

DELEGATION OF JUDICIAL AUTHORITY TO EXPERTS: PROFESSIONAL AND CONSTITUTIONAL IMPLICATIONS OF SPECIAL MASTERS IN CHILD-CUSTODY PROCEEDINGS

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I. INTRODUCTION

Child-custody proceedings are an intricate, dramatic, and multi-faceted area of the family law system.¹ To determine custody, courts invade the privacy of the family to make decisions that will affect the rest of a child's life. There are many players in the system, all of whom strive for the best outcome in such highly emotional decisions.

Since the 1970s, family courts have granted custody based on their determination of the best interests of the child.² This subjective test has resulted in family courts referring psychological issues to mental-health professionals, who are assumed to be better qualified to make such delicate decisions.³ Specifically, judges increasingly appoint mental-health professionals as special masters and delegate to them fact-finding authority in order to inform their determination of the child's best interests.⁴

Use of special masters, however, may be problematic. Special masters in custody cases contribute to efficiency and provide family courts with psychological insights. Yet, the lack of professional and educational guidelines coupled with the power such an expert can wield over the court might ultimately harm the fragile nature of child-custody proceedings. To avoid this negative outcome, courts need clearer professional and judicial guidelines to ensure that special masters can continue to provide valuable assistance to family courts.

This note explores the issues presented in the effort to define professional criteria for special masters in family courts and the constitutional implications of

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¹ See ELEANOR E. MACCOBY ET AL., DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 266 (1992) (utilizing four central questions of "(1) gender differentiation in parental roles, (2) legal conflict, (3) children's contact with both parents over time, and (4) the nature of the co-parenting relationship" to study how divorced parents face the dilemmas of child custody); Victoria Mikesell Mather, *Evolution and Revolution in Family Law*, 25 ST. MARY'S L.J. 405, 413 (1993) (tracking major changes in family law over the last twenty-five years).

² Janet M. Bowermaster, *Legal Presumptions and the Role of Mental Health Professionals in Child Custody Proceedings*, 40 DUQ. L. REV. 265, 265 (2002).

³ *Id.* at 269.

⁴ *Id.* at 272. For a simple example of what an appointment of a special master entails, see SUPER. CT. OF CAL., MONTEREY COUNTY, LOCAL RS. 11.01–11.08, available at <http://www.monterey.courts.ca.gov/local.html> (follow "Local Rules" hyperlink) (last visited on Nov. 28, 2007) [hereinafter MONTEREY COUNTY RS.].

appointing mental-health professionals to quasi-judicial roles. First, Section II discusses the changes in how family courts view custody decisions and the resulting proliferation of special masters in family courts. Next, Section III examines the hurdles for defining the requirements that mental-health professionals must possess to act as qualified special masters. Section IV explores the constitutional issues involved in using special masters, primarily the potential of an unconstitutional delegation of judicial authority and related due process concerns. Finally, Section V shows how allowing parties to stipulate to a special master's findings on small factual issues may solve some of the professional and constitutional obstacles to the use of special masters in family court.

II. BACKGROUND

In recent years, family law courts have delegated decision-making authority to experts, particularly in the area of child custody.⁵ Commonly, courts employ psychiatrists, social workers, therapists, psychologists, and family law attorneys.⁶ The recent delegation of power is a response to the law's shift in the 1970s from the determinative, gender-based custody rules outlined below, to subjective determinations of the best interests of the child.⁷

A. Replacement of Determinative Rules with the Best-Interests-of-the-Child Standard

Beginning in the nineteenth century, the tender years doctrine became an exception to courts' preference for paternal custody.⁸ The courts presumed that awarding custody to the mother during a child's early years favored a child's interest because courts and society assumed a mother could provide a more nurturing environment.⁹ In the 1970s, legislatures and courts recognized the importance of gender-neutrality in family law and largely did away with the determinative rules that governed custody awards.¹⁰ Very few bright-line rules filled the void left by the revolution against determinative rules.¹¹ Rather, the new standard requires courts to subjectively determine the best interests of the child. In making this determination, judges must predict how parents will raise a child and

⁵ Bowermaster, *supra* note 2, at 268–69.

⁶ *Id.* at 269–70 (providing brief descriptions of the role each mental-health professional may play in family court).

⁷ *Id.* at 265 (explaining the general trends and uses of expert testimony).

⁸ *Id.* at 267.

⁹ Helms v. Franciscus, 2 Bland 544, 563 (Md. Ch. 1830) (“Yet even a court of common law will not go so far as to hold nature in contempt, and snatch helpless, pulling infancy from the bosom of an affectionate mother, and place it in the coarse hands of the father. The mother is the softest and safest nurse of infancy . . .”).

¹⁰ Bowermaster, *supra* note 2, at 268.

¹¹ *Id.* at 269.

meet the child's needs.¹² In choosing between parents, judges refer to many factors, some of which require value-based determinations to decide the fittest parent for the particular child.¹³

While most jurisdictions have enumerated lists of relevant factors similar to those in the Uniform Marriage and Divorce Act,¹⁴ the factors inherently implicate value judgments and personal biases. Consequently many judges, feeling unequipped to make such emotional and psychological decisions, have delegated the task of determining the best interests of the child to mental-health professionals.¹⁵ For example, mental-health professionals may perform child-custody evaluations by visiting the home and assessing the child's needs and may also submit psychological assessments to the court. After assessing the child's needs, experts also inform judges of the general effects of divorce on children and child development.¹⁶ Recently, family courts have employed special masters, more commonly used in commercial litigation, for decision-making roles in child-custody cases.¹⁷

¹²T.J. Hester, Note, *The Role of Mental Health Professionals in Child Custody Determination Incident to Divorce*, 14 WOMEN'S RTS. L. REP. 109, 109–10 (1992).

¹³See Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 260 (1975).

¹⁴See, for example, UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 282 (1998), which states:

The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

- (1) the wishes of the child's parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
- (4) the child's adjustment to his home, school, and community; and
- (5) the mental and physical health of all individuals involved.

The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

Id.

¹⁵Bowermaster, *supra* note 2, at 269–70.

¹⁶For example, experts often testify about the effects of “parental alienation syndrome” where one parent attempts to turn the child's affections away from the other parent. See, e.g., Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases*, 35 FAM. L.Q. 527, 531 (2001).

¹⁷Bowermaster, *supra* note 2, at 272.

B. Emergence of Special Masters

1. Historical Use of Special Masters

A state courts' authority to appoint or delegate decision-making power to special masters stems from the state's adoption of Federal Rule of Civil Procedure 53.¹⁸ Generally, Rule 53 allows for reference to a special master to:

- (A) perform duties consented to by the parties;
- (B) hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by
 - (i) some exceptional condition, or
 - (ii) the need to perform an accounting or resolve a difficult computation of damages; or
- (C) address pretrial and posttrial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.¹⁹

Courts use special masters for fact-finding and decision-making most often in complex litigation.²⁰ Under Rule 53, the court drafts a reference order that specifically describes the parameters of the master's authority.²¹ Generally, masters appointed by the judge or stipulated to by the parties aid in discovery motions, calculation of fees and damages, and management of mass tort litigation.²² Retired judges, attorneys, or academics with expertise and perspective most often act as special masters.²³ Parties usually pay the special master's fees based upon their relative responsibility for the need to have a special master, their relative financial means, and the amount in controversy.²⁴

The ubiquitous use of special masters today has led scholars to argue that the role of a special master has changed from the historical role of prelitigation

¹⁸ Lynn Jokela & David F. Herr, *Special Masters in State Court Litigation: An Available and Underused Case Management Tool*, 31 WM. MITCHELL L. REV. 1299, 1325 (2005) (chart summarizing each state's form of Rule 53). Courts also have inherent equitable powers to appoint special masters. *See In re Peterson*, 253 U.S. 300, 312 (1920) (holding that courts have inherent power to appoint persons to aid in performance of judicial duties). For simplicity, this Note will use language from the Federal version of Rule 53 as a proxy for various state adoptions of the Rule.

¹⁹ FED. R. CIV. P. 53(a)(1)(A)–(C).

²⁰ Linda J. Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2142–45 (1989).

²¹ FED. R. CIV. P. 53(b)(2)–(4).

²² Jokela & Herr, *supra* note 18, at 1303–07 (listing documented uses of special masters in federal and state court).

²³ Silberman, *supra* note 20, at 2134.

²⁴ FED. R. CIV. 53(h)(1)–(3).

discovery management to one that permeates all facets of litigation, including settlement.²⁵ Some have argued that judges, in appointing special masters, “have developed an almost Pavlovian response” to difficult and complex cases.²⁶ Moreover, few procedural guidelines exist to govern both the appointment and substantive practices of special masters, resulting in a system that fosters ad hoc reference to special masters.²⁷

2. *Emerging Use of Special Masters in Child-Custody Proceedings*

Similar to judges’ increased reliance on special masters in commercial litigation, family courts have more frequently appointed mental-health professionals as special masters.²⁸ Advocates for special master appointments in custody cases emphasize the benefits that special masters can provide in high-profile divorces, where the parties face long, drawn-out battles in the courtroom with little hope of consensus.²⁹ Additionally, proponents argue that the use of special masters in child custody proceedings and high-profile divorces protects vulnerable children from consuming litigation and familial uncertainty.³⁰

²⁵ Silberman, *supra* note 20, at 2135–36.

²⁶ *Id.* at 2158. *But see* Richard A. Posner, *Coping with the Caseload: A Comment on Magistrates and Masters*, 137 U. PA. L. REV. 2215, 2217–18 (1989) (arguing that although there are few rules that govern special masters, and judges perhaps over-delegate matters to special masters, special masters nevertheless are respectable people and “a few bad apples need not spoil the entire barrel”).

²⁷ *See* James S. DeGraw, Note, *Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits on Special Masters*, 66 N.Y.U. L. REV. 800, 803 (1991) (focusing primarily on the deviation from traditional uses of special masters in institutional reform litigation).

²⁸ Bowermaster, *supra* note 2, at 272–73. The term “special master” has taken on many different names in family court. Common synonyms include: master, referee, or judicial adjunct. Jokella & Herr, *supra* note 18, at 1325. Certain psychology periodicals refer to parent coordinators as special masters, but parent coordinators are used more often as post-trial therapists to families. *See, e.g.*, OKLA. STAT. ANN. tit. 43, § 120.2 (West Supp. 2007). Parent coordinators offer workable custody arrangements and then stay in contact with the family to make sure the parents implement the arrangement. Special masters, on the other hand, participate in pre-trial motions and trial adjudications. For a description of parental coordinator duties, see Matthew J. Sullivan, *Ethical, Legal, and Professional Practice Issues Involved in Acting as a Psychologist Parent Coordinator in Child Custody Cases*, 42 FAM. CT. REV. 576, 576 (2004), and Christine A. Coates, et al., Special Issue, *Parenting Coordination for High-Conflict Families*, 42 FAM. CT. REV. 246, 247–48 (2004).

