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## Family Law- Letting Go and Stopping the Continuous Cycle of Litigation: Massachusetts Supreme Judicial and Limited Non-Binding Parent Coordinator Authority in Custody Cases of Minor Children - Bower v. Bournay-Bower 15 N.E.3D 745 (Mass. 2014)

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**FAMILY LAW— LETTING GO AND STOPPING  
THE CONTINUOUS CYCLE OF LITIGATION:  
MASSACHUSETTS SUPREME JUDICIAL COURT  
AFFIRMS SCOPE OF JUDICIAL AND LIMITED  
NON-BINDING PARENT COORDINATOR  
AUTHORITY IN CUSTODY CASES OF MINOR  
CHILDREN—*BOWER V. BOURNAY-BOWER*,  
15 N.E.3D 745 (MASS. 2014).**

To protect all litigants' access to justice, the Massachusetts Constitution provides that an individual has the right to seek recourse for all injuries or wrongs to persons, property, or character.<sup>1</sup> In domestic relation cases, recent trends have shown that parties tend to unanimously agree to alternative dispute resolutions (“ADR”) rather than enduring protracted and expensive litigation.<sup>2</sup> By preserving the legislative intent set forth in these provisions, all parties must agree to utilize a third-party mediator who possesses decision-binding authority, instead of completing

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<sup>1</sup> See MASS. CONST. pt. 1, art. XI. (providing right to remedy for wrongs). Article 11 of the Massachusetