No. 10-FM-375

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

APPELLANT,

v.

APPELLEE.

ON APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA FAMILY COURT – DOMESTIC RELATIONS BRANCH, DRB-2936-08

BRIEF OF APPELLANT

---

*Kerri L. Ruttenberg (D.C. Bar # 467989)
*Danielle M. Hohos (D.C. Bar # 485633)
JONES DAY
51 Louisiana Ave, NW
Washington, D.C. 20001
202-879-3939
Counsel for Appellant

Joan S. Meier (DC Bar # 398745)
Director, Domestic Violence Legal Empowerment
and Appeals Project (DV LEAP) and
Professor of Clinical Law
George Washington University Law School
2000 G Street, N.W.
Washington, D.C. 20052
202-994-2278
Of Counsel for Appellant

July 27, 2010

CERTIFICATE REQUIRED BY RULE 28(a)(2) OF THE RULES OF THE DISTRICT OF COLUMBIA COURT OF APPEALS

Pursuant to Rule 28(a)(2) of the Rules of the D.C. Court of Appeals, the undersigned counsel of record for the Appellant files this Rule 28(a)(2) certificate. This Rule 28(a)(2) certificates include the identities of all counsel and all *amicus curiae* and their counsel in the consolidated appeals (Nos. 10-FM-00375, 09-FM-001152 and 09-FM-001337). Counsel for the Appellant certifies that the parties listed in the caption in this appeal (Appellant and Appellee), and no other parties appeared in the Superior Court in the action below. The identity of counsel for the parties in the Superior Court and in the appellate proceedings is as follows:

Ms. Kerri L. Ruttenberg (D.C. Bar # 467989)
Ms. Danielle M. Hohos (D.C. Bar # 485633)
Jones Day
51 Louisiana Ave, NW
Washington, D.C. 20001
Counsel for Appellant in the appellate proceeding 10-FM-000375 only and not 09-FM-001152 or 09-FM-001337.

Ms. Joan S. Meier (DC Bar # 398745)
Director, Domestic Violence Legal Empowerment
and Appeals Project (DV LEAP) and
Professor of Clinical Law
George Washington University Law School
2000 G Street, N.W.
Washington, D.C. 20052
Co-counsel for Appellant in the appeal Nos. 09-FM-001152 and 09-FM-001337, and Of Counsel for Appaellant in appeal No. 10-FM-000375. Appellant was pro se *throughout the custody proceedings in Superior Court. DV LEAP assisted her in drafting her motion to reconsider and amend judgment.*

Ms. Elizabeth S. Liu
Domestic Violence Legal Empowerment
and Appeals Project (DV LEAP)
2000 G Street, NW
Washington, D.C. 20052
Co-counsel for Appellant in the appellate proceedings in 09-FM-001152 and 09-FM-001337, and not 10-FM-000375. Appellant was pro se *throughout the custody proceedings in Superior Court. DV LEAP assisted her in drafting her motion to reconsider and amend judgment.*

Ms. Avery E. Roselle (D.C. Bar # 499560)
Ms. Lotus Ryan (D.C. Bar # 1808495)
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
Counsel for Appellant in the appellate proceedings 09-FM-001152 and 09-FM-001337 only and not 10-FM-000375.

Mr. Gregory R. Nugent
The Lewis Law Firm
901 15th Street, Suite 625
Washington, D.C. 20005
Counsel for Appellant in the Superior Court in the bifurcated divorce hearing.

Ms. Gail Landau
One Central Plaza
11300 Rockville Pike
Suite 710
Rockville, MD 20852
Counsel for Appellee.

The following individuals filed an amicus brief in connection with appeal Nos. 09-FM-001152 and 09-FM-001337, but not in 10-FM-000375:

Ms. Caroline Judge Mehta (D.C. Bar #471935)
Zuckerman Spaeder LLP
1800 M Street, NW
Suite 1000
Washington, DC 20036
Counsel for Amici New York Legal Assistance Group, Justice for Children, InMotion, Women's Justice Center at Pace University School of Law, and Legal Services NYC.

Ms. Rebecca O'Connor
Mr. Kenneth E. Noyes (D.C. Bar # 440336)
(*Mr. Noyes originally on amicus brief; no longer with DC Coalition)*
DC Coalition Against Domestic Violence
5 Thomas Circle, NW
Washington, DC 20005
Counsel for DC Coalition Against Domestic Violence.

Ms. Sue Ryan (D.C. Bar #990486)
Legal Director
Women Empowered Against Violence, Inc.
1422 K Street, NW
Washington, DC 20005
Counsel for Women Empowered Against Violence, Inc.

These representations are made in order that the judges of this Court, *inter alia*, may evaluate possible disqualification or recusal.

Dated: July 27, 2010

_____

Kerri L. Ruttenberg (D.C. Bar # 467989)
Jones Day
51 Louisiana Ave, NW
Washington, D.C. 20001
Counsel for Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

OTHER AUTHORITIES

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the court's appointment of a Parenting Coordinator, over Appellant's objection, unconstitutionally delegates judicial power and violates due process?

2. Whether any legal authority, including Domestic Relations Rule 53, permits the court's appointment of a Parenting Coordinator over Appellant's objection?

3. Whether the court's order requiring Appellant to pay 50% of the cost of the Parenting Coordinator to whom she objects, to be deducted from her child support, violates law and public policy because it is contrary to the purpose of child support and burdens Appellant with an unlimited and unreasonable court financial obligation?

4. Whether the court's order requiring Appellant to use a Parenting Coordinator over her objection, despite Appellee's history of domestic violence against Appellant, violates public policy?

5. Whether the court's order requiring Appellant to waive her medical privilege violates her constitutional and statutory rights to privacy?

STATEMENT OF THE CASE

This appeal, No. 10-FM-375, seeks reversal of two December 29, 2009 Orders appointing Roberta Eisen and Mary Atwater as Parenting Coordinators in this case, which were issued after the custody order that is the subject of the consolidated appeal. J.A. 585, 588.[1] Pursuant to D.C. App. R. 28(j), Appellant incorporates herein the Statement of the Case contained in Appellant's Brief in the consolidated appeal ("Consolidated Statement of the Case"), Nos. 09-FM-001152 & 09-FM-001337, which details the procedural history of the parties' divorce, custody and child support proceedings.

The custody and support order that is the subject of the consolidated appeal was issued on August 21, 2009. J.A. 1. As detailed in the Consolidated Statement of the Case, Appellant filed a motion to reconsider, which was denied, followed by two separate notices of appeal of the August 21st order and the denial of the motion to reconsider. On October 7, 2009, Appellee moved for contempt and to enforce the August 21st custody order. Appellant opposed the motion, and on December 29, 2009, the court conducted a hearing on the motion. At the conclusion of the hearing, the court issued two orders. The first, entitled "Order," appointed Roberta Eisen as the Parenting Coordinator subject to her availability. J.A. 585. The second order, called "Order Appointing Special Master," appointed Roberta Eisen and Mary Atwater as Special Masters/Parenting Coordinators pursuant to Superior Court Domestic Relations Rule 53 (hereafter "D.R. Rule 53"), and set forth in detail, *inter alia*, their role and authority. J.A. 588.

[1] Citations to the Joint Appendix appear as "J.A. __." In the consolidated appeal, Appellant filed Volumes I and II of a "Joint Appendix" (J.A. 1-294 and J.A. 295-494, respectively) and a separate "Joint Appendix: Hearing Exhibits" (J.A. 495-584). Appellant incorporates all three of these volumes herein. D.C. App. R. 28(j). The Joint Appendix filed with this appeal, 10-FM-375, begins pagination at J.A. 585 to create a fully consolidated Joint Appendix.

Appellant filed separate motions to reconsider and amend as to both of these December Parenting Coordinator orders on January 13 and January 15, 2010. J.A. 890, 895. In a single order on February 23, 2010, the court denied both motions. J.A. 934. On March 23, 2010, Appellant timely filed a Notice of Appeal of the December 29, 2009 and February 23, 2010 orders concerning the Parenting Coordinator (this appeal). J.A. 938.

On April 21, 2010, this Court ordered Appellant to show cause why this appeal should not be dismissed as having been taken from non-final and non-appealable orders. J.A. 940. Appellant filed her response to this show cause order, J.A. 941, and Appellee timely filed an opposition. J.A. 946. On May 27, 2010, this Court discharged the show cause order and ordered the parties to address the appellate jurisdiction issue in their briefs. J.A. 973. The Court also ordered that the current appeal be consolidated with the prior appeals from the divorce and custody proceedings (Nos. 09-FM-1152 and 09-FM-1337), but permitted separate briefing for each appeal. *Id.*

STATEMENT OF FACTS

Introduction

The parties, Appellant and Appellee, were married on August 27, 1997, in Moscow, Russia. J.A. 2. While in Russia, they had their first daughter, Elizabeth ("Liza"), who is now eleven years old. In 1999, they moved from Moscow to Maryland and then, in 2001, into the District of Columbia. The parties had a second daughter, Alexandra ("Sasha"), in 2005. J.A. 2-4.

Custody Hearing

Intrafamily Offenses

As detailed extensively in Appellant's brief in the consolidated appeal, Nos. 09-FM-0001152 & 09-FM-001337,[2] the parties' marriage, as found by the lower court, was "fraught with conflict." J.A. 2. The court found that in two separate incidents, Appellee committed intrafamily offenses against Appellant. J.A. 8.[3] The trial court concluded that Appellee is "frustrated, does not handle emotions well, and is more likely to lose his temper than most people." J.A. 3, 5. The court further found that Appellee "used temper and intimidation to impose his will." J.A. 3, 5.

---

[2] Pursuant to D.C. App. R. 28(j), Appellant refers the Court to the Statement of Facts contained in Appellant's Brief in the consolidated appeal ("Consolidated Statement of Facts") and incorporates those facts herein.

[3] The court found that on one occasion Appellee "lost his temper, grabbed [Ms. J's] upper arms and shook her" with enough pressure to bruise. J.A. 3, 8. The court further found that on another occasion, Appellee committed an assault during an intense argument when he wrapped a dish towel around the back of Appellant's neck. J.A. 3, 8. Appellant testified that Appellee "tried to strangle her" and demonstrated how the towel was wrapped "around her neck toward the front of her body" and how it was "crossed in froth of her neck as she was leaning back at the time." J.A. 355. As detailed in the Consolidated Appeal, there were also numerous other incidents that Appellant asserts constituted intrafamily offenses, which the trial court failed to address. Consolidated Statement of Facts at 4-6.

Discussions Regarding Parenting Coordinator

On July 22, 2009, the court referred the parties to the Office of the Parenting Coordinator ("OPC"). J.A. 600, 603-04. From the outset, Appellant was confused about the role of the Parenting Coordinator and objected to the appointment of such an individual, in large part because of the cost. The court instructed the parties to reach out to the OPC and "decide from the resources that they offer which is more convenient to you in terms of time, and location, as well as cost. I assume some of the resources might be free of costs. Some might have a sliding scale fee. Something for you to find out." J.A. 599-600. In response, Appellant asked the court, "What is the role – the general role of Parent Coordinator, because this term is usually used quite loosely? So in this case what is the role?" J.A. 600. The Court replied, "You talk to them and whatever they tell you their program does that's what you do." *Id.*

The next time the Parenting Coordinator issue arose in court was during the August 6, 2009 custody hearing. By that time, the parties had spoken to the OPC, and the court asked Appellant "what is your position regarding a Parenting Coordinator?" J.A. 658. Appellant replied, "I don't think it would help." J.A. 658. Appellee, however, through counsel, asked that a Parenting Coordinator be appointed who could act as "a special master, someone who can become the tiebreaker, who can allow for the access schedule to be dynamic in the future as is therapeutically indicated." J.A. 700-01. Appellee's justification for this request was that "[i]t isn't practical or good judicial economy to ask Your Honor to re-decide those things on a therapeutic timetable." J.A. 700. Appellee's counsel recognized, however, that appointing a Parenting Coordinator "will not happen immediately. This Court needs to spell out the tasks and authority of this individual[.]" J.A. 707.

The court noted that the OPC recommended Roberta Eisen as a Parenting Coordinator. J.A. 724. Appellee's counsel volunteered that she had contacted Dr. Eisen to check her availability, learning that Dr. Eisen's associate, Mary Atwater, was available. J.A. 724. Upon learning the court was considering appointing a private Parenting Coordinator, Appellant interrupted, explaining that she learned from OPC that private Parenting Coordinators cost $200-$300 per hour, "[a]nd this is not what I can afford at this point." J.A. 724-25.

After this discussion, Appellant remained confused and unsuccessfully attempted to clarify the Parenting Coordinator's intended role. J.A. 728 (Appellant: "[R]oberta Eisen, what is she going to be doing?" The Court: "She's going to be a parenting coordinator."). Appellant also was unclear whether the court was appointing Dr. Eisen as the Parenting Coordinator at that time. The court said it was not. J.A. 730 (Appellant: "Roberta Eisen is not an order yet." The court: "No, I'm not writing it."). Instead, the court instructed Appellant to talk to Dr. Eisen to explore the possibility of her appointment. J.A. 730.

When the parties appeared in court again on August 20, 2009, for a continuation of the custody hearing, the court still had not issued an order regarding a Parenting Coordinator. Appellant reported that, per the court's instruction, she spoke with Dr. Eisen about acting as the Parenting Coordinator in this case, and Dr. Eisen told Appellant she "needed a very, very specific Court order" and that both Appellee and Appellant would have to sign a contract for at least a year with Dr. Eisen. J.A. 743. Appellant again objected to the cost of the Parenting Coordinator, explaining that Dr. Eisen's fees were "two hundred and fifty dollars an hour" and that she "require[d] at least twenty hours of fees in advance to retain her," so Appellant again called OPC for another recommendation. J.A. 742.

Appellee's counsel stated that she has worked with Dr. Eisen before, and that Dr. Eisen required consent of both parties before she would agree to work with them. J.A. 743 ("[N]otwithstanding anything this Court might craft as an order, she has a separate contract that she requires the signature of both parties to sign. And, if any party doesn't sign it, she doesn't start work.").

August 21, 2009 Custody and Support Order

The next day, on August 21, 2009, the court issued a sixteen-page order awarding joint legal and physical custody to both parties and ordering Appellee to pay Appellant $1,737 per month in child support. J.A. 1. In addition to these provisions (detailed further in the Consolidated Statement of Facts), the order contained several broad provisions regarding a Parenting Coordinator. J.A. 16.

The first mention of a Parenting Coordinator in the August 21st custody order appears on page 14, in paragraph 2: "Visits between Liza and the defendant will increase at the discretion of the Parenting Coordinator in consultation with the therapist providing family reunification therapy for Liza and the defendant." J.A. 14. Later, the order provides that Liza and Sasha will remain enrolled in their current schools "absent an agreement between the parties or a decision of the Parenting Coordinator to change [their] school enrollment." J.A. 14, 15 (¶¶ 7, 15).

The order also gave the yet-unnamed Parenting Coordinator unlimited authority to make decisions about the children: "The parties will use a Parenting Coordinator to assist them in making parenting decisions for their children. When the parties are unable to reach a joint decision, the Parenting Coordinator will make the final determination *on any issue*. The Parenting Coordinator will have discretion to delegate tie-breaking authority *on any issue* to either parent." J.A. 16 (¶¶ 16, 17) (emphases added).

The final reference to a Parenting Coordinator is in paragraph 21: "The defendant will pay $1,737 in monthly child support to the plaintiff for both children. If the plaintiff is unable to pay for her share of the Parenting Coordinator, the defendant will pay the full cost, and will receive a credit for half the cost towards the monthly child support payments." J.A. 16. Neither party, nor the court, had ever suggested such an arrangement prior to the court's order.

Motion for Contempt or Injunction

On October 7, 2009, Appellee, through counsel, filed a "Motion to Enforce Judgment for Contempt and Other Relief" relating to the Parenting Coordinator and other provisions in the August 21, 2009 custody order. J.A. 762. Appellee asserted that Appellant did not and would not select a parenting coordinator per the court's August 21, 2009 order, although the order itself contained no such provision. J.A. 763-64. Appellee asked the court to hold Appellant in contempt and confine her to jail "until she selects a parenting coordinator." J.A. 764-65, 767. In the alternative, Appellee asked the court "to enjoin Plaintiff from failing to select a parenting coordinator, or [sic] from [not] cooperating with the parenting coordinator or from [not] paying the parenting coordinator and authorizing defendant to select a parenting coordinator." J.A. 767.

Appellant, *pro se*, opposed this motion. J.A. 802. Appellant explained that despite her objections to the appointment of a Parenting Coordinator at all, she had begun searching for a Parenting Coordinator. J.A. 803 (¶ 5). She listed the names of the Parenting Coordinators she had contacted and attached as an exhibit her e-mail correspondence with Appellee informing him of her progress. J.A. 810-13. Appellant further stated "that she cannot afford these expensive services, and, as the Order allows the Defendant to pay entire [sic] cost of the parenting coordinator by not paying child support, spending money on a parenting coordinator at

the expense of the children is not in the children's best interest." J.A. 804 (¶ 6). The court set a hearing on Appellee's motion for December 29, 2009.

December Hearing

During the hearing, Appellant again raised objections to the Parenting Coordinator's appointment. First, however, she questioned the authority of the court to appoint one. As the court and the parties began discussing Dr. Eisen as a potential Parenting Coordinator, Appellant asked the court a "legal question" regarding the basis for appointing a Parenting Coordinator: "Based on what statutes [are we] even doing this?" J.A. 837. Offering no specific authority, the court responded, "It's called the sound discretion of the Court, okay?" *Id*. The court subsequently stated "the parenting coordinator will be Roberta Eisen." J.A. 838. At that time, counsel for Appellee told the court that Dr. Eisen had provided her with an order used in another case for the court to sign. *Id*. Appellee's counsel previously submitted this order to the court. *Id*. Indeed, the order was drafted on Appellee counsel's letterhead. J.A. 588-98.

Appellant renewed her objection, stating "let me just kind of raise my objection to that to start with[.]" J.A. 839. She further questioned "who's going to pay for that?" and objected to the reduction or elimination of her child support payments to cover the cost of the Parenting Coordinator. J.A. 839-40. The court responded "I am giving you the option. You either pay half or it comes out of the child support and he gives you the balance. Which of those two options do you choose?" J.A. 840. Appellant responded "Well, actually neither, but I object . . . I don't think the [sic] it will be fair to the children and in the best interest of – to deny the child support to them[.]" *Id*. The court responded, "Okay. Then you will pay half." *Id*. Appellant replied, "I cannot pay – I'm telling you right now, I cannot pay it." *Id*.

In addition to objecting to paying 50% of Dr. Eisen's $250 per hour rate, Appellant also objected to the $6,000 retainer Dr. Eisen required. J.A. 841-44. However, the court made clear that the 50/50 payment structure for Dr. Eisen's fees and retainer was the court's order. J.A. 844. The following colloquy then ensued:

> APPELLEE'S COUNSEL: Does Your Honor want the order that Ms. – Dr. Eisen had modeled for me?
>
> THE COURT: Is that an order that Dr. Eisen wanted used if she was appointed parenting coordinator?
>
> APPELLEE'S COUNSEL: Very specifically.
>
> APPELLANT: I object.
>
> THE COURT: Okay. Hand it over. Your objection is noted, Appellant.

J.A. 844.

The court instructed Appellee to contact the parenting coordinators to "schedule an intake." J.A. 882. Appellant asked, "I'm sorry, but this intake is for whom, for Appellee or for me?" J.A. 883. The court said, "Whatever they need to do. Whether it's for the two of you to come in together –" *Id*. Appellant reiterated the safety concerns she had raised about Appellee: "Well, that's what I'm saying. I'm sorry, Your Honor, but I – given, you know, my past experience with Appellee, I'm trying to stay away from him. I'm not going anywhere with him." *Id*. The court responded that Appellee would contact the parenting coordinator to schedule an intake, and "[i]f they want to meet with you separately, whatever, okay?" *Id*.

Parenting Coordinator Orders

At the conclusion of the December 29th hearing, the court issued two orders. The first, titled "Order," appointed Roberta Eisen as the Parenting Coordinator, ordered Appellee to

contact Ms. Eisen by a date certain to schedule intake, and provided other individuals to contact if Ms. Eisen was unavailable to serve as the Parenting Coordinator in this case. J.A. 585 (¶ 1).

The second order, titled "Order Appointing Special Master," is the order Appallee's counsel received and modified from Dr. Eisen and submitted on counsel's letterhead to the court. J.A. 588. The Order Appointing Special Master ("Special Master Order") appointed Dr. Eisen "in association with Mary Atwater, PhD" as the Parenting Coordinators in this case "[p]ursuant to Super. Ct. Dom. Rel. R. 53." J.A. 588 (¶ 1). The Special Master Order specified that the Parenting Coordinators were appointed "as a quasi-judicial officer of the Court pursuant to Dom. Rel. Rule 53, not as a psychotherapist or counselor for the parties, children or family." J.A. 589 (¶ 3). For purposes of this appeal, the following provisions of the Special Master Order are of particular relevance.

Decisions Effective Immediately

The Special Master Order provides:

> Each party specifically agrees that decisions of the Special Master with respect to day-to-day matters or otherwise contemplated in the foregoing paragraph are effective as if they were court orders when made and will continue in full force and effect unless modified or set aside by a court of competent jurisdiction. If either party disagrees with any order thus made, then he or she may make a timely motion requesting judicial intervention.

J.A. 593 (¶ 11); *see also* J.A. 592 (¶ 10) (again stating that the Parenting Coordinators' "decisions are effective when made and will continue in effect unless modified or set aside by order of the Special Master or a court of competent jurisdiction"). Presumably, the language imputing agreement of the parties, which directly contradicts Appallant's repeated objections, reflects Dr. Eisen's purported refusal to work with non-consenting parties. J.A. 743.

Scope of Authority

The Special Master Order authorizes the Parenting Coordinators to "assist the parties in making parenting decisions for their children. When the parties are unable to make a joint decision, the Special Master shall make the *final determination on any issue*. The Special Master shall have the authority and discretion to delegate tie breaking authority *on any issue* to either parent." J.A. 589 (¶ 4) (emphasis added). The Special Master Order then excludes from the Parenting Coordinators' authority "fundamental issues of custody and visitation" and "decisions regarding the children's religion or the children's observation of religious requirements." J.A. 589 (¶ 5).

The Special Master Order does not define what constitutes a "fundamental" issue of custody and visitation. It does, however, expressly give the Parenting Coordinators the authority to decide "issues significantly affecting the[] children," such as *dates* for picking up and dropping off (i.e., visiting with) the children, and how and when the parties can communicate with the children regardless of the residential schedule of visitation. J.A. 592-93 (¶ 10, 10(b), 10(i)). Other key decisions expressly enumerated in the Special Master Order as within the Parenting Coordinators' authority include the administration of medicine or other treatment recommended by the children's physicians or psychiatrists. J.A. 592 (¶10(e)). And, like the August 21, 2009 custody order, the Special Master Order gives the Parenting Coordinators the authority to decide the children's school attendance, but the Special Master Order adds daycare and camp attendance to the list. J.A. 592 (¶ 10(d)).

Payment

The Special Master Order provides that the Parenting Coordinators' fees "shall be $250 per hour, billed in ten minute increments, for both out-of-court time and in-court time. Time

spent in interviewing, report preparation, review of records and correspondence, telephone conversation, travel, court preparation and any other time invested in connection with serving as a Special Master will be billed at the regular hourly rate." J.A. 590-91 (¶ 8). Additionally, the parties will reimburse the Parenting Coordinators for expenses, including but not limited to "photocopies, messenger service, long distance telephone charges, express and/or certified mail costs, airfare, parking, tolls, mileage, and other travel expenses." *Id*. The Special Master Order also requires the parties to pay an initial retainer of $6,000 to the Parenting Coordinators, to be replenished any time the account balance "reaches or approaches" $1,500. *Id*. Each party must pay 50% of the retainer and all costs and fees. *Id*.

Termination of Services

The Parenting Coordinators' services "can only be terminated upon mutual consent of the parties, the resignation of the [Parenting Coordinators], or court order." J.A. 589-90 (¶ 6).

SUMMARY OF THE ARGUMENT

This appeal requires the Court to determine whether the trial court erred in ordering Appellant, over her objection and despite Appellee's history of domestic violence, to use Special Masters/Parenting Coordinators with immediately-effective decision-making authority, and to pay for their services out of her child support. The trial court's orders suffer at least five fatal flaws.

First, the trial court's orders unconstitutionally delegate judicial power to the Parenting Coordinators and violate due process. The orders grant the Parenting Coordinators authority to make significant decisions regarding the parties' children, but provide no opportunity for the parties to be heard by the court until after those decisions already are in effect. This improper delegation of the court's final authority to the Parenting Coordinators, which itself violates D.C. Code § 16-914(a)(1)(A), (d)(2), deprives Appellant of a meaningful opportunity to be heard and thereby violates her due process rights. These unconstitutional orders must be reversed.

Second, the court's Parenting Coordinator orders violate Domestic Relations Rule 53 regarding special masters, the very rule the court relied on for its orders. Rule 53(e) requires a special master to report his findings to the court, which reserves ultimate judicial authority. Here, the Parenting Coordinators have authority to make decisions that are immediately effective as court orders when made. Moreover, Rule 53 does not permit the appointment of a special master absent an "exceptional condition," which is lacking here. The court's appointment of a special master without authority requires reversal.

Third, the court's order that Appellant pay for Parenting Coordinators with child support payments violates both law and public policy regarding child support. D.C. Code §§ 15-501(a)(7)(D) and 16-916.01(c)(3), as well as *Mims v. Mims*, 635 A.2d 320, 323 (D.C. 1993),

make clear that child support is intended for the benefit of the children and is not subject to attachment. The trial court's order should be reversed because it effectively attaches the child support to pay the Parenting Coordinators' $6,000 renewable retainer and ongoing $250/hour fee, which itself constitutes an unreasonable court cost. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982).

Fourth, ordering a Parenting Coordinator over a party's objection where the parties have a history of domestic violence contradicts widely recognized national and local public policy. *See, e.g.*, Hon. Jerry J. Bowles et al., Nat'l Council of Juvenile & Family Court Judges, *A Judicial Guide to Child Safety in Custody Cases* 28 (2008). Programs requiring joint decision-making and ongoing cooperation between a batterer and victim pose serious safety risks to the abused party and invite manipulation by the abuser. Having found that Appellee committed two intrafamily offenses against Appellant, the court erred in ordering the parties to participate in a process that is inappropriate in a domestic violence context. The court's order should be reversed as against public policy.

Fifth, the trial court's order requiring Appellant to waive her medical privilege violates her statutory right to privacy embodied in D.C. Code §§ 14-307 and 7-1201.02. This requirement also violates Appellant's constitutional due process right to the privacy of her personal medical information and records, recognized in *Whalen v. Roe*, 429 U.S. 589, 599-600 (1976). This violation of Appellant's statutory and constitutional rights to privacy further constitutes reversible error.

STATEMENT OF JURISDICTION

After Appellant filed her Notice of Appeal in this matter, this Court ordered her to "show cause why this appeal should not be dismissed for having been taken from a non-final and non-appealable order of the Superior Court." J.A. 940. Appellant, *pro se*, explained that the December 29, 2009 orders were final as to the Parenting Coordinator issues and that she would have no subsequent ability to seek review of those decisions. J.A. 941-45. Appellee, through counsel, did not dispute that the orders were final. Instead, he appeared to concede finality and argued that the appeal was untimely because the August custody order finalized the Parenting Coordinator issues and Appellant could have appealed at that time. J.A. 948. After these filings, this Court discharged the order to show cause and directed the parties to brief "whether these later [December] orders are independently appealable." J.A. 973.

Simply put, this Court has jurisdiction over Appellant's appeal because the December 29th orders are injunctions. *See* D.C. Code § 11-721(a)(2)(A). This Court's jurisdiction is further confirmed because the orders are final and have an immediate and irreparable effect on Appellant's rights independent of the August custody order. *See* D.C. Code § 11-721(a)(1).

A. This Court Has Jurisdiction Because The December 29, 2009 Orders Are Injunctions.

There is no question that the December 29th Order and Special Master Order are injunctions, as they constitute "command[s] by the court, through an order . . ., that [Appellant] do . . . some specified act," namely, meet with, use, obey, and pay for Parenting Coordinators. *McQueen v. Lustine Realty Co.*, 547 A.2d 172, 176 (D.C. 1988) (defining injunction). Injunctions are appealable as of right, *regardless of whether they are final* and *regardless of whether they are independent of previous orders*. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 855-57 (2005). D.C. Code § 11-721(a)(2)(A) makes this clear: "The District of Columbia

Court of Appeals has jurisdiction of appeals from interlocutory orders of the Superior Court . . . granting, continuing, [or] modifying . . . injunctions." The rationale for immediate review of injunctions is to "further the statutory purpose of permitting litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981) (quotation marks, alteration, and citation omitted). Thus, by themselves, the December 29th injunctions are appealable.

B. Appellant Did Not Waive an Appeal of the Parenting Coordinator Provisions in the August Custody Order Because Those Provisions Were Not Appealable.

In response to this Court's order to show cause, Appellee argued that the Parenting Coordinator provisions in the August 21st custody and support order could have been appealed, and therefore Appellant waived her right to appeal the Parenting Coordinator provisions in the December 29th orders. As discussed above, this argument is legally incorrect because the December orders are injunctions and thus are independently appealable irrespective of the August order. Additionally, Appellee's waiver argument is incorrect because the conclusory references to a Parenting Coordinator in the August custody order rendered them so vague as to be unenforceable and thus unappealable in the first instance.

The mandate of Super. Ct. Dom. Rel. R. 65(d) is clear: "Every order granting an injunction . . . shall be specific in terms [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." *Id.*; *cf.* Fed. R. Civ. P. 65(d) (functionally equivalent, and therefore providing persuasive authority under *Patterson v. Sharek*, 924 A.2d 1005, 1009-10 (D.C. 2007)). If an injunction lacks the specificity required by Rule 65(d), it is not enforceable. *See, e.g., Int'l Longshoremen's Ass'n, Local 1291 v. Phila. Marine Trade Ass'n*, 389 U.S. 64, 76 (1967).

With respect to a Parenting Coordinator, the August custody order only stated that the "parties will use a parenting coordinator" who shall "make the final determination on any issue" "[w]hen the parties are unable to reach a joint decision" and would have access to the findings of Sasha's therapist. J.A. 13, 14, 16 (¶¶ 2, 7, 13, 16, 17). But the decree entirely failed to specify who the Coordinator would be or how to select one; what amount the Coordinator would be paid; which costs or services would be payable to the Coordinator; where, when and how the parties would meet with the Coordinator; when the Coordinator could be terminated and by what process; how (or by what standard) the Coordinator would make decisions; or even how the Coordinator's decisions would become final or could be appealed, if at all. Without such basic information as to the who, what, where, when, why, and how of the Parenting Coordinator, the August order was so vague as to the Parenting Coordinator as to violate Rule 65(d) and be unenforceable on that issue. An unenforceable order, or part of an order, is not appealable because Appellant would have lacked standing. *See, e.g., Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 319-21 (7th Cir. 1995) (holding that an unenforceable order "does not impose the type of tangible harm that Article III requires for standing to seek judicial relief"); *cf.* D.C. Code § 11-721(b) (requiring standing to appeal).

Even Appellee appeared to recognized the unenforceability of the August custody order's Parenting Coordinator provisions. That is why, presumably, his contempt motion, which precipitated the December 29th orders, actually requested a specific injunction, and why he came prepared to the hearing with an 11-page Order Appointing Special Master that set forth the necessary detail that was omitted from the August custody order. J.A. 767, 838. As Appellee's counsel informed the court, "[t]his Court *needs to spell out the tasks and authority*" of

the Parenting Coordinator, and Roberta Eisen had "very specifically" requested the Order Appointing Special Master. J.A. 707, 844 (emphasis added).

The Special Master Order cures the vagueness inherent in the August custody order as to the Parenting Coordinator by specifying, *inter alia*, who the Parenting Coordinators will be; what amount they will be paid; what costs are payable to the Coordinators; where and how the parties will meet with the Coordinators; when the Coordinators may be terminated and by what process; how (or by what standard) the Coordinators will make decisions; and even how the Coordinators' decisions will become final and may be appealed. J.A. 588-98 (¶¶ 1, 5, 6, 8, 9(b), 11, 12). In contrast to the August custody order's limited and conclusory references to a Parenting Coordinator, the Special Master Order is sufficiently specific as to be enforceable. As the first enforceable order on the Parenting Coordinator issue, appeal on this issue was not waived and the December 29th orders are independently appealable.

C. This Court Has Jurisdiction Because The December 29th Orders Are Final.

The December 29th orders are also final judgments and appealable as of right under D.C. Code § 11-721(a)(1), which grants this Court jurisdiction over "all final orders" of "the Superior Court." The orders have a "final and irreparable effect on" Appellant's "important rights;" her appeal should be heard. *Heard v. Johnson*, 810 A.2d 871, 877 (D.C. 2002).

The December 29th orders are final because they conclusively resolve the outstanding Parenting Coordinator issues in the case. An order is final "if it disposes of the whole case on its merits, so that the court has nothing remaining to do but to execute the judgment or decree already rendered." *In re D.M.*, 771 A.2d 360, 364 (D.C. 2001) (quoting *In re Estate of Chuong*, 623 A.2d 1154, 1157 (D.C.1993) (en banc)). That is the case here, as all issues on the merits –

divorce, custody, child support, and appointment of a Parenting Coordinator – have been resolved.

In contrast, the August order did not conclusively resolve the Parenting Coordinator issue, although it did resolve the "main issue" of custody and the "collateral" issue of child support.[4] J.A. 588. The Parenting Coordinator issue was only finalized upon entry of the December 29th orders, with their specific terms governing the selection of and procedures for the use of a Parenting Coordinator.[5]

D. This Court May Also Treat this Appeal as a Petition for a Writ of Mandamus.

Should this court conclude otherwise, however, it should treat this brief as a petition for a writ of mandamus. "The appellate court issues the writ in two classic situations: where the lower court has acted without jurisdiction or power, or where the lower court has clearly abused its discretion." *Morrow v. District of Columbia*, 417 F.2d 728, 736 (D.C. Cir. 1969). Several factors guide the decision to issue the writ: "whether the matter is of 'public importance,' whether the policy against piecemeal appeals would be frustrated, whether there has been a willful disregard of legislative policy or of the rules of a higher court, and whether refusal to

[4] The August order's lack of finality with respect to the Parenting Coordinator issue does not affect this Court's jurisdiction over Appellant's appeals of the other issues that the August 21st order did finalize. As this Court has long recognized, a judgment can be final as to the issues that it conclusively resolves, even if it contemplates further proceedings as to other issues. *Wilkins v. Bell*, 917 A.2d 1074 (D.C. 2007) (finding that an order temporarily suspending child support payments for two months is appealable despite potential for further modifications after those two months); *Quarles v. Quarles*, 353 A.2d 285, 288 (D.C. 1976) (finding divorce and property decree final despite pendency of child support issue). Moreover, any lack of finality in the August order has been resolved by the December Orders, so this Court has jurisdiction over all of the issues raised in Appellant's appeals under the doctrine of cumulative finality. *See generally* 15A Charles Alan Wright et al., *Federal Practice and Procedure* § 3914.9 (2d ed. 1991).

[5] Even if the December Orders were not final, they would be appealable in this case under the collateral order and practical finality doctrines. *See, e.g., Galloway v. Clay*, 861 A.2d 30, 32 (D.C. 2004); *Rachal v. Rachal*, 412 A.2d 1202, 1204 (D.C. 1980).

issue the writ may work a serious hardship on the parties." *Id*. at 736-37 (citations omitted). "The clearer the lower court's lack of jurisdiction the more appropriate will be the writs' issuance, but the writs will issue where the question of jurisdiction is undecided." *Id.* at 737 (citations omitted).

Here, the court's order for Appellant to use Parenting Coordinators (over her objection) with immediately-effective decision-making authority is both "undecided" and of substantial "public interest." *Id*. at 736-37. Given the growing reliance of the D.C. Superior Court on Parenting Coordinators, the issues herein are likely to recur in numerous family court proceedings. Moreover, "the policy against piecemeal appeals" would not be frustrated because all matters before the Superior Court in this case are now final and on appeal. *Id.* Additionally, as is discussed in more detail below in sections I.C.2. and III., appointment of a special master here, in the absence of an exceptional condition, and despite the history of violence against Appellant, is a significant violation of the law and a "willful disregard of [the] legislative policy" embodied in Super. Ct. Dom. Rel. R. 53 and the jurisdiction's custody and domestic violence laws. *Id.* Finally, "refusal to issue the writ" would work a serious hardship on Appellant and her children, as she continues to be forced to participate in processes which subject her continually to her abuser, and cost her children virtually all of the child support to which they are entitled. *Id.* Thus, as is detailed further below, the Superior Court has "usurp[ed] . . . judicial authority" and committed a "clear abuse of discretion." *Banov v. Kennedy*, 694 A.2d 850, 858 (D.C. 1997) (quotation marks and citation omitted). A writ of mandamus would therefore be appropriate. *See La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) (Seventh Circuit properly issued writ of mandamus ordering district judge to vacate a referral to special master under Fed. R. Civ. P. 53).

STANDARD OF REVIEW

The standard of review in this case depends on the basis on which the Court concludes it has jurisdiction. If the Court determines that the December 29th orders granted, continued, or modified an injunction, they are reviewed for abuse of discretion. *See, e.g.*, *In re Estate of Reilly*, 933 A.2d 830, 834-35 (D.C. 2007). An error of law, reviewed *de novo*, constitutes an abuse of discretion. *See, e.g.*, *In re S.L.E.*, 677 A.2d 514, 519 (D.C. 1999). If the Court determines that the orders at issue are final orders, legal conclusions contained therein are reviewed *de novo*, while factual findings are reviewed for clear error. *In re A.C.G.*, 894 A.2d 436, 439 (D.C. 2006). Finally, mandamus requires a showing of clear and indisputable entitlement to the writ. *Banov*, 694 A.2d at 858.

ARGUMENT

I. THE COURT'S PARENTING COORDINATOR ORDERS UNCONSTITUTIONALLY DELEGATE JUDICIAL POWER AND VIOLATE DUE PROCESS.

A. Appointment of Parenting Coordinators with the Power to Issue Enforceable "Court Orders" is an Improper Delegation of Judicial Authority.

The Special Master Order provided that the Parenting Coordinators' decisions "are effective as if they were court orders when made and will continue in full force and effect unless modified or set aside by a court of competent jurisdiction. If either party disagrees with any order thus made, then he or she may make a timely motion requesting judicial intervention." J.A. 593 (¶ 11). In short, the Parenting Coordinator's decisions are effective immediately and enforceable by contempt, like court orders. *See* D.C. Code § 15-320 (power of attachment to enforce decrees); *cf., e.g.*, *Stalb v. Stalb*, 768 A.2d 1269, 1270-71 (Vt. 2000) (Master's order enforceable by contempt; contempt vacated on appeal only because master's order was not sufficiently specific).

The grant of such power to issue judicially enforceable decisions constitutes an improper delegation of judicial authority in violation of the First Amendment's right of access to the courts for redress of grievances. It is well settled that a court "cannot, of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers." *Kimberly v. Arms*, 129 U.S. 512, 524 (1889). "American policy, stated quite simply, upholds the right of a litigant to have his suit tried before a judge and/or a jury if he so requests." Hon. Irving R. Kaufman, *Masters in the Federal Courts: Rule 53*, 58 Colum. L. Rev. 452, 453 (1958).

District of Columbia law also reflects the non-delegation doctrine: "The *Court shall* make a determination as to the legal custody and the physical custody of the child . . . [and]

shall designate the *parent(s)* who will make the major decisions concerning the health, safety and welfare of the child that need immediate attention." D.C. Code § 16-914(a)(1)(A), (d)(2) (emphases added). "Shall" is mandatory – the *court* must make the determinations and designate a *parent* to make decisions requiring immediate action. *Leonard v. District of Columbia*, 801 A.2d 82, 84-85 (D.C. 2002) (construing the term "shall" as denoting a mandatory requirement). The Superior Court has no discretion to vest these determinations in any master or subordinate officer, or to designate someone other than a parent to make these decisions.

Yet the December Orders do precisely that. The Special Master Order expressly assigns the Parenting Coordinators the authority to "make major decisions . . . that need immediate attention." *See* J.A. 589, 593 (¶¶ 3, 11) ("[T]he Special master shall make the *final determination on any issue* . . . [including] event emergencies." (emphasis added)). Likewise, the Parenting Coordinators, and not the court, are empowered to "designate the parent(s) who will make the major decisions" and "shall have the authority and discretion to delegate tie breaking authority *on any issue* to either parent." J.A. 589 (¶ 4) (emphasis added).

This Court has twice reviewed delegations of authority in custody proceedings, and both times held that the permissibility of a delegation depends on whether the Superior Court retained final and independent decision-making authority. In *Lewis v. Lewis*, 637 A.2d 70 (D.C. 1994), this Court rejected an order that gave the mother "discretion to determine whether the minor children should visit" their father. *Id.* at 71. It reasoned that the order "improperly commits to a parent a decision that must remain with the trial court." *Id.* at 73. Similarly, this Court in *Hamel v. Hamel*, 489 A.2d 471 (D.C. 1985), approved of an order "direct[ing] Dr. Beal *to submit* a new visitation schedule" because "[t]he court *expressly retained* ultimate authority to decide the terms and conditions of visitation." *Id.* at 474 (emphases added).

Other states' custody and divorce decisions are entirely in accord, and have consistently struck down excessive delegations of final decision-making authority to an appointed third party.[6] Several state courts have specifically struck down references granting decision-making authority to parenting coordinators. *See Hausladen v. Knoche*, No. 35996, 2010 WL 2681170, at *4 (Idaho July 8, 2010) (holding that the statutory authorization for parenting coordinators "was not intended to give a parenting coordinator judicial powers of decision-making"); *In re Marriage of Dauwe*, 148 P.3d 282, 285 (Colo. Ct. App. 2006) (same, holding that granting "decision-making authority to the parenting coordinator . . . is contrary to" their statutory role). Of particular relevance are decisions from those states that, like the District of Columbia, lack *any* codified authority for appointing parenting coordinators. *See Edwards v. Rothschild*, 875

[6] *See, e.g.*, *In re E.H.*, 137 P.3d 809, 815-16 (Utah 2006) (approving stipulated reference to psychologist because the court held the ultimate authority to review the psychologist's recommendations and enter a final order); *BAC v. BLM*, 30 P.3d 573, 578 (Wyo. 2001) (reversing custody judgment because "we cannot . . . determine that the district court *independently* determined that the custody arrangement recommended by the commissioner was in the best interests of the minor child" (emphasis in original)); *Domingues v. Johnson*, 593 A.2d 1133, 1134-35 (Md. 1991) ("We hold, however, that the chancellor incorrectly accepted the recommendations of the master upon a finding that those recommendations were not clearly erroneous, instead of subjecting the master's fact-finding to a clearly erroneous test and then exercising his independent judgment concerning the proper conclusion to be reached upon those facts."); *Russell v. Thompson*, 619 P.2d 537, 539 (Nev. 1980) (exercising mandamus review and rejecting reference of divorce proceedings to master because "the trial court's function has been reduced to that of a reviewing court"); *Gelfond v. Dist. Ct.*, 504 P.2d 673, 675 (Colo. 1972) (en banc) (exercising prohibition review and rejecting reference because it "in effect delegated the decision making, as well as the fact finding, function to the Master"); *In re Marriage of S.K.B.*, 867 S.W.2d 651, 659 (Mo. Ct. App. 1993) ("In the case at bar, the master was given ultimate authority as to appointment of a guardian ad litem. This was a decision that should be made by a court."); *In re Marriage of Matthews*, 161 Cal. Rptr. 879, 882 (Cal. Ct. App. 1980) (holding that an order "authorizing [a master] to alter the visitation schedule in any way she deemed reasonable and necessary constituted an improper delegation of judicial power to a subordinate court attachee"); *Bell v. Bell*, 307 So. 2d 911, 914 (Fla. Dist. Ct. App. 1975) ("[T]he court is duty bound to examine and consider the evidence for itself and to make a judicial determination as to whether under the law and the facts the court is justified in entering the judgment recommended by the master."); *see generally* Allison Glade Behjani, *Delegation of Judicial Authority to Experts: Professional and Constitutional Implications of Special Masters in Child-Custody Proceedings*, 2007 Utah L. Rev. 823, 831-35.

N.Y.S.2d 155, 159 (N.Y. App. Div. 2009) ("[A]uthorizing the Parenting Coordinator to resolve issues between the parties . . . constitutes an improper delegation of the court's authority to determine issues relating to visitation."); *Rodriguez v. Crane*, 2006 WL 59814, at *3 (N.J. Super. Ct. App. Div. Jan. 12, 2006) (reversing order and disapproving "the apparent delegation of ultimate decision-making authority to the Parent Coordinator"). Appellant is not aware of *any* appellate case, in *any* jurisdiction, that upholds a grant of decision-making authority to a parenting coordinator in the absence of an express "Parenting Coordinator" statute or rule, which does not exist in the District.

B. The Improper Delegation of Judicial Authority Violates Due Process.

D.C. Code § 16-914 requires the court and not a delegate to make custody decisions for one critical reason—any other procedure would violate parents' due process rights. "It is a basic principle that parents have a due process right to make decisions concerning the care, custody, and control of their children." *In re A.G.*, 900 A.2d 677, 680 (D.C. 2006). While state interference with these rights is sometimes necessary to secure the best interests of the child, such interference must comport with the protections of the Due Process Clause. *Id.*

The Fifth Amendment "imposes procedural requirements on the government *before* it deprives individuals of protected interests." *Richard Milburn Pub. Charter Alternative High Sch. v. Cafritz*, 798 A.2d 531, 541 (D.C. 2002) (emphasis added). The most fundamental of these requirements is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Logan, supra*, 455 U.S. at 437; *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard."). "Due process includes the right to present evidence and argument to the trial court . . . . In order to have an opportunity for meaningful presentation of evidence and argument, a litigant must have access, both in the trial

court and on appeal, to the evidence that can be (or has been) used by the judge in ruling against her." *N.D. McN. v. R.J.H.*, 979 A.2d 1195, 1201 (D.C. 2009).

The Special Master Order violates the fundamental prerequisites of due process. There is no notice or opportunity to be heard at all, much less meaningfully, before the Parenting Coordinator can enter a final order. The Special Master Order affords the Appellant and Appellee no ability "to present evidence and argument to the trial court," *id.*, before the master can enter "decisions . . . effective as if they were court orders when made." J.A. 593 (¶ 11). Even more troubling, there is no guarantee that either parent will "have access . . . to the evidence that . . . has been used by the [master] in ruling against [them]." *N.D. McN*, 979 A.2d at 1201. Indeed, the Parenting Coordinators, unlike a judge, are specifically authorized to have *ex parte* contact with the parties. J.A. 594 (¶ 15). The Parenting Coordinator can then use that one-sided information, information that the opposing party does not know of and cannot controvert, to make significant decisions affecting the children, such as whether to administer medicine, require speech therapy, or change their school. *See* J.A. 592 (¶ 10(d), (e)); *cf.* D.C. Code § 16-914(a)(1)(B)(i) (defining "legal custody" as "includ[ing] the right to make decisions regarding that child's health, education, and general welfare"). Finally, and most troubling, the master is empowered to "implement . . . a *comprehensive* parenting plan," even if such a plan violates *both* parents' wishes. J.A. 591 (¶ 9(b)).

This Court has struck down custody orders when the trial court did not afford the litigants a fair opportunity to be heard. In *In re J.F.*, 615 A.2d 594 (D.C. 1992), this Court overturned a custody order where the trial judge converted a second disposition hearing into a review hearing, giving deference to her own previous order despite having not afforded the parties notice of the first disposition hearing. *Id.* at 598. This is precisely what is contemplated here – the masters'

disposition would be subject only to a review hearing, not an initial examination of the facts, and even that hearing only *after* it had already taken effect. J.A. 592-93 (¶¶ 10, 11). Similarly, in *Ziegler v. Ziegler*, 304 A.2d 13 (D.C. 1973), this Court summarily struck down a custody order where the trial judge had accepted the findings of a subordinate court officer and entered final judgment without permitting the parties an opportunity to litigate challenges to the officer's report. 304 A.2d at 13 & n.2. As in *J.F.* and *Ziegler*, the orders appealed from here permit subordinate court officers to enter an immediately-effective final judgment that continues in full force and effect unless modified or set aside upon motion by a party requesting judicial intervention. "This plain violation of due process requirements requires reversal." *Id.* at 13.

II. THE PARENTING COORDINATOR ORDERS VIOLATE DOMESTIC RELATIONS RULE 53.

No District of Columbia statute or rule authorizes courts to use Parenting Coordinators in family cases. There is no legal authority whatsoever for doing so – least of all over objection of one of the parties. In fact, when Appellant questioned the court as to its statutory basis for ordering a Parenting Coordinator – "Based on what statutes [are we] even doing this?" – the court merely responded, "It's called the sound discretion of the Court, okay?" J.A. 837.

Ultimately, the Special Master Order, drafted by Appellee's counsel in consultation with Dr. Eisen and signed by the court, relied on D.R. Rule 53 as the authority for appointing Parenting Coordinators. J.A. 588 (¶ 1). However, D.R. Rule 53 was not designed for Parenting Coordinators and, even if a Parenting Coordinator can be dubbed a "special master," the Rule does not authorize the type of appointment and powers contained in the December 29th orders.

A. Domestic Relations Rule 53 Does Not Authorize Appointment of a Special Master With Immediately Effective Decision-Making Authority.

Domestic Relations Rule 53 sets forth a process by which the master may make findings of fact and even preliminary conclusions of law, but requires those to be set forth in a report to

the court, with notice to the parties and an opportunity to object and be heard by the court *before* any orders are issued and take effect. The Rule provides, in pertinent part:

> (d) Proceedings.
>
> (1) Meetings. – When a reference is made, the Clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, ***the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days*** after the date of the order of reference and shall notify the parties or their attorneys. ***It is the duty of the master to proceed with all reasonable diligence***. . . .
>
> * * *
>
> (e) Report.
>
> (1) Contents and filing. – The master ***shall prepare a report*** upon the matters submitted to the master by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report. The master ***shall file the report*** with the Clerk of the Court and ***shall serve on all parties notice of the filing***. Unless otherwise directed by the order of reference the master shall file with the report a transcript of the proceedings and of the evidence and the original exhibits. ***Unless otherwise directed by the order of reference, the master shall serve a copy of the report on each party***.
>
> (2) Objections. – The Court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the Court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in SCR-Dom Rel 7(d). ***The Court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.***

Sup. Ct. Dom. Rel. R. 53 (emphases added).

In stark contrast, the Special Master Order in this case authorizes the Parenting Coordinators to make decisions that are effective as court orders immediately. J.A. 592-93 (¶¶ 10, 11). The parties are given no notice or opportunity to object to the Parenting Coordinators' decisions before they take effect. The parties may only appeal a decision of the Parenting Coordinators after it has become effective. D.R. Rule 53 simply does not authorize the

delegation of such broad powers, nor could it, in light of the constitutional concerns described above. *See In re Johnson*, 699 A.2d 362, 369 (D.C. 1997) (rules must be construed to avoid significant constitutional questions); *see A.L.W. v. J.H.W.*, 415 A.2d 708, 711-12 (Del. 1980) (applying canon and construing Delaware statutory master provision, parallel to D.R. Rule 53, not to authorize final decision-making).

B. Domestic Relations Rule 53 Does Not Authorize Appointment of a Special Master Without a Showing of an Exceptional Condition.

Presumably because of the constitutional constraints on the delegation of judicial powers, D.R. Rule 53(b) expressly provides that "[e]xcept in matters of account and of difficult computation of damages, a reference [to a master] shall be made *only upon a showing that some exceptional condition requires it*." *Id.* (emphasis added).

Here, there was no judicial finding of an exceptional condition justifying a special master. No exceptional condition was referenced in the December 29th orders or demonstrated during the December hearing. Other than the parties' general difficulty making joint decisions, the only justification Appellee offered for a Parenting Coordinator was "judicial economy." J.A. 700-01 ("It isn't practical or good judicial economy to ask Your Honor to re-decide those things on a therapeutic timetable.").

It is not sufficient under the Rule for the court to appoint a special master simply to avoid the parties returning to court and thereby relieve some amount of court congestion. *See La Buy*, *supra*, 352 U.S. at 259 (holding that "congestion in itself is not such an exceptional circumstance as to warrant a reference to a master"); *Marriage of S.K.B.*, *supra* note 6, 867 S.W.2d at 658 ("In the present case, the reason the trial court sent the matter to a special master was due to court congestion in Independence and its aggravation with the procedural 'games' played by the

attorneys. These stated reasons do not provide sufficient cause for reference to a master because this was a relatively simple, single issue case regarding the custody of a little girl.").

The Supreme Court's opinion in *La Buy* is instructive on this issue. The Seventh Circuit issued a writ of mandamus to compel Federal District Judge Walter La Buy to vacate his orders referring two consolidated antitrust cases for trial before a master under Federal Rule of Civil Procedure 53. *La Buy*, 352 U.S. 249. Judge La Buy contended, and the record reflected, that "the cases had been burdensome" while on his docket. *Id*. at 253 ("I remember hearing more motions, I think, in this case than any case I have ever sat on in this court."). In the orders of reference, Judge La Buy "declared that the court was 'confronted with an extremely congested calendar' and that 'exception [sic] conditions exist for this reason[.]'" *Id*. He later elaborated "'that the cases were very complicated and complex, that they would take considerable time to try,' and that his 'calendar was congested.'" *Id*. at 254. The Seventh Circuit ordered the references vacated, and the Supreme Court upheld the Court of Appeals' ruling, explaining that "[t]he use of masters is 'to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause.'" *Id*. (internal citations omitted). The Supreme Court further held that "congestion in itself is not such an exceptional circumstance as to warrant a reference to a master." *Id*. at 259.

Other than case complexity (which is inapplicable here) or court congestion (which is a legally insufficient justification), no other even arguable exceptional condition exists in this case that would require the use of a Parenting Coordinator, and no such condition was raised by Appellee

or found or referenced by the court.[7] Therefore, the referral to a special master under D.R. Rule 53 was unlawful.

III. THE SPECIAL MASTER ORDER'S REQUIREMENT THAT APPELLANT PAY FOR THE PARENTING COORDINATORS TO WHOM SHE OBJECTS VIOLATES LAW AND PUBLIC POLICY.

During the December 29, 2009 hearing, the lower court made clear its intention to order Appellant to pay half of the Parenting Coordinator's $6,000 renewable retainer and ongoing fees at a rate of $250 per hour. J.A. 840. When Appellant responded that she did not have the means to pay the retainer or the hourly fees, the court ordered that Appellee would pay the full cost and would receive a credit for half the cost towards his monthly child support payments. J.A. 840-42. This order violates law and public policy in two respects: it essentially eliminates the children's child support, and it subjects Appellant to an excessive court fee – an open-ended financial burden for "services" she does not want.

A. The Court's Order that Child Support Be Used to Pay the Parenting Coordinator Violates Law and Public Policy Concerning Child Support.

Under D.C. Code § 15-501(a)(7)(D), child support "is free and exempt from distraint, attachment, levy, or seizure and sale on execution or decree of any court in the District of Columbia." Yet, the lower court's order requiring that Appellant's child support payments be

[7] It may be argued that parties such as these, who are unable to co-parent and reach cooperative parenting decisions, require a parenting coordinator, else no parenting decisions are capable of being made. However, the cure for this ill lies not in the appointment of a third party to stand in for the parents and make the decisions, but in the proper award of legal custody to one party rather than both equally. *Cf.* D.C. Code § 16-914(d)(2). Joint legal custody was never contemplated or intended for parties who could not cooperate as parents. *See generally* Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 Ohio St. L.J. 455, 471, 487 (1984) (noting that even the most ardent of the early joint custody advocates assumed that it is appropriate only where the parties voluntarily agreed to it); Janet R. Johnston, *Research Update: Children's Adjustment in Sole Custody Compared to Joint Custody Families and Principles for Custody Decision Making*, 33 Fam. and Conciliation Cts. Rev. 415 (1995) (including discussion of recent studies and concluding that joint custody is not advisable where the parties are in conflict).

reduced to pay for her share of the Parenting Coordinators' fees effectively attached Appellant's (and the children's) support in anticipation of her inability to pay for the Parenting Coordinator's court-ordered services. This order is unlawful.

The lower court's order tramples the well-established principle that the "children's interest is paramount," and therefore child support payments should not be prejudiced by controversies between the parents. *Mims, supra*, 635 A.2d at 323. As early as 1958, this court recognized that it was inappropriate to impute to a child the wrongful conduct of a parent. *Edmonds v. Edmonds*, 146 A.2d 774, 775-76 (D.C. 1958) (citing *Maschauer v. Downs*, 53 F. 540, 543 (D.C. Cir. 1923) (requiring the father to provide child support despite the mother's wrongful departure from the father)); *see also Nevarez v. Nevarez*, 626 A.2d 867, 869 (D.C. 1993) (requiring that the father modify his lifestyle so as to prioritize the child's support rather than his own "personal desires and purported needs"). A child's claim to support "is not affected by the merits of controversies, however serious, between the spouses." *Edmonds*, 146 A.2d at 776 (quoting *Howard v. Howard*, 112 F.2d 44, 45-46 (D.C. Cir. 1944) (internal quotations omitted)). As a result of the court's order in this case, however, child support payments are funding parental dispute resolution instead of providing the children with the support to which they are entitled.

Moreover, using child support to pay Parenting Coordinators violates the fundamental purpose of child support: to ensure that children share in their parents' standard of living. Child support is designed to protect the welfare of children. *Mims*, 635 A.2d at 323. "A parent has the responsibility to meet the child's basic needs, as well as to provide additional child support above the basic needs level." D. C. Child Support Guidelines, D.C. Code § 16-916.01(c)(3); *see also Mims*, 635 A.2d at 323 (child support payments are intended to "ensure a decent standard of living for the child"); Stephanie Giggetts, Annotation, *Application of Child-Support Guidelines*

to Cases of Joint-, Split-, or Similar Shared-Custody Arrangements, 57 A.L.R.5th 389 (1998) ("One of the basic principles of child support in many jurisdictions is that the child is entitled to a level of support commensurate with the income and lifestyle of the parents. It is a parent's responsibility to meet the child's basic needs as well as to provide additional child support above the basic-needs level."). As one commentator explained:

> Children are not only entitled to basic support from their parents, but they are also entitled to share in their parents' good fortune. In the divorce context, some courts characterize the objective as setting support at a level that enables children to maintain the standard of living they would have had if the marriage had remained intact. If a child has enjoyed benefits such as private schools, piano lessons, and summer camps, then the child support payments will be set at a level to continue these benefits as long as the paying parent can afford it. The fact that none of these things would be necessities to a lower middle-class child is irrelevant.

Judith McMullen, *The Professional Athlete: Issues In Child Support*, 12 Marq. Sports L. Rev. 411, 417 (2001).

As described above, Appellant's share of the costs for the Parenting Coordinators are deducted from the child support payments she is entitled to receive from Appellee, which the court set at $1,737 per month. J.A. 16. The Special Master Order also requires that the parties provide the Parenting Coordinators with a retainer of $6,000 at the outset of their appointment, or $3,000 for each party. J.A. 591. This retainer, alone, deprives the children of all child support for approximately two months. Beyond the retainer, the costs of the Parenting Coordinators can easily exceed the monthly child support payment. At the rate of $250/hour, the Parenting Coordinators need only work on the case approximately 14 hours per month between them, or incur such costs or expenses, to effectively eliminate the girls' support. Surely, depriving the children of the child support on which they rely to instead pay for someone else to make

parenting decisions and to force Appellant's cooperation with her abuser harms the children[8] by depriving them of support necessary for their welfare. Using child support in this manner is contrary to the fundamental purposes of the child support system.

B. Ordering the Parties to Pay for a Parenting Coordinator Over Objection Violates the Public Policy In Favor of Reasonable Court Charges.

The December 29th orders transfer the parties' post-trial parenting disputes from the court to the Parenting Coordinators and require them to pay costs vastly in excess of the ordinary and reasonable court fees they would normally incur. Moreover, the lack of advance notice of the costs they may be subjected to at the hands of the Parenting Coordinators conflicts with judicial policy regarding such fees. In essence, the Parenting Coordinators' fees constitute an open-ended, unlimited charge for a mandated system of private justice – one Appellant cannot escape without Appellee's consent.

Certainly, a State may impose procedural prerequisites, such as filing fees, that must be satisfied before litigants may exercise their First Amendment right to file suit. *United States v. Kras*, 409 U.S. 434, 446-49 (1973). Equally well established, however, is the requirement that such fees be *reasonable*, as determined on a case-by-case basis. *See Logan, supra*, 455 U.S. at 437 ("The State may erect *reasonable* procedural requirements for triggering the right to an adjudication, be they statutes of limitations or, in an appropriate case, filing fees. . . . What the Fourteenth Amendment does require, however, is a hearing appropriate to the nature of the case." (quotation marks, alterations, and citations omitted; emphasis added)).

In this case, had the Parenting Coordinators not been appointed, any disputes between the parties would be resolved between the parties or by the court. Prior to requesting relief from the

[8] Whether the Parenting Coordinators have benefited the children in any meaningful respect is undetermined, but Appellant would argue – and stands ready to supplement the record – that their decisions and actions to date have only harmed the children.

court, the moving party would have to file the requisite complaint or motion and pay any associated filing fees, which are published in D.C. Family Court Rule C. Because the court fees are published, a party has notice of the amount of the fee and can thereby weigh the costs and benefits of seeking judicial intervention. Indeed, the rationale for filing fees, in part, is to prevent the filing of frivolous suits. *See Boddie v. Connecticut*, 401 U.S. 371, 381 (1971) (explaining that the rationale for court "fee and cost requirement[s] are that the State's interest in the prevention of frivolous litigation is substantial"); *Johnson v. Atkins*, 999 F.2d 99, 100 (5th Cir. 1993) (explaining "filing fees are necessary to pay for the administrative costs of litigation, and in part, to discourage baseless suits").