²⁹ Janet Griffiths Peterson, *The Appointment of Special Masters in High Conflict Divorces*, UTAH B.J. Aug./Sept. 2002 at 16, 17 (arguing that appointing special masters in commercial litigation to ensure compliance with court orders is analogous to the use of special masters in family court where parents can become fiercely litigious).

³⁰ *Id.* at 18; *see* Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL. L. REV. 495, 529–34 (2001) (explaining ways in which a special master can mediate between two hostile parents by setting parent plans).

To facilitate the use of special masters in family law issues, courts have adopted Rule 53 or equivalent rules in varying ways.³¹ Some special masters are only permitted to determine the best interests of the child with respect to a narrowly defined range of issues: education, extracurricular activities, healthcare, and issues surrounding substance-abusing parents.³² Other courts, however, have extended the power of a special master well beyond these unique circumstances and have either appointed a special master or allowed the parties to stipulate to the use of a special master to decide the final custody arrangement.³³ In each situation, a mental-health professional must assume a legal role that blends her professional knowledge and experience with her knowledge and experience—however limited—of legal procedure and dispute resolution.

Overall, the indeterminate nature of the best-interests-of-the-child standard, combined with the fast-growing use of special masters to make factual decisions, presents issues of professionalism and constitutionality. As courts deciding custody arrangements assign more responsibility to special masters, the need for clearer professional and judicial guidelines increases.

III. PROFESSIONAL IMPLICATIONS OF SPECIAL MASTERS

A. *Professional guidelines*

Critics are concerned that courts may give too much deference to a mental-health professional's findings, regardless of the professional's credentials.³⁴ In complex commercial litigation, retired judges and seasoned attorneys usually serve as special masters.³⁵ In child-custody proceedings, however, mental-health professionals may have little experience with judicial procedure and must quickly adapt to the legal arena.³⁶ Generally, mental-health professionals acting as experts must abide by professional rules of conduct, such as the American Psychological Association's Ethical Principles of Psychologists.³⁷ Beyond that, Rule 53 gives

³¹ ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 108–12 (2004).

³² *Id.* at 110–11.

³³ For examples of states allowing stipulation or arbitration for child custody, see MICH. COMP. LAWS § 600.5071(b) (2004) and *In re E.H.*, 2006 UT 36, ¶¶ 20–28, 137 P.3d 809, 814–17.

³⁴ See Bowermaster, *supra* note 2, at 265.

³⁵ Silberman, *supra* note 20, at 2134.

³⁶ Bowermaster, *supra* note 2, at 276–90 (explaining that mental-health professionals may refuse to take on a judicial role, may be ignorant of new presumptions developed in the law, have inadequate legal knowledge, or disagree with the policy behind the law). *But see* N.H. SUP. CT. R. 38, APPLICATION OF THE CODE OF JUDICIAL CONDUCT, available at <http://www.courts.state.nh.us/rules/scr/scr-38.htm> (last visited Nov. 28, 2007) (including a marital master and a special master as judges subject to the judicial conduct code).

³⁷ APA, Ethical Principles of Psychologists and Code of Conduct (2003), available at <http://www.apa.org/ethics/code2002.pdf>; see also Marion Gindes, *Guidelines for Child*

little guidance for the qualifications that a master must have to make an informed decision. For example, under Rule 53(b)(1), “[t]he court must give the parties notice and an opportunity to be heard before appointing a master.”³⁸ The rule also provides that “[a] party may suggest candidates for appointment.”³⁹ Although the rule’s language may prevent arbitrary appointments by allowing the parties a chance to be heard, the rule does not adequately define the professional eligibility for the proposed masters. This lack of guidance gives the court and parties broad discretion in determining the eligibility and skill of the proposed special master.

Some jurisdictions have opted, through local court rules, to set further guidelines on what types of experts may serve as special masters in custody proceedings.⁴⁰ For example, California’s Monterey County Local Court Rules set special guidelines for special masters deciding child custody and visitation.⁴¹ Under the Monterey County Local Court Rules, psychologists, psychiatrists, marriage and family counselors, clinical social workers, and attorneys may serve as special masters.⁴² A psychologist or psychiatrist must belong to a national or state professional association, have three years post-license experience in child and family therapy, and have three years experience in diagnostic evaluations for family courts and/or mediation with a minimum of ten evaluations.⁴³

The Monterey County Local Court Rules also recommend that psychologists and psychiatrists serving as special masters be familiar with the ethical issues surrounding child-custody disputes and that they previously work at least six cases with attorneys.⁴⁴ Counselors and social workers must meet the same guidelines as

Custody Evaluations for Psychologists: An Overview and Commentary, 29 FAM. L.Q. 39, 41–49 (1995); Task Force for Model Standards of Practice for Child Custody Evaluation, *Model Standards of Practice for Child Custody Evaluation*, 45 FAM. CT. REV. 70, 72–75 (2007). Special masters are also bound by the Code of Judicial Conduct. MODEL CODE OF JUDICIAL CONDUCT, Application of Code of Judicial Conduct, § A (2004).

³⁸ FED. R. CIV. P. 53(b)(1).

³⁹ *Id.*

⁴⁰ See, e.g., N.H. SUPER. CT. ADMIN. RS. 12-1 to 12-18, available at <http://www.nh.gov/judiciary/rules/admn/index.htm> (last visited Nov. 28, 2007) (requiring that a “marital master” be appointed by a Master Committee, not practice law, and have three-year initial terms with renewable five-year tenures); SUPER. CT. CAL., SACRAMENTO COUNTY, LOCAL R. 14.09(A)–(B), available at http://www.saccourt.com/geninfo/local_rules/PDFChapters/2007/Chapter%2014%20010107.pdf [hereinafter SACRAMENTO COUNTY RS.] (stating that the court will publish a list of masters that meet set requirements, from which the parties may choose to stipulate).

