investigate the applicable custody factors and make recommendations to the court regarding the best interest of the child.[28] The presentation of the GAL's findings differ between jurisdictions with some states allowing live testimony from the GAL while others requiring the GAL to author written reports.[29] In either instance, the GAL's ul-

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27 *See, e.g.,* R.H. v. M.H., 324 A.3d 720, 724 (Conn. 2024) ("We conclude that the trial court's order authorizing the plaintiff to exercise unilateral control over the defendant's visitation with R was an improper delegation of judicial authority because the court delegated to the plaintiff, in consultation with the child's therapist, the authority to suspend or terminate the defendant's visitation with R. Unlike the order in Zilkha, in which the trial court concluded that the defendant did not have any right to visitation; the order in the present case granted the defendant a specific right to visitation after the defendant engaged in at least four sessions with her mental health professional.") (citation omitted); *In re* Children of Richard E., 227 A.3d 159, 169 (Me. 2020) ("Here, the court required that contact between the father and the older child shall resume 'as therapeutically recommended.' Similarly, the court required that contact between the father and the younger child take place in the presence of a professional supervisor for a period of six weeks, but after that time, contact could be extended 'upon recommendation of the child's therapist.' The court erred by requiring that future contact, and any extension of such contact, between the father and each child be dependent upon the recommendation of the child's therapist, because this 'transfer[red] the court's responsibility for determining the best interest[s] of the child[ren].' As we made clear in Knight, although the court can consider a therapist's opinion in its determination of a parent's right to have contact with a child, "the court cannot make the visitation outcome dependent upon that opinion.") (citations omitted).

28 *See* Cecka, *Don't Just Ask*, *supra* note 21.

29 *See* Dana E. Prescott & Diane A. Tennies, *The Lawyer as Guardian ad Litem: Should Status Make Expert Opinions All-In and Trump Gatekeeping Functions by Family Courts*, 30 J. Am. Acad. Matrim. Law. 379, 393-94 (2017) ("The GAL role is intended by policy makers to fill this gap by acquiring information through investigation and inquiry outside the courtroom and then transferring that knowledge, by report and testimony, to judicial fact finding and decision making.").

timate task is to present the court with facts applicable to each of the statutory criteria and make formal *recommendations* to the court. What is—or at least should be—clear is that due process requires the GAL's report and opinions to be subject to cross-examination.[30] This is not, however, a benign power of suggestion when the testimony of the GAL and recommendations are more likely (but not always) adopted by the judge. The hybrid role of the GAL as court-appointed neutral and third-party mediator for the parties, makes them tempting "stand-ins" for the court to resolve custodial disagreements.

Although role confusion is a risk in child custody delegations, another widely-studied approach to chronic conflict is a parenting coordinator ("PC"), who may be authorized, with or without specific state statutes or local rules, to mediate or decide future child

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30 *See, e.g.*, Banks v. Leary, 209 A.3d 109, 114 (Me. 2019) ("First, as we have held, 'the most effective challenge to the quality, completeness, or competence of a guardian ad litem's work will be accomplished through cross-examination of the GAL at trial." Consequently, for there to be a full explication of the GAL's opinions and recommendation, which would be important for the court to determine how much weight to assign to that information, the opportunity for cross-examination of the GAL is necessary. Second, the right to cross-examine the GAL about the report has constitutional significance because it is part of the process that serves to protect parents' 'fundamental liberty interest to direct the care, custody, and control of their children.'") (citations omitted); *In re* Hoffman, 776 N.E.2d 485, 489 (Ohio 2002) ("Due process necessitates that appellee should have had the right to cross-examine the guardian ad litem, since the trial court relied upon the report. As such, notwithstanding R.C. 2151.414(C), we hold that in a permanent custody proceeding in which the guardian ad litem's report will be a factor in the trial court's decision, parties to the proceeding have the right to cross-examine the guardian ad litem concerning the contents of the report and the basis for a custody recommendation. Without these safeguards, there are no measures to ensure the accuracy of the information provided and the credibility of those who made statements."); Kelley v. Kelley, 175 P.3d 400, 406 (Okla. 2007) ("The legislative act removing the guardian ad litem from the discovery process cannot be construed so as to deny due process which includes the right to be heard in open court and to have a determination of issues based upon competent evidence offered by persons who submit themselves to cross-examination. Therefore, to the extent that 43 O.S. Supp. 2006 §107.3 (A)(2)(e), barring discovery of the guardian ad litem, negates the right of a parent to cross-examine the guardian concerning the contents of the report and the basis for a custody recommendation, it is an unconstitutional restraint on the parent's fundamental rights to the care, custody, companionship and management of his or her child. The trial court's order barring the father from calling the guardian ad litem from testifying in the cause suffers from the same constitutional infirmity.").

custody disputes. As scholars note, the "specific nature of the role of a parent coordinator varies significantly both within and among jurisdictions that permit such appointments. In certain circumstances, the role of parent coordinator may be analogous to that of a mediator, in others to that of a master, and still in others, the parent coordinator's role combines multiple functions."[31] binding on the parties unless modified by the court.[32] In this setting, PCs are encouraged to provide parents with a setting to present their disagreements to each other and the PC, work towards common ground, and in the absence of an organic agreement, comply in good faith.

There is, however, much debate about the authority of the trial court to delegate to PCs absent enabling legislation.[33] As the Nevada Supreme Court held with a legitimate warning:

> Here, the district court granted the parenting coordinator temporary decision-making authority to resolve minor disputes between Bautista and Picone, which included both substantive and nonsubstantive changes to their parenting plan. The district court's order defined a substantive change "as a modification to the parenting plan that (a) significantly changes the timeshare of the child with either parent; or (b) modifies the timeshare such that it amounts to a change in the designation of primary physical custody or a shared physical custodial arrangement." Because the parenting coordinator's authority was not limited in scope to nonsubstantive issues, we conclude that the district court improperly delegated its decision-making authority.[34]

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31 Milford D. Dale et al., *Parenting Coordination Law in the US and Canada: A Review of the Sources and Scope of the PC's Authority*, 58 Fam. Ct. Rev. 673, 673-74 (2020).

32 *Id*. at 688 ("In the twenty-one states that have a parenting coordination statute or rule, only five require the consent of both parents for the appointment. In most states, the court has authority to order parenting coordination on its own motion as well as upon agreement of the parents or upon motion by a party.").

33 In *Bower v. Bournay-Bowe*r, 15 N.E.3d 745, 753-54 (Mass. 2014), the Massachusetts Supreme Judicial Court examined various jurisdictions and the role and authority of PCs, and concluded: "Therefore, probate court judges possess the inherent authority to refer parties to a parent coordinator in appropriate circumstances in order to conserve limited judicial resources and aid in the probate court's functioning and capacity to decide cases, or if in the judge's discretion such referral is necessary to ensure the best interests of the children in a divorce- or custody-related proceeding. However, this authority is not without limit." (citations omitted).

34 Bautista v. Picone, 419 P.3d 157, 159-60 (Nev. 2018).

The challenge is that states have been irregular as to consequences, including sanctions, for ignoring the PC or engaging in more litigation with the PC process as just a new sandbox.[35]

An excellent example of tensions may be found in the matter of *R.H. v. M.H.*,[36] in which the Supreme Court of Connecticut decided whether an order permitting one parent to "suspend" the other parent's access with the minor children was an improper delegation of judicial authority despite a continuous and demonstrated pattern over a period of years in which the other parent had generated the vast majority of the family's problems and posed a significant risk of psychological harm to the children as a result of her substance abuse issues. There, the court held that such an order was an improper delegation of judicial authority, since it effectively granted one parent the sole authority, in consultation with the child's therapist, to suspend the other parent's parenting time, a task strictly reserved for the courts.[37]

The Supreme Court in *R.H. v. M.H.* supported an inconsistent and prior ruling in *Lehane v. Murray*[38] and drew factual distinctions between the two cases. In *Lehane v. Murray*, the Connecticut Court of Appeals upheld an order that provided the father discretion to "alter, change, or modify" the mother's access schedule with the minor child since the discretion was limited in scope and did not permit a reduction or elimination of the mother's access. Read together, *R.H v. M.H.* and *Lehane v. Murray* suggest that determining whether a trial court has delegated its authority, whether any such delegation is proper, and the extent of any delegation, is a delicate and fact-driven inquiry that will be reviewed for any abuse of discretion.

One important consideration is to "whom" judicial authority has been delegated. The Supreme Court of Connecticut opined

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35 *See, e.g.*, Estape v. Seidman, 269 So. 3d 565, 569 (Fla. Dist. Ct. App. 2019) ("Furthermore, section 61.125, Florida Statutes (2012), authorizes the appointment of a parenting coordinator, whose purpose is to assist parents in dispute resolution over parenting plans. Section 61.125(7) contains an express confidentiality provision for communications between the parenting coordinator, who could be a licensed therapist, and the parties. However, section 61.125(9) provides for a limitation of liability for a coordinator, unless the coordinator acts in bad faith or reckless disregard for the rights of the parties.").

36 324 A.3d 720 (Conn. 2024).

37 *Id*. at 724.

38 283 A.3d 62 (Conn. App. Ct. 2022).

that "given the inherent tensions between the parties in visitation cases, we conclude that a trial court shall not delegate to a parent its judicial authority to suspend visitation with the other parent."[39] Given the emotionality of custodial disputes clear risks exist that one party may weaponize its delegated authority in order to exert power over or undermine the other parent's relationship with the child. To that point, Justices Robinson and Mullins authored a concurrence in the matter of *R.H. v. M.H.,* focusing largely on whether the order delegating some judicial authority over custody-related matters allowed for a temporary and finite suspension or modification of rights as compared to a permanent change.[40]

Almost exactly one year after the decision in *R.H. v. M.H.,* the Connecticut Appellate Court affirmed this concept in the matter of *Milot v. Milot.*[41] There, the court found a delegation to be improper in so far as it placed the decision-making authority in the hands of a party to the litigation.[42] Most recently, the Connecticut Appellate Court found that in circumstances where a parent is

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39 R. H. v. M. H., 324 A.3d 720, 729-30 (Conn. 2024).

40 *Id.* at 731. The original order read:

> If at any time the defendant reasonably determines, after consultation with [the child's] therapist, that the unsupervised visits with the plaintiff are causing negative behavioral or emotional consequences for [the child], then the defendant may either suspend the plaintiff's visitation or reinstate the requirement of supervision of the visits by a third party of his choice, with defendant responsible for the cost of supervision if any, until further order of the court or written agreement of the parties.

Id. at 723.

41 344 A.3d 320 (Conn. App. Ct. 2025).

42 *Id.* at 325 ("We conclude that the court in the present case impermissibly delegated its authority to the custodial parent in ordering that '[v]isits between the children and the defendant shall be at the sole [discretion] of the plaintiff with all arrangements approved by the plaintiff.'"); Kamil v. Kamil, 242 A.3d 801 (N.H. 2020) ("It is the trial court's responsibility to determine parental rights and responsibilities in cases of divorce and legal separation. The court may not delegate that responsibility to a third party."); Kosciusko v. Parham, 836 S.E.2d 362 (S.C. Ct. App. 2019), *rehearing denied* 2019 S.C. App. LEXIS 196 (S.C. Ct. App. 2019) ("The family court did not have subject-matter jurisdiction to sanction binding arbitration of issues involving custody and visitation or to confirm the arbitrator's award" such that any order thus generated was void and unenforceable."); Pearson v. Wendell, 125 A.3d 1149 (Me. 2015) ("Although the court can consider the expression of such an expert opinion by a therapist, the court cannot make the visitation outcome dependent upon that opinion.").

afforded *zero* custodial rights, the other parent's award of *sole* legal and physical custody creates a permissible delegation that allows the custodial parent to dictate and determine the visitation rights of the non-custodial parent.[43] It is no surprise why these forms of delegation occur so frequently (whether or not the delegation is lawful). Family law attorneys and the court system are always looking for ways in which to increase judicial economy, reduce the financial and emotional toll of litigation, and provide informed and supportable results.