Instead, under the Special Master Order, Appellant is required to pay an unknown and unpredictable amount for services she otherwise would forego or obtain through the court. Although the amount is measured at an hourly rate of $250, it is impossible for her to predict – or to control – the amount of money she ultimately will have to spend under this Order. Indeed, because the lower court ordered *both* parties to pay for the Parenting Coordinators – rather than just the party seeking the services or requiring the expenditure of the Parenting Coordinators' time – Appellant will be paying for half of all of *Appellee's separate visits and telephone calls or other requests* for services. J.A. 591. Under the Special Master Order, Appellant must pay half of all in-court and out-of-court time the Parenting Coordinator spends on this case, and half of all costs, including photocopies, postage, parking and mileage. J.A. 590-91. In contrast, if a party were to file a complaint or motion with the court, there may be a one-time filing fee of $80 or $20, respectively, for those services. *See* D.C. Fam. Ct. R. C. The fee would be paid only by the party choosing to file. And going forward, the party would not have to pay for the court's time to read the motion and opposition, hold a hearing, conduct legal research or talk with a law

clerk, hold a scheduling conference, draft a written decision, mail out an opinion, drive to the courthouse, etc. Yet, all of these activities by the Parenting Coordinators – which are *doubled if both Dr. Eisen and Dr. Atwater participate in meetings or calls, attend court, talk to each other about the case, etc.* – will cost the parties $250 each hour per Parenting Coordinator under the Special Master Order. Thus, the orders imposes excessive and unknown "court fees" on Appellant by ordering Appellant to resolve her domestic disputes through a Parenting Coordinator, over her objection, and to pay for it.

The public policy against imposition of unreasonable court fees is also embodied in the District's dispute resolution practices. Mediation through the District of Columbia's Multi-Door Dispute Resolution Division provides an effective venue for parties (in non-domestic violence cases) to "discuss issues of communication, separation, child custody, support and visitation, alimony, debt, division of property and other familial matters." Multi-Door Dispute Resolution Division, Family Mediation Brochure (2008), *available at* http://www.dccourts.gov/dccourts/docs/multi/FamilyMediationBrochure.pdf. Notably, these services are available to families and other residents of the District at *no cost* and without regard to income. *See* Family Mediation Program, *available at* http://www.dccourts.gov/dccourts/superior/multi/family.jsp; Multi-Door Dispute Resolution Division, Frequently Asked Questions, *available at* http://www.dccourts.gov/dccourts/superior/multi/faq.jsp.

Requiring child support to be diverted to pay for a Parenting Coordinator, or imposing open-ended excessive court-related charges without notice or consent, is violative of public policy. Many courts have reversed trial court rulings, or rejected doctrines or arguments, on grounds that they violate public policy, and this Court should do so here. *See, e.g.*, *Feltmeier v. Feltmeier*, 798 N.E.2d 75, 88 (Ill. 2003) (rejecting statute of limitations as against public policy);

In re Marriage of Day, 74 P.3d 46, 53 (Kan. Ct. App. 2003) (reversing divorce property distribution on public policy grounds); *State v. Dejarlais*, 944 P.2d 1110, 1113 (Wash. Ct. App. 1997) (rejecting consent defense in domestic violence case on grounds it violated public policy and instead favoring deterrence of domestic violence); *Van Vleck v. Van Vleck*, 47 N.Y.S. 470, 472 (N.Y. App. Div. 1897) (reversing trial court's alimony award on public policy grounds).[9]

IV. ORDERING A PARENTING COORDINATOR OVER A PARTY'S OBJECTION WHERE THERE IS A HISTORY OF DOMESTIC VIOLENCE IN THE RELATIONSHIP VIOLATES PUBLIC POLICY.

The lower court found that Appellee committed two intrafamily offenses against Appellant, that Appellee "is frustrated, does not handle emotions well, and is more likely to lose his temper than most people," and that he "used temper and intimidation to impose his will." J.A. 3, 5. Despite those findings, the court both awarded the parties joint legal custody (a ruling Appellant is challenging in the consolidated appeal) and, over her repeated objections, ordered Appellant to submit to a Parenting Coordinator process that requires joint decision-making and cooperation with Appellee in a manner entirely inappropriate in light of the parties' history of domestic violence.

> Domestic violence has an impact on victims and their children that is not conducive to an ongoing secure and safe relationship with the batterer. The foundations for a successful shared parenting plan or regular contact – trust, communication, respect and equality – have been seriously eroded by past abusive behavior.

[9] The most common context for reversing a family law decision on public policy grounds arises in the context of contract enforcement. *See, e.g.*, *Lana C. v. Cameron P.*, 108 P. 3d 896 (Alaska 2005) (reversing trial court's enforcement of private agreement to withhold testimony about child sexual abuse on public policy grounds); *Combs v. Sherry-Combs*, 865 P.2d 50, 54 (Wyo. 1993) (among other things, pre-nuptial contract provision requiring custody to be granted to same-sex parent void as against public policy); *Langer v. Langer*, 704 N.E.2d 275, 280 (Ohio Ct. App. 1997) (reversing divorce property distribution based on length of marriage pursuant to pre-nuptial contract and finding contract was void as against public policy, where husband's criminal domestic violence was reason for short marriage).

Peter G. Jaffe, et al., *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, Juv. & Fam. Ct. J. Fall 2003, at 57, 58, 61. Thus, "[t]he relevance of domestic violence in child custody proceedings requires a significant paradigm shift away from prevailing notions of . . . shared parenting plans [and] emphasis on mediation and conflict resolution." *Id.* Forcing a victim of abuse to co-parent, mediate, or be subjected to any kind of joint counseling process against her will is a re-victimization that facilitates continued intimidation and manipulation by an abusive spouse.[10] Such re-victimization is unlawful and contrary to federal and District public policies favoring legal recognition, accountability and consequences for domestic violence as well as universally recognized public policies against forced mediation and cooperation between a batterer and the victim.

A. Mandated Parenting Coordination and Mediation are Widely Recognized as Inappropriate Where the Parties Have A History of Domestic Violence.

The trial court appointed Parenting Coordinators because the court believed that the parties would not be able to cooperate in making parenting decisions. The Parenting Coordinators were offered by Appellee's counsel as the solution to the conundrum of a grant of joint legal custody to two parents who are incapable of working out parenting decisions together. However, co-parenting is widely recognized as an inappropriate expectation in domestic violence cases. *See* D.C. Code § 16-914(a-2) (rebuttable presumption against joint custody in cases where an intrafamily offense has occurred); *P.F. v. N.C.*, 953 A.2d 1107, 1112 (D.C. 2008) ("The law of this jurisdiction requires a judicial officer to exercise considerable caution before granting custody or visitation rights to a parent who has committed an intrafamily offense.").

[10] In addition to supplementing the record regarding the impact of the Parenting Coordinators' decisions to date on the children, *see supra* note 8, Appellant stands ready to supplement the record with an affidavit describing the actual conduct and impact of the parenting coordination process between the parties to date, should this Court so request.

The incompatibility between domestic violence and judicial processes requiring cooperation, compromise and joint decision-making is well recognized and embodied in many laws. "Parent coordinators, like many mental health professionals or volunteers, are appointed by judges to mediate and supervise court-ordered custody and visitation. *Parent coordinators are inappropriate for DV cases*." Marjory J. Fields, *DV Case Preparation and Trial Examination: A Heavy Burden*, in Civic Research Inst., *Cases Involving Domestic Violence, Abuse, and Child Custody: Legal Strategies and Policy Issue* 19-1, at 19-9 (Mo Therese Hannah & Barry Goldstein eds., 2010) (emphasis added); *see also* Hon. Jerry J. Bowles et al., *supra*, at 28 (2008) ("Some jurisdictions presume by statute that parents shall have equal decision-making authority on issues involving the child. Most presumptions, appropriately so, include exceptions for cases where there is a history of abuse."); Joan Zorza, *Child Custody Practices of the Family Courts*, in Civic Research Inst., *supra*, at 1-1, 1-15 ("[e]xcept when victims are within the family, society does not expect victims and perpetrators to get along"). Moreover, the inappropriateness of mediation or any kind of joint counseling for domestic violence cases is long established. *See* Wendy J. Koen et al., *Custody Mediation in Violent and Non-Violent Families: Pitfalls and Perils*, 19 Am. J. Fam. L. 253, at 254-257 (2006) ("There is widespread agreement in the mediation community that mediation is inappropriate in a relationship characterized by domestic violence and other situations in which abuse takes place. It is becoming clearer that there are circumstances in which the adversarial process works better for divorcing couples than does the cooperative mediation process."); Zorza, *supra*, at 1-15 ("Mediation is just not appropriate when there is violence and does not protect victims of DV[.]"); *see also* Lundy Bancroft & Jay Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* 204 (2002) ("Couples counseling (or other kinds of conjoint therapy or mediation

sessions) should generally not be ordered in domestic violence cases." (internal citations omitted)).

1. Programs Requiring Joint Decision-Making and Ongoing Cooperation Between a Batterer and Victim Pose Serious Safety Risks to the Abused Party.

Requiring joint decision-making between parties with a history of domestic violence poses ongoing safety risks to the abused party. To reach joint decisions, the parties are put "in the position of having to communicate frequently and directly with each other. This contact allows the pattern of abuse and control to continue, and perhaps even encourages it to escalate, since the abusive parent now has a court order that supports contact and forces decision-making with the at-risk parent." Hon. Jerry J. Bowles et al., *supra*, at 28.

The December 29th orders mandate a cooperative relationship between Appellee and Appellant, with an over-arching goal of joint decision-making. J.A. 589-97 (¶¶ 4, 5, 9(a)-(c), 12, 16, 22, 23, 24). Moreover, the Orders invite the Parenting Coordinators to mandate joint counseling, mediation, or *any other method or suggestion* that the Parenting Coordinator chooses to establish, in the service of the goal of requiring the parties to "work together" and minimize "conflict." *Id*.

While these may be laudable goals and practices in a custody case not marred by domestic violence, they are inappropriate and affirmatively dangerous when one party has abused the other. "[T]he primary goal of [domestic violence] law is the safety and survival of the injured party, which regularly necessitates the end of communication and contact between the divorcing parties. Obviously, the goal of creating a cooperative parenting partnership cannot be reached while adhering to the primary goal of [domestic violence] law." Koen et al., *supra*, at 257; *see also* Bancroft & Silverman, *supra*, at 207 ("Battered mothers should not be taught that they can improve conditions for their children by increasing or improving communication with

the batterer, as this can have results opposite to the intended ones and can interfere with her own recovery from abuse-related trauma, with resultant implications for her children").

As explained in the handbook of the National Council of Juvenile and Family Court Judges – *A Judicial Guide to Child Safety in Custody Cases*, "Mediation assumes that if communication skills can be improved, the parties will be able to work together. However, abuse is not a communication problem. Indeed, any communication between the parties may increase the safety risks for the at-risk parent by providing opportunities for control by the abusive parent." Hon. Jerry J. Bowles et al., *supra*, at 24 (internal citations omitted).