⁴¹ MONTEREY COUNTY RS., *supra* note 4, at Rs. 11.02–.08. But see FLA. FAM. LAW R. P. 12.492(a), available at http://www.flcourts.org/gen_public/family/forms_rules_rules_and_opinions.shtml (follow “Acrobat (PDF)” hyperlink next to “Family Law Rules”) (stating that a court may only appoint a special magistrate from the Florida Bar).

⁴² MONTEREY COUNTY RS., *supra* note 4, at R. 11.02(b).

⁴³ *Id.*

⁴⁴ *Id.*

psychologists and psychiatrists, but must have five years of experience in areas where psychologists and psychiatrists only need three.⁴⁵

If all jurisdictions created bright-line requirements similar to those described above, child-custody decisions made by special masters would have more continuity and predictability.⁴⁶ Clear guidelines would allow family courts to benefit from the psychological expertise a special master has in dealing with high-conflict divorces and custody battles while maintaining credibility.

B. Special Masters Playing Dual Roles

On the other hand, while professional eligibility requirements may provide a court more guidance in appointing a special master, the same requirements may not reveal a master's personal biases. Rule 53 requires that: "[a] master must not have a relationship to the parties, counsel, action, or court that would require disqualification of a judge under 28 U.S.C. § 455 unless the parties consent with the court's approval to appointment of a particular person after disclosure of any potential grounds for disqualification."⁴⁷ Special masters in child-custody proceedings may have unusually high levels of involvement with the parents and children involved in the litigation.⁴⁸ A special master may observe a family closely for up to a year⁴⁹ and will undoubtedly form subconscious bonds with the family.

Compared to custody proceedings, a special master in commercial litigation may be more professionally removed from the parties and therefore may more easily remain unbiased. In child-custody proceedings, however, the parties may wish to choose a special master with whom they have had contact.⁵⁰ Moreover, to make an informed decision regarding the best interests of the child, the special master may also need to spend time with one or both parents observing everyday life. This method of observation creates a situation where the special master may not differentiate his or her professional opinion from personal or emotional feelings toward one or both parents.⁵¹ As one commentator observed:

⁴⁵ *Id.*

⁴⁶ Peterson, *supra* note 29, at 20.

⁴⁷ FED. R. CIV. P. 53(a)(2). Notably, 28 U.S.C. § 455(a) disqualifies judges and magistrates whose judicial partiality might be reasonably questioned.

⁴⁸ See Daniel B. Pickar, *On Being A Child Custody Evaluator: Professional and Personal Challenges, Risks, and Rewards*, 45 FAM. CT. REV. 103, 104–07 (2007) (explaining the difficulties a mental-health professional encounters when overcoming bias and maintaining a forensic rather than sympathetic role).

⁴⁹ *In re E.H.*, 2006 UT 36, ¶ 11, 137 P.3d 809, 813.

⁵⁰ Pickar, *supra* note 48, at 105.

⁵¹ Kirk Heilbrun, *Child Custody Evaluation: Critically Assessing Mental Health Experts and Psychological Tests*, 29 FAM. L.Q. 63, 70–71 (1995) (addressing the difficulties treating clinicians face when testifying as experts in litigation involving their current patients).

It would be very difficult, if not impossible, in most cases for a clinician to “set aside” the attitudes and feelings that constitute the “therapeutic orientation” that has been developed with a given individual or family in exchange for the more detached, skeptical, and objective stance that is necessary for the forensic evaluator.⁵²

Understandably, marital special masters may also be tempted to assume additional roles as counselors and/or mediators for the family. However, Rule 53 requires that the order referencing the master specifically define situations in which a master may appropriately speak *ex parte* with the parties.⁵³ Although mental-health professionals and attorneys are asked to rely on their professional acumen when making decisions, “judgments and decisions made by the Special Master are often simply based on reasonableness and not on any scientific or professional knowledge . . . and his or her own beliefs about what is best for children.”⁵⁴ One scholar stated, “[t]he danger of a new cottage industry, enhanced by large fees for special masters and endangered by potential cronyism and conflicts of interest, cannot be ignored when assessing the system of special masters presently in vogue.”⁵⁵

Overall, special masters fill the gaps left open by the non-determinative best-interests-of-the-child standard. Given the fact-based nature of child-custody proceedings, courts need professional guidance to inform judicial decision making. However, courts should establish stricter professional guidelines to lend more credibility and predictability to the current system. Additionally, as shown below, courts should be mindful of their constitutional judicial role when delegating authority to special masters.

IV. CONSTITUTIONAL IMPLICATIONS OF SPECIAL MASTERS

A. *Delegation of Core Judicial Powers*

Although special masters can provide insight into family relationships that judges may not have, delegating fact-finding authority to special masters diminishes the judiciary’s core constitutional responsibility. When making a reference to a special master, “the authority of the trial court . . . is constrained by the basic constitutional principle that judicial power may not be delegated.”⁵⁶ In general, “the court is duty bound to examine and consider the evidence for itself . . . in entering the judgment recommended by the master.”⁵⁷

⁵² *Id.* at 70.

⁵³ FED. R. CIV. P. 53(b)(2)(B).

⁵⁴ Sullivan, *supra* note 28, at 580.

⁵⁵ Silberman, *supra* note 20, at 2137.

⁵⁶ *Ruisi v. Thieriot*, 62 Cal. Rptr. 2d 766, 772 (Cal. Ct. App. 1997).

⁵⁷ *Bell v. Bell*, 307 So. 2d 911, 914 (Fla. Dist. Ct. App. 1975); *In re United States*, 816 F.2d 1083, 1087 (6th Cir. 1987) (holding that a special master could not decide the dispositive summary judgment motion because even though the antitrust case was complex,

Rule 53 requires that a court appoint a special master only if warranted by “some exceptional condition.”⁵⁸ The United States Supreme Court in *La Buy v. Howes Leather Co.* stated that court congestion is not an “exceptional circumstance” that warrants appointment of a master.⁵⁹ As noted above, however, advocates of special masters in child-custody proceedings often cite congested courts and emotional damage to children as reasons for appointing special masters.⁶⁰

Courts that have reviewed the use of special masters in custody proceedings have rejected the argument that court congestion constitutes an “exceptional condition.” For example, in *In re the Marriage of S.K.B. v. J.C.B.*, the Missouri trial court appointed a special master to conduct a five-day hearing to determine the custody of a thirteen-year-old girl.⁶¹ The master preserved a record for only two days of the proceeding, leaving out the mother’s testimony entirely.⁶² Moreover, the master unilaterally denied the parents’ repeated requests for guardian ad litem representation.⁶³

Despite the trial court’s reasoning, the appellate court rejected the appointment of a special master.⁶⁴ The appellate court determined that calendar congestion and the attorneys’ “procedural ‘games’” did not constitute exceptional conditions warranting the appointment of a master for a custody issue.⁶⁵ Instead, the court concluded that “[m]asters are appointed to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause, and not to place the judge into a position of a reviewing court.”⁶⁶ Additionally, the court reasoned that the “exceptional conditions” standard should especially apply to custody cases where it is the “better practice to have a sitting judge hear and decide the matter.”⁶⁷

Other courts have agreed that delegating the finding of the best interests of the child to a special master strips the court of its core judicial powers.⁶⁸ In a prominent California case regarding a mother’s right to move with her daughter to Rhode Island, *Ruisi v. Thieriot*, the trial court appointed a special master after the

appointment of a special master to decide matters other than discovery “run[s] counter to the spirit and purpose of judicial administration”).

⁵⁸ FED R. CIV. P. 53(a)(1)(B)(i).

⁵⁹ 352 U.S. 249, 259 (1957) (holding that in an antitrust suit, neither court congestion nor complexity of facts and law was an exceptional circumstance).

⁶⁰ See *supra* notes 29–30 and accompanying text.

⁶¹ 867 S.W.2d 651, 655 (Mo. Ct. App. 1993).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 658–59.

⁶⁵ *Id.* at 658.

⁶⁶ *Id.* (internal quotations and citations omitted); see also *M.F.M. v. J.O.M.*, 889 S.W.2d 944, 950 (Mo. Ct. App. 1995) (“Where a master is used, the trial court sees not the child, but only a cold record of the interview.”).

⁶⁷ *In re Marriage of S.K.B.*, 867 S.W.2d at 659.

⁶⁸ *Ruisi v. Thieriot*, 62 Cal. Rptr. 2d 766, 773–75 (Cal. Ct. App. 1997).

court evaluator recommended that a special master decide “any and all issues regarding custody.”⁶⁹ The appellate court determined that only a limited number of issues could be delegated to a special master. Such issues included accounting, discovery questions, special proceedings, and questions of fact in *existing* controversies, but not custody disputes that may arise later.⁷⁰

Additionally, the Monterey County Local Court Rules, discussed above, state that recommendations “which alter a child’s primary residence, alter an award of physical custody, alter an award of legal custody, prohibit a party’s contact with his/her children, or require or prohibit adherence to a religion,” are prohibited.⁷¹ These rules further state that such issues “are reserved to the . . . court for adjudication, and may be presented to the court by either party or upon the recommendation of the Special Master without a recommendation as to outcome.”⁷² As evidenced by the cases and court rules discussed, a delegation to a master for custody awards likely does not constitute an exceptional circumstance and also jeopardizes preservation of courts’ constitutional powers.

B. Due Process Concerns

Beyond the potential unconstitutional delegation of judicial authority, appointing special masters in custody proceedings may deprive family members of due process. Rule 53 gives the parties some rights to object to the special master and to the court’s powers to overturn the master’s findings. In general, Rule 53 allows parties to make objections to a master’s order within twenty days of service.⁷³ If either party files an objection, Rule 53 only allows an appellate court to overturn the master’s factual finding if clearly erroneous.⁷⁴ In custody proceedings such a high standard of appellate deference may not adequately address and remedy biases that occur when special masters determine the best interests of the child.⁷⁵ Courts have recognized that the special master system “undoubtedly has salutary effects resulting in the more expeditious dispatch of the

⁶⁹ *Id.* at 771–72.

⁷⁰ *Id.* at 774. The court conceded, however, that the California statute allows the parties to agree or stipulate for the court to refer to a special master to try “any or all of the issues in an action or proceeding, whether of fact or law.” *Id.* at 773 n.13 (quoting CAL. CODE CIV. P. § 638(a)). Thus, while California has restricted the range of issues that a special master may determine, these restrictions are subject to the parties’ contractual agreements.

⁷¹ MONTEREY COUNTY RS., *supra* note 4, at R. 11.03(c).

⁷² *Id.*

⁷³ FED. R. CIV. P. 53(g)(2).