By ordering parents to engage in some judicially-sanctioned process, the hope is that parties are (a) more likely to attain quicker resolution on issues; (b) those resolutions have a single-judge case management process that is faster and more responsive than a court system may allow; and (c) parents are less likely to return to court if they are heard and structure is consistently put in place. This delegation, however, is bounded by a long tradition of indeterminate laws concerning children and good intentions that may be disconnected from research or effective policy.[44] What matters here is that none of these roles are the same as delegating power and authority to an arbitrator who can hold a trial and render a judgement that may impose legal or physical custody arrangements on parents. Accordingly, the duties of informed consent for lawyers in the latter instance is of paramount importance.

II. The (Real) Delegation Doctrine and Informed Consent

Evolving statutory frameworks require, historically, that custody determinations be made by the court and are inherently nondelegable. But that is not the trend in practice. The shift is, in part, a response to the desperation of overwhelmed court dockets,

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43 D. K. v. D. F., 344 A.3d 564 (Conn. App. Ct. 2025).

44 *See* Sharvit Or et al., *Parenting Coordination–Outcome Measurement and Prediction: Implications for Research and Practice*, 61 Fam. Ct. Rev. 135, 153 (2023) ("Five desired final outcome indicators were specified for the program. The study findings show that on the whole, parents in high conflict experienced a significant improvement in the desired outcome indicators following participation in the parenting coordination pilot program. Given that most of the participants in the parenting coordination pilot program finished their participation in the program ahead of schedule, these findings are especially noteworthy.").

family systems and children in complex crisis, and an interdisciplinary array of professionals trying to mitigate the harm of an adversarial trial. Common delegations to an arbitrator, without much controversy, include economic issues of alimony and equitable distribution of assets and debts, with a mutually agreed upon professional just like many other economic civil lawsuits in the courts.[45]

There is, however, legitimate scholarly and legal opposition to the delegation of power to non-judges concerning child custody matters.[46] Unlike other forms of civil litigation, child custody is subject to iterations of litigation until a minor is no longer a minor as defined by each state (no final judgments as with other litigation), and the state has a special obligation to children beyond the allocation of net worth and income (the ancient *parens patriae* doctrine).[47] Professor Dale Margolin Cecka summarized this argument quite well:

> This practice, whereby the best interests of the child are decided outside of a courtroom, should have been dispensed with long ago. The Virginia

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45 *See, e.g.,* Taylor v. Taylor, 517 P.3d 380 (Utah 2022) (holding that submitting issues of alimony, property division, child support, and custody to binding arbitration was a permissible delegation and that the express provisions of the Utah Uniform Arbitration Act authorized the private arbitration of these issues.).

46 Bridgette Woodford, *Leave It to the Courts: Why Child Custody Arbitration Is Improper*, 14 Arb. L. Rev. 1, 16 (2023) ("Despite Americans' distrust in the judicial process and disdain towards litigious proceedings, arbitration does not provide an effective alternative in determining child custody issues."). The author cites Christine Albano, Comment, *Binding Arbitration: A Proper Forum for Child Custody*?, 14 J. Am. Acad. Matrim. Law. 419 (1997) (stating that an arbitrator may not secure the legal rights of children if the arbitrator is unfamiliar with family law).

47 When on the New York Court of Appeals before becoming a U.S. Supreme Court Justice, Judge Benjamin Cardozo, in 1925, wrote the test later adopted by many states:

> He acts as *parens patriae* to do what is best for the interest of the child. He is to put himself in the position of a "wise, affectionate and careful parent" and make provision for the child accordingly. He is not adjudicating a controversy between adversary parties, to compose their private differences. He is not determining rights "as between a parent and a child" or as between one parent and another. He "interferes for the protection of infants, *qua* infants, by virtue of the prerogative which belongs to the [state] as *parens patriae.*"

Finlay v. Finla*y*, 148 N.E. 624, 626 (N.Y. 1925).