2. Requiring Joint Decision-Making Between a Batterer and Victim Invites Manipulation by the Abuser.

It is well-recognized that domestic violence is typically motivated by a desire for and/or exercise of power and control. *See, e.g.,* Koen et al., *supra*, at 258. "[M]ediation is rarely appropriate for families experiencing violence and almost never when there has been a pattern of abuse and intimidation. The premise of mediation is that it is a negotiation between equals, which is not the case when one partner has been controlling the other, often for many years." Dalton et al., *High Conflict Divorce, Violence and Abuse: Implications for Custody and Visitation Decision,* Juv. & Fam. Ct. J., Fall 2003, at 11, 26.

A primary risk of mediation in a domestic violence case is that the abuser, who is often a skilled self-presenter in public and court settings, will be able to manipulate the mediation process and the mediator. "Mediators . . . are unlikely to recognize just how manipulative and deceptive abusers are and that they themselves are likely to be manipulated into siding with the abuser." Zorza, *supra*, at 1-14.

The risks of coercion and control by Appellee are particularly high here. The lower court already found he uses "intimidation to impose his will." J.A. 3; *see also* J.A. 180-81, 355-

56, 372-73 (testimony regarding two incidents of Appellee speeding on dangerous roads with Appellant in the passenger seat to "show [her] what it means to be in control"; Appellee admitted and testified about one of these incidents and denied the other). Moreover, the payment provisions are an open invitation to Appellee to further harass Appellant through the Parenting Coordinator process. Appellant is required to pay money she does not have whenever the Parenting Coordinators are working directly with the parties or are otherwise working on the case in any capacity. And, because she must pay half of whatever time the two Parenting Coordinators work, even if that time is triggered by acts or requests from Appellee alone, the more time demands he makes, the more money she will pay. Because she must pay for every extra tenth of an hour the Parenting Coordinators work, J.A. 590 (¶ 8), Appellant is under tremendous financial pressure to agree – quickly – to Appellee's terms. Appellee, in contrast, would have to pay Appellant $1,737 per month in child support if he did not spend it on the Parenting Coordinator, so that entire amount is money he knows he cannot keep. Appellee thus can avoid giving this money to Appellant simply by running up the Parenting Coordinator bills, which would be to her detriment alone, a situation ripe for manipulation.

> It is . . . clear that the great benefits of mediation are not available to families with DV history. The processes do not fit their safety needs, the objectives of mediation run contrary to their objectives, and no amount of balancing of power structures can mitigate these underlying facts. . . . Mediation should be actively discouraged in families with DV in their history, and victims of DV should not be mandated to comply with a process that greatly disadvantages them and results in life-altering agreements that put them and their children at greater risk for further abuse.

Koen et al., *supra*, at 260. For the very same reasons, "[p]arent coordinators are inappropriate for DV cases." Fields, *supra*, at 19-9.

B. Ordering Appellant to Use a Parenting Coordinator Over Her Objection is Inconsistent with Federal and D.C. Public Policy Regarding Recognition of and Legal Consequences for Domestic Violence.

Over the past several decades, every state has adopted increasingly powerful legal responses to domestic violence. *See, e.g.*, Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges and the Court System*, 11 Yale J.L. & Feminism 3, at 4-5 (1999) (reviewing history of increasing legal responses to domestic violence); Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 Wis. L. Rev. 1657, 1667-74 (same).

In the District of Columbia, these responses have included mandatory arrest when police have probable cause to believe an intrafamily offense has occurred (D.C. Code § 16-1031), civil protection orders (D.C. Code §§ 16-1001 to -1006), a growing commitment of resources to criminal prosecution (*see, e.g.*, Epstein, *supra*, at 15-16 (describing substantial increase in domestic violence prosecutions in D.C. since adoption of "no drop" policy)), and, of particular importance here, specific provisions in the custody statute aimed at ensuring that neither children nor adult victims of abuse are put at risk through custody orders. *See, e.g.*, D.C. Code § 16-914(a-1) (requiring the court to explicitly consider any risk of emotional or physical harm joint custody or visitation could impose); *id.* § 16-914(a)(2) (rebuttable presumption against joint custody when an intrafamily offense has been committed); *see also P.F.*, *supra*, 953 A.2d at 1112; *Wilkins v. Ferguson*, 928 A.2d 655 (D.C. 2007) (reversed award of unsupervised visitation where court did not make the required finding that the child and custodial parent can be adequately protected from harm).

Federal law, too, has increasingly recognized and responded to domestic violence. *See, e.g.*, Violence Against Women Act, Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified as amended in U.S.C. Titles 8, 16, 18, 28, 42) (created federal programs to support remedies and

interventions on behalf of domestic violence victims); 18 U.S.C. § 922(g)(9) (prohibits "any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence" from owning, possessing or using a gun); 18 U.S.C. § 922(g)(8) (prohibits gun ownership, possession, or use by any person who is the subject of a court order restraining him or her from threatening to use or using physical force against an intimate partner).

Against the backdrop of these strong policies against domestic violence, the Special Master Order's requirements that Appellant cooperate with her abuser, ignore past adjudicated violence, and pay for the privilege, re-victimizes the victim and rewards the perpetrator with continued access to the victim – in direct contravention of national and local public policy. *Cf.* Susan Fay & Bunny Flint, Am. Bar Ass'n, *Parent Coordination, the Vermont Model*, Quarterly E-Newsletter, January 2006, at *1 (describing Vermont Model of parenting coordinator program specifically designed for use in domestic violence cases, which, *inter alia*, requires consent of both parties; permits termination by either party at any time; requires extensive and ongoing domestic violence training for parenting coordinators; charges fees on a sliding scale with parties not necessarily paying the same rate and with each party only paying for their portion of the services provided; imposes a cap on the number of hours a parenting coordinator can work on a particular case; limits the parenting coordinator's role to "simply attempt to establish a reasonable and safe contact schedule for the parent and the children;" includes regular status conferences before a judge with an opportunity to file objections before the court's decisions take effect; and ultimately strives toward successful "parallel" parenting rather than joint parenting).

V. THE SPECIAL MASTER ORDER REQUIRING APPELLANT TO WAIVE HER MEDICAL PRIVILEGE VIOLATES HER STATUTORY AND CONSTITUTIONAL RIGHTS TO PRIVACY.

The Special Master Order commands Appellant to "provide all . . . information requested by the Special Master," including "all authorizations and/or releases necessary to allow the Special Master to speak- [sic] with any third party, *including medical, mental health and other professionals*, who has treated or been involved with *the parties* or their children." J.A. 594 (¶¶ 13-14) (emphasis added). Commanding such nonconsensual releases, over a party's objection, violates the clear statutory and constitutional protection of private medical information and violates Appellant's substantive due process rights.

The Supreme Court has recognized at least two distinct kinds of constitutionally-protected privacy interests in the context of medical records and information: "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Whalen, supra,* 429 U.S. at 599-600 (footnotes and citations omitted); *see also Yin v. California*, 95 F.3d 864, 870 (9th Cir. 1996) ("[I]ndividuals have a right protected under the Due Process clause of the Fifth or Fourteenth Amendments in the privacy of personal medical information and records."); *see generally* Joel Glover & Erin Toll, *The Right to Privacy of Medical Records*, 79 Denv. U.L. Rev. 540, 541 (2002).

The District of Columbia has also long recognized this privacy interest in medical information. *See* Act of May 25, 1896, ch. 245, 29 Stat. 138 (1896) ("[N]o physician or surgeon shall be permitted, without the consent of the person afflicted . . . , to disclose any information, confidential in its nature, which he shall have acquired in attending a patient . . . ."). The privilege extends to all health professionals, D.C. Code § 14-307, and directly prohibits "the disclosure of mental health information to any person." D.C. Code § 7-1201.02.

The cursory assertion in the Special Master Order that the "release . . . shall not be deemed a waiver of any applicable privilege" is unavailing. Appellant still is being ordered, over her objection, to waive her privilege and her privacy interests as to the Parenting Coordinators. This Court has only once dealt with a constitutional privacy claim to medical records in a family law case. *In re N.H.*, 569 A.2d 1179, 1184 (1990), held that "the interest of the District of Columbia in assuring that the mother is mentally competent to raiser her daughter is sufficiently strong to limit the mother's privacy rights." *N.H.* is distinguishable, however, because that case concerned *neglect* proceedings, which are specifically exempted from the statutory doctor-patient privilege. *See* D.C. Code §§ 4-1321.05, 14-307(b)(3). A similar exemption does not exist for child *custody* proceedings. *Y.J.K. v. D.A.*, No. DRB-1911-04, 2005 WL 2220021, at *4 (D.C. Super. Ct. Sept. 9, 2005) ("This is a custody proceeding in which the physician-patient privilege is not statutorily exempted . . . . Therefore, the physician-patient privilege in D.C. Code § 14-307 applies."). The public interest is far lower in custody proceedings than in neglect proceedings.

If disputes in this case are sufficiently important to override Appellant's statutory and constitutional right to privacy in her medical information, then it must be an unconstitutional delegation of powers to permit a master and not a judge to decide them. If the disputes are not sufficiently important to override her statutory and constitutional rights to privacy, then the orders necessarily violate those rights. Either way, the December 29th orders must be reversed. Otherwise, they could have the chilling effect of preventing Appellant from seeking treatment because she knows that private and confidential information will be shared with the special master without her consent.

CONCLUSION

The December 29, 2009 Orders unconstitutionally delegate the core judicial power to enter final decisions without ensuring adequate protections for Appellant's due process rights. They do so in the absence of *any* rule, statute or other authority permitting such delegation, and over Appellant's objection. Moreover, the December Orders violate this jurisdiction's clear law and public policies concerning child support, court costs, and protection of victims of domestic violence. Finally, the trial court violated Appellant's statutory and constitutional right to privacy in her medical records by forcing her to waive her constitutional rights to privacy and her medical privilege as to the Parenting Coordinators. This Court should reverse the trial court's December orders for each of these reasons.

Respectfully submitted,

_____

Kerri L. Ruttenberg
Danielle M. Hohos

JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July, 2010, I filed the required number of bound copies of the foregoing Brief of Appellant, Joint Appendix and two-volume Addendum of Authorities with the Clerk of Court via hand delivery. I further certify that I caused a copy of these documents to be served on Appellee by mailing them, via pre-paid UPS ground transportation, to the address below.

Gail B. Landau, Esq.
One Central Plaza
11300 Rockville Pike
Suite 710
Rockville, MD 20852

_____

Kerri L. Ruttenberg (D.C. Bar # 467989)
Jones Day
51 Louisiana Ave, NW
Washington, D.C. 20001
Counsel for Appellant

This the 27th day of July, 2010.