⁷⁴ FED. R. CIV. P. 53(g)(3)(A). If the parties have stipulated to a master, then the master’s findings are final as to facts but not law. *Id.* at 53(g)(3)(B).

⁷⁵ See *Hadick v. Hadick*, 603 A.2d 915, 917–18 (Md. Ct. Spec. App. 1992) (holding that family court chancellor could not accept special masters findings simply because they were not clearly erroneous, but had to exercise independent judgment of the best interests of the child based on the facts).

judicial process” but that “[I]tigators in . . . child custody proceeding[s] . . . are entitled to have their cause determined ultimately by a duly qualified judge.”⁷⁶ This language suggests that if a special master’s determination is immune from review on appeal, each parent is entitled as a matter of due process to have the court thoroughly consider and question the masters’ analysis and recommendation.⁷⁷

Additionally, reference to special masters may involve inappropriate *ex parte* discussions between the special master and the parties outside the formal hearing process. Such discussions may deprive the parties of an opportunity to respond to the statements of the special master and the other party.⁷⁸ Rule 53 requires the order appointing the master to define circumstances in which the master may proceed *ex parte*.⁷⁹ In many instances, however, masters have failed to either include all testimony on the official record or have conducted private conferences.⁸⁰ If a special master is allowed to spend too much time with a parent or child and does not include interviews on the record, the master’s biases will be hidden from the court. Some courts have attempted to remedy this situation by making it explicit in the appointment that the court will not give communications

⁷⁶ *Ellis v. Ellis*, 311 A.2d 428, 430–31 (Md. Ct. Spec. App. 1973) (determining that the mother had a right to an independent review of the evidence and testimony despite the master’s report, especially since the chancellor accepted the report without any independent information of the living conditions of the parties). *But see Ex parte Atkinson*, 121 S.E.2d 4, 8 (S.C. 1961) (“When considering the question of the custody of a child between estranged parents, the recommendation of the Master is entitled to considerable weight because of his opportunity to observe the witnesses”); *Moser v. Moser*, 836 P.2d 63, 66–67 (Nev. 1992) (holding that even if a party objects to factual findings of a special master, the reviewing district court cannot strike all of the master’s findings without an evidentiary hearing).

⁷⁷ For an example of one local rule that attempted to remedy the deprivation of due process by creating more transparency, see MARIN COUNTY SUPERIOR COURT UNIFORM LOCAL R. 6.33, available at <http://www.co.marin.ca.us/depts/MC/main/PDFs-LocalRules/ULRules.pdf>, which states that the court “permits parties, by stipulation only, to agree to the appointment of a Special Master.” Additionally, the rule also limits a special master’s authority by explicitly stating that “[n]o Special Master will have authority to make orders on subjects which are, by law, reserved to the Court for adjudication, such as substantial changes in time sharing arrangements, an award of physical custody, an award of legal custody, or orders which substantially interfere with a party’s contact with his/her children.” *Id.*

⁷⁸ See Degraw, *supra* note 27, at 804, 816–17 (arguing that the prohibition against *ex parte* discussions is constantly violated by special masters).

⁷⁹ See *supra* Section II; FED. R. CIV. P. 53(b)(2)(B).

⁸⁰ See, e.g., *In re Marriage of S.K.B. v. J.C.B.*, 867 S.W.2d 651, 655 (Mo. Ct. App. 1993) (noting that the master excluded the mother’s testimony); *Moser*, 836 P.2d at 65 (requiring new psychologist reports after the father claimed the court erroneously considered only one of two available reports, rejecting the one report on which the father alleged the child had “bonded” with the psychologist); *Walker v. Walker*, 317 N.E.2d 415, 417 (Ohio Ct. App. 1974) (holding that if the referee wishes to interview children in private, a record of the interview must be made upon the request of either party).

received *ex parte* a presumption of correctness.⁸¹ However, this standard may be unworkable in a child-custody proceeding where the judge relies more heavily on the expert's expertise in interviewing the child and applying psychological analysis. Ultimately, depriving a parent of access to his or her child implicates a violation of fundamental constitutional rights to family associations. Parents ought to have a meaningful chance to be heard through independent court review.⁸² While these procedural inconsistencies may not deprive a party of a fair trial, they raise due process questions about the prudence of delegating such important court procedures to a quasi-judicial professional.

V. POSSIBLE SOLUTION: STIPULATIONS TO MASTERS FOR MINOR FACTUAL DISPUTES

Concerns regarding the professional eligibility of special masters and the constitutional problems associated with their involvement in family courts may be resolved by making reference to special masters only when stipulated to by the parents.⁸³ In principle, a stipulation that appoints a special master to determine small factual issues would insure the parents' consent and allow the trial judge to make an informed final decree about the best interests of the child without risking an improper delegation of judicial authority. The parties may also have more control over the education and experience of the chosen special master. Because custody proceedings vary widely in facts and circumstances, the parties can choose a special master who will fit their unique needs.

Some jurisdictions already require both parents' consent when a family court appoints a special master.⁸⁴ For example, in Florida, if a special master is to make a "conclusive determination" about the case, the parties' consent is required.⁸⁵ In

⁸¹ See *Ruiz v. Estelle*, 679 F.2d 1115, 1163 (5th Cir. 1982) (stating that *ex parte* discussions will not be presumed correct and will not be subject to clearly erroneous standard of review), *amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982) (cited in *Degraw*, *supra* note 27, at 820 n.121); *cf. Krinsley v. United Artists Corp.*, 225 F.2d 579, 582 (7th Cir. 1955) (holding that the "clearly erroneous" standard of review applies to "findings of fact made after hearings, by masters" (citing FED. R. CIV. P. R. 53(c)(2))).

⁸² *B.A.C. v. B.L.M.*, 30 P.3d 573, 578 (Wyo. 2001) (noting that a family court commissioner could not deny evidence and district court could not defer to commissioner's findings without independent finding, especially when involving child custody).

⁸³ A stipulation to a special master implies that the parties have consented to a special master and the court need not appoint one. In general, family courts are more hesitant to appoint special masters without the parties' consent. See, e.g., *SACRAMENTO COUNTY RS.*, *supra* note 40, at R.14.09(B) ("The court will not order parties to use a Special Master . . .").

⁸⁴ See *Swezy v. Bart-Swezy*, 866 So.2d 1248, 124 (Fla. Dist. Ct. App. 2004). Florida Rule 12.490(b)(1) requires "[n]o matter shall be heard by a general magistrate without an appropriate order of reference and the consent to the referral of all parties." FLA. FAMILY LAW R. P. 12.490(b)(1).

⁸⁵ *In re Marriage of Esparza*, No. DO44853, 2006 WL 165014, at *4 (Cal. Ct. App. Jan. 4, 2006).

other words, the party can stipulate to a special master to avoid the potential for an unconstitutional delegation of judicial power. Therefore, requiring the parties to make a detailed stipulation to a special master may alleviate some of the constitutional concerns involved in judicial appointment of special masters.⁸⁶

However, stipulating to the appointment of a special master in a custody dispute should be limited to small factual disputes to avoid giving ultimate decision-making power to a special master who may not have the same legal experience as a judge.⁸⁷ Currently, most courts would likely hesitate in entering a master's order regarding final custody of a child.⁸⁸ For example, the Monterey County Local Court Rules only consider the parties' stipulation in limited, discreet matters.⁸⁹

⁸⁶ Bowermaster, *supra* note 2, at 273 (stating “[t]he range of referable issues is much broader when the parties affirmatively consent to appointment of a special master.”).

⁸⁷ See Peterson, *supra* note 29, at 18 (arguing that because special masters are most analogous to court commissioners, a special master cannot have judicial authority but could be assigned to find smaller issues such as vacation time, education, etc.).

⁸⁸ See Bowermaster, *supra*, note 2, at 295–96; American Psychological Association, *Guidelines for Child Custody Evaluations in Divorce Proceedings*, 29 FAM. L.Q. 51, 58 (1995). Specifically, the American Psychological Association's guidelines state:

While the profession has not reached consensus about whether psychologists ought to make recommendations about the final custody determination to the courts

If the psychologist does choose to make custody recommendations, they should be derived from sound psychological data, and must be based upon the best interests of the child Recommendations are based on articulated assumptions, data, interpretations, and inferences based upon established professional and scientific standards. Psychologists guard against relying upon their own biases or unsupported beliefs in rendering opinions in particular cases.

Id. See also *Glauber v. Glauber*, 600 N.Y.S.2d 740, 741–43 (N.Y. App. Div. 1993) (holding that the court would not recognize an arbitration agreement for child custody determination).

⁸⁹ MONTEREY COUNTY RS., *supra* note 4, at R. 11.03(a). The local rules state the following as the limited matters for stipulation:

1. Dates and times of pick-up and delivery
2. Sharing of parent vacations and holidays
3. Method of pick-up and delivery
4. Transportation to and from visitation
5. Selection of child care/daycare and baby sitting
6. Bedtime
7. Diet
8. Clothing
9. Recreation
10. After school and enrichment activities
11. Discipline

Recently, however, the Utah Supreme Court allowed a biological mother and the adoptive parents involved in a heated custody dispute to stipulate to the use of a special master to ultimately determine the best interests of the child.⁹⁰ An analysis of this case shows the danger in allowing a stipulation for a custody award, but also suggests that stipulations to smaller matters may improve court efficiency and reduce hostile litigation.

In *In re E.H.*, a mother allowed a family to adopt her child after the prospective adoptive parents assured her that all of their children were well adjusted and on the honor roll at school.⁹¹ After the biological mother lived with the adoptive parents, she felt the adoptive parents had not represented their family truthfully, and appealed to the court to regain custody of her child.⁹² Before trial the parties decided that to facilitate a resolution, they would stipulate to a special master to find the best interests of the child. The parties also agreed that the trial court would enter the final decree.⁹³ Following the policy arguments that “the law favors the settlement of disputes” and that arbitration agreements often stop the court from intervening, the Utah Supreme Court reasoned that the parties could determine by contract how they wished to settle the final custody arrangement.⁹⁴ The court compared the stipulation to a stipulation of facts that “determine[s] the contours of the factual landscape” and as “an exercise entirely consistent with efficient and just judicial administration.”⁹⁵ The court further reasoned that because the court retained the power to review the psychologist’s determination and

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12. Health care management
 13. Alterations in schedule which do not substantially alter the basic time share agreement
 14. Participation in visitation (significant others, relatives, etc.)

Id.

⁹⁰ *In re E.H.*, 2006 UT 36, ¶ 21, 137 P.3d 809, 814–15.

⁹¹ *Id.* ¶ 7, 137 P.3d at 812.

⁹² *Id.*

⁹³ *Id.* ¶ 9, 137 P.3d at 812. The stipulation at issue stated:

[T.H.] having waived any right to proceed on her claim to set aside the relinquishment for fraud, constructive fraud, violation of procedures, breach of contract, or for any other good cause in light of the parties’ Stipulation, it is hereby ordered that she shall not challenge the Judgment in this case or in the adoption case on the basis of such claims. [The adoptive parents] and Families for Children having waived any right to object to or challenge the propriety or enforceability of a Judgment for post-adoption contact in this case in light of the parties’ Stipulation, it is hereby ordered that they shall not challenge such an order or Judgment for post-adoption contact should such an order or Judgment be recommended.

Id. ¶ 10, 137 P.3d at 813.

⁹⁴ *Id.* ¶¶ 20–21, 137 P.3d at 814–15.

⁹⁵ *Id.* ¶ 22, 137 P.3d at 815.

overturn the recommendation if “clearly erroneous,” the core functions of the court were not compromised by the stipulation.⁹⁶ Because the trial court had ultimate authority to enter the final order, the Utah Supreme Court found that the stipulation did not jeopardize any core judicial powers.⁹⁷

Similar stipulations may solve some of the constitutional obstacles a family court encounters when appointing a special master because stipulations allow the court to respect the parties’ wishes without relinquishing court authority. However, stipulations should be limited to smaller factual disputes. Although a court may see virtue in permitting parties to contract for a resolution of their dispute, allowing parties to stipulate to a final determination of the best interests of the child may trump the purpose of the judiciary. If such stipulations are upheld, the court becomes merely a “reviewing court” with little power to balance the special master’s findings with its own view of the facts.⁹⁸ Although *In re E.H.* stands for the proposition that parties may stipulate to an ultimate custody decision made by a special master, the reasoning of the court fails to address the commonly accepted concept that judicial efficiency is not an exceptional condition under the rule.⁹⁹ Furthermore, although the court speaks extensively about its ability to overturn a special master’s findings if “clearly erroneous,” it points to nothing in Utah’s version of Rule 53 that would give the court safeguards to verify the veracity of the special master’s order.¹⁰⁰

Overall, a stipulation for a special master’s findings on parenting time, school choice, location, and other day-to-day activities would help the court avoid the difficult task of inquiring into the parties’ private lives, but would preserve the courts’ ultimate discretion over the final custody award. A stipulation to a special master will protect the parties’ constitutional rights and will protect fragile family bonds from high-conflict litigation. This proposed solution will also conform to the general direction of private ordering in family law and at the same time keep ultimate discretion and authority with the court.

VI. CONCLUSION

The requirement of a family court to find the best interests of the child in a custody proceeding has made custody awards more gender-neutral but has also made custody determinations more value-based and less predictable. Consequently, the reliance on expert testimony in determining the best interests of

⁹⁶ *Id.* ¶ 23, 137 P.3d at 815.

⁹⁷ *Id.* ¶ 28, 137 P.3d at 815–16.

⁹⁸ *In re Marriage of S.K.B.*, 867 S.W.2d 651, 658 (Mo. Ct. App. 1993).

⁹⁹ *See* UTAH R. CIV. P. 53 (stating that “[a] reference to a master shall be the exception and not the rule . . . [i]n actions to be tried without a jury, save in matters of account, a reference shall, in the absence of the written consent of the parties, be made only upon a showing that some exceptional condition requires it.”).

¹⁰⁰ FED. R. CIV. P. 53(g)(3)(B) states that factual findings by a special master stipulated to by the parties will be final. Therefore, a stipulation to a special master may alleviate the due process concerns involved in appointments of special masters.

the child has grown more popular among courts. While experts often testify as to their opinion, some act as special masters with bigger roles in the final custody decision under a process equivalent to Federal Rule of Civil Procedure 53. While delegating judicial proceedings to special masters may unclog courts and shorten lengthy proceedings in hostile divorce litigation, clearer rules should be set in place to guarantee that courts will retain their ultimate adjudicative power.

First, the unique nature of the child-custody proceeding may require stricter guidelines than those that govern traditional special masters under Rule 53. Special masters in complex commercial litigation, often retired judges and attorneys, have knowledge of court procedure and the importance of pre-trial decisions. Mental-health professionals acting as special masters in family court may not reconcile their professional standards with court procedure. Furthermore, a special master in family court may not separate her own beliefs and biases from the necessary legal conclusions of the child's best interest. While some jurisdictions have set specific educational and experience requirements for mental-health professionals serving as special masters, such objective requirements may not guarantee that the special master will serve the court adequately.

Second, the use of special masters in child-custody proceedings may strip the court of its core fact-finding function. If the special master is allowed to enter a report of facts or ultimate findings and the court is bound by that report unless clearly erroneous, the court may in essence become a reviewing court rather than a finder of fact and law. A parent appearing in front of a court for an ultimate determination of their child's custody deserves to have a judge make the final conclusions. Although the court may be able to overturn a special master's findings if clearly erroneous, the high deference makes it less likely that parties will appeal decisions, effectively giving special masters more decision-making authority. Additionally, the process of monitoring a family to determine the best interests of the child may result in inappropriate ex parte discussions between parties and the special master.

One solution to these problems is to allow the parties to stipulate to the use of a special master only for small factual issues. Requiring parties to consent to the use of a special master may solve some of the problems inherent in setting uniform professional standards for special masters. Furthermore, party stipulations to the use of a special master may protect the court by preventing it from unconstitutionally delegating its fact-finding authority.

In short, special masters play an important role in the court system. To preserve this important role, courts and legislatures should develop clearer rules to ensure reliability. While the best-interests-of-the-child standard will always remain subjective and value driven, guidelines for decision makers will help preserve judicial authority and maintain access to professionals that provide such valuable assistance.