> Code makes this clear. Delegation orders also run afoul of the United States Constitution. Delegation violates the fundamental right to parent and can violate an individual's physical liberty when that individual is held in contempt of court orders made by a non-judicial decision maker. Other states have banned the practice for years. Delegation is simply a cultural relic of the Virginia trial courts that has never had any legal basis.[48]

Whatever form a judicial delegation may take, the intent is to reduce the emotional and financial toll associated with iterations of chronic or emergent child custody disputes.[49]

This section, however, is concerned with a lawful delegation to a judicially-empowered lawyer with authority to decide legal or physical custody litigation between parents. The section also addresses what that means for lawyers advising clients of their rights, waiver of those rights to court, and risk and benefits of the arbitration process. The scaffolding for best practices begins with adapting decades of state law from the medical field. The doctrine of informed consent originated in the context of surgical and psychiatric treatment. The goal was to ensure that patients could make informed choices about whether to undergo proposed procedures, surgeries, or other medical treatments after having been made well-aware of all the attendant risks and potential array of outcomes.[50]

The parallel question in the context of child custody arbitrations is whether there is a comparable duty to explain the benefit/risk of arbitration and the delegation doctrine in a particular state to a client who may be vulnerable or lack the capacity to consent, or may be a sophisticated litigant with years of suing and being sued? Relatively little case law exists addressing this issue. After all, the legal profession is rather active when demanding that other

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48 Cecka, *Delegation*, *supra* note 22, at 182.

49 For purposes of this article, the phrase "child custody" will be used, acknowledging that some states have changed their laws to *shared*, *allocated,* and *sole parental rights and responsibilities*. The debate concerning the best interests' standards, the bargaining between parents, and the efficacy of parenting plans and presumptions for children is beyond the scope of this article. *See* Dana E. Prescott, *The AAML and a New Paradigm for Thinking about Child Custody Litigation: The Next Half Century*, 24 J. Am. Acad. Matrim. Law. 107, 127 (2011) ("In child custody litigation, parents who prefer litigation rather than collaboration may incur no marginal costs for that choice and thereby impose those costs upon society by creating a higher probability of chronic conflict litigation, excessive use of scarce judicial resources, more children-at-risk, and economic deprivation for the family system").

50 Felder v. Children's Hosp. Corp., 150 N.E.3d 1, 7 (Mass. App. Ct. 2020).

professionals with licensure obtain informed consent before commencing human experimentation or treatment. This is not to say that lawyers should have clients sign informed consent releases. But what it does mean is that lawyers are obligated to explicitly explain processes, risks, and potential outcomes to their clients before permitting the client to engage in a process that would delegate the court's authority to hear evidence and impose binding custody arrangements to someone other than the court.

Professor Mark Spiegel suggested, in 1979, that "informed consent is not meaningful unless a person understands what he is consenting to; understanding requires information, and it is the doctor who must supply the necessary information because the patient lacks the expertise to procure and translate it himself."[51] This test derives from the ABA Code of Professional Responsibility as it then existed, which is adapted here with more current language:

- A lawyer should exert best efforts to ensure that decisions of the client are made only after the client has been informed of relevant considerations.
- A lawyer ought to initiate this informed decision-making process if the client does not do so before a court order is contemplated much less signed.
- A lawyer should bring to bear upon this decision-making process the fullness of their experience as well as that objective viewpoint of risk and benefit.
- In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not the lawyer.
- A lawyer's obligation to protect the right of informed consent clearly places the obligation on the lawyer to initiate discussion.[52]

This is a practical, albeit incomplete, test for AAML Fellows and any family law practitioner. Lawyers are often the bearers of bad news. Because the legal profession is inherently risk averse for

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51 Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. Pa. L. Rev. 41, 45 (1979).

52 *Id*. at 71 (*quoting* ABA Code of Professional Responsibility, Ethical Consideration 7-8).

clients, attorneys are trained to anticipate and communicate potential adverse outcomes. While "no clear rule exists for whether such delegations are permissible . . . there is a permissibility spectrum: the more authority and discretion delegated to a third party, the more likely the delegation is to be struck down."[53]

Thus, the challenges are conveying to the client-parent the reality that a court trial may be worse than a delegation to an arbitrator who has one case (theirs), can schedule times that may work better for their family, and can render decisions that are more consistent than a randomly-assigned judge in a trial. In some states, judges are appointed from many different specialties (criminal prosecution or defense, personal injury, real estate) with no experience in family law. The choice of an arbitrator can fit the unique facts and legal issues that confront a family bounded by iterations of litigation.

From the perspective argued in this article, the starting point for discussion with a client, and documenting that discussion later, is a principle of waiver familiar to any lawyer and typically illuminated in the Sixth Amendment context of waiving the right to assistance of counsel: "Constitutional rights, including the right to counsel, may be waived as long as the waiver is voluntary, knowing, and intelligent. However, because it is a fundamental constitutional right, the right to representation by counsel requires that every reasonable presumption must be indulged against waiver."[54] Before consenting to a waiver of these rights, clients should have sufficient information to clearly answer, within their capacity to understand, the following questions:

- What does the delegation order provide as the precise scope of the arbitrator's authority to enter judgment (e.g., holidays, sole custody, relocation) because avoiding arguments that the judgment was ultra vires is a major concern?[55]

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53 Jason Iuliano, *The Judicial Nondelegation Doctrine*, 75 Ala. L. Rev. 51, 70 (2023) ("Far and away, however, the most common subset of custody cases involves visitation rights. In these cases, the object of delegation is tasked with determining how often, and under what conditions, a parent may visit a child. Despite there being nearly three hundred cases on this issue, no clear rule exists for whether such delegations are permissible. Instead, there is a permissibility spectrum: the more authority and discretion delegated to a third party, the more likely the delegation is to be struck down.").

54 State v. Watson, 900 A.2d 702, 707 (Me. 2006).

55 *See* Brinckerhoff v. Brinckerhoff, 889 A.2d 701, 705 (Vt. 2005) ("As the trial court here cogently observed, however, these issues were sharply contested

- Is participation voluntary or mandated?
- Is participation confidential?[56]
- Is there a mandated reporting requirement?[57]
- May the delegated surrogate speak with parents, children, or professionals privately?
- Do lawyers participate with clients in the forum or do clients attend alone?
- Are the forum events and conferences recorded or informal?
- Will the arbitrator engage in any form of so-called "med-arb" which means meeting with parties and lawyers *ex parte* or conducting an informal hearing?

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at the arbitration hearing, and the fact that the panel declined to adopt husband's characterization of the inheritance and investment accounts 'does not constitute an evident miscalculation or evident mistake to be modified under 12 V.S.A. § 5678(b), nor is the panel's determination ultra vires so as to warrant vacation of the award under 12 V.S.A. § 5677.'").

56 *See* Jacqueline E. Akhurst & Mark M. Leach, *Confidentiality, Informed Consent, and Multiple Relationships in Four Emerging Regions*, 33 Ethics & Behav. 175, 179 (2023) ("Respectful discussions of people's expectations and psychoeducation about the processes that might unfold are thus fundamental to gaining informed consent."); Lindy Marie Fields & James Douglas Calvert, *Informed Consent Procedures with Cognitively Impaired Patients: A Review of Ethics and Best Practices*, 69 Psychiatry & Clinical Neuroscience 462 (2015) ("Cognitively impaired patients may be unable to appropriately make educated treatment decisions because they lack the cognitive ability or capacity to adequately understand the situation and possible decisions. Cognitive capacity is a complex construct consisting of three global domains: conceptual, inferential and mnemonic competency.").

57 *See* Talia Gruber*, Beyond Mandated Reporting: Debunking Assumptions to Support Children and Families*, 1 Abolitionist Persp. in Soc. Work 1, 9 (2023) ("Though MR is positioned as, at worst, a neutral tool that exists to support the identification, prevention, and treatment of child abuse and neglect, in practice, MR exacerbates and directly causes harm to children and families. This is clear in the ways that MR mirrors the punitive nature of the criminal legal system, policing and surveilling Black, Indigenous, and Latinx families and allowing for caregivers' civil rights to be violated through invasive, traumatic, and harmful investigative practices."); Michael Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*, 8 Harv. Negot. L. Rev. 81, 114 (2003) ("Mediators who fail to uphold the requirements of mandatory reporting face a range of sanctions.").

- What impact and consequences to them and their children may the judge in that jurisdiction consider when reviewing an arbitration "opinion?"[58]
- What are the rules for creating and maintaining a record or is the process just "informal"?[59]
- What are the roles of the other professionals like therapists or GALs?
- Will children testify and, if so, how and with what record?[60]

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58 Adapting the wise advice from Richard Fullerton, *supra* note 7, at 33-34:

> The med-arb process has no governing ethical code of its own. Because claims of ethical violations are based on the standards for its component practices, the Mediator Standards and Arbitrator Code act as controls. Med-arb also does not have universally accepted procedures; instead, it relies on common practices that can be modified by the parties. To provide a consistent comparison, this article will consider med-arb to include the following: Before committing to med-arb, parties agree on a protocol de tailing both the mediation and arbitration phases. The result ant procedures are detailed in a med-arb agreement. By signing this document, parties commit to the process until either a mediated resolution is executed or a binding arbitration award is issued. The sequential process begins with the mediation phase to address all mutually recognized issues. If mediation results in full agreement, the med-arb is terminated without the need for an arbitration phase. Lacking full agreement, the same neutral closes the mediation and commences the arbitration phase that will result in a binding award. During both phases, the neutral is allowed to communicate with parties the same as in the traditional practices, engaging in ex parte conversation during mediation but not during arbitration.

59 Johnson v. Johnson, 9 A.3d 1003, 1014 (N.J. 2014) ("In the final analysis, whether an arbitration is conducted under the Arbitration Act or APDRA is not the issue of consequence. What matters is the state of the record. Obviously, a verbatim transcript of a trial-type hearing will satisfy Fawzy, assuming the other requirements of that case are met. However, where, as here, the arbitrator creates a detailed record for review, the award can be confirmed without verbatim transcription. It goes without saying that it would behoove any arbitrator tasked with resolving a child custody or parenting-time issue to prepare a record, at least as detailed as the one we have approved today. Such preparation will avoid a judicial replay of the entire matter in the event of a substantial claim of harm.").

60 *See* Hutchinson v. Cobb, 90 A.3d 438, 442-43 (Me. 2014) ("Further, the record provides no indication that Hutchinson had prior notice that his child's testimony would be taken off the record, and we will not infer that he acquiesced in or otherwise consented to the same. Because the court relied heavily on the in-chambers testimony in its findings and its ultimate decision to

- Are judicial surrogates (including parenting coordinators, arbitrators, and referees) subject to subpoena and thereby deposition and/or trial testimony?
- What are the procedures and standard of review for confirmation of the arbitration decision?[61]
- In which of these forums are agreements binding without a court order (or is there a waiver of appeal)? What are the rights of appeal and what does that mean for enforcement in the interim after the award?

The practice of delegating judicial authority to qualified, impartial professionals are for the purpose of improving efficiency, effectiveness, and satisfaction. The value of incorporating professionals vested with this authority is sufficiently clear. Unfortunately, so too are the legal challenges, which heightens the duty of lawyers to assure clients make informed and intelligent decisions consistent with their capacity to consent.

III. Conclusion

Decades of research show that damage is done to children when their parents engage in protracted litigation and fail to co-parent civilly over the long term. IPV and child abuse and neglect may influence the litigation and autonomy of the parents; especially if child protective services are involved. Of critical importance as well, not all forms of ADR or court-appointees like PCs or GALs are more efficient or benign pathways but may embed their own unique forms of flawed, biased, time-consuming, and less safe mechanisms. [62] One of the reasons for adding brakes or guardrails to policy is that the law and social science can get caught up in fads and fixes that may lack an empirical basis. This does not mean, by any measure, that such efforts are not worthy of policy design to try to better protect parents and children. It just means that caution and modest expectations are encouraged.

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modify. Hutchinson's rights of contact, we cannot say that the error resulting from the absence of a record was harmless.").

61 *See* Nix v. Scarbrough, 894 S.E.2d 658, 663 (Ga. Ct. App. 2023) ("Scarbrough filed a motion to confirm arbitration award, and Nix objected to the confirmation and asserted that the Arbitrator manifestly disregarded the law, and was not impartial, but rather was biased toward Scarbrough.").

62 Cecka, *Don't Just Ask*, *supra* note 21, at 699.

No matter its jurisprudential challenges and jurisdiction-specific precedents, the broad and recurrent pressure to delegate judicial authority persists in response to the pressures deeply embedded in family courts. Court calendars are bursting at the seams. Inequities associated with physical, intellectual, emotional (particularly trauma-based) needs, language, culture, religion, and identity run rampant. Litigation is often an extraordinarily time-consuming, expensive, stressful, and unpredictable process. Children linger in a sort of purgatory, often caught in the midst of their parents' simmering conflicts, while the wheels of justice turn (if turning at all) slowly forward.

These are among the many powerful reasons why child custody professionals, litigants, and family court systems are always looking for ways to increase judicial economy, reduce the financial and emotional toll of litigation, provide informed and supportable results, and reduce harm to children.[63] Recidivist litigation is permissible but not desirable. Given that no parenting plan can anticipate every possible future contingency, it is enticing for courts to empower impartial, disinterested players as decision-makers or "tiebreakers" rather than require parties to queue up for another round of litigation.

Family law attorneys need to know and explain precisely how delegation is treated by statute and case law to adequately inform clients about the scope of relief that can be sought and delegated by a court, impact and risk associated when electing a mechanism that is on unresolved footing, and the ways in which enforcement and appeal of an arbitration award work when there are objections. Clients should be informed that even to the extent that the prevailing law favors (or at least does not explicitly reject) delegation, that delegation carries the risk of more litigation and unenforceability (or delayed and expensive enforceability). The resulting inefficiencies, inefficacies, and dissatisfaction work against all involved and particularly against the best interests of the children.[64] Nevertheless, it is wise to finish with a reminder of where

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63 *See Brief of the Connecticut Bar Associated as Amicus Curiae*, *supra* note 26, at 13.

64 The political spectrum, and separation of powers as it may still exist, also facilitates or impedes solutions. *See* Albert W. Alschuler, Law Without Values: The Life, Work, and Legacy of Justice Holmes 63 (2000) ("Skeptics tend to view any profession of judicial restraint only when it produces outcomes

any child custody article is rooted: a parent or parents have the constitutional and legal right of autonomy and self-determination, over the time that litigation occurs and reoccurs, to avoid asking a court to decide or a tribunal delegated that authority to decide, privately, their own lives.[65]

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they like."); Marsha Garrison, Family Life, Family Law, and Family Justice: Tying the Knot 168 (2023) ("Well-functioning families promote a well-functioning society. Poorly functioning families promote devastating social problems and national disintegration. Family law can, and does, make a difference in the likelihood that our families will succeed.").

65 This is not a new policy argument. *See* Dana E. Prescott, *The Constitutional Right to Parent: Does the Doctrine of Waiver Apply to Guardianships*, 33 Me. B.J. 13, 16 (Fall 2018) ("As a measure of judicial restraint in family matters, federal and state courts have historically acknowledged a presumptive right of parental autonomy 'except in the context of neglect, abuse, or other emergencies.' In Prince v. Massachusetts, for example, the Supreme Court, in the context of a parent's religious beliefs, wrote that 'parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they make that choice for themselves.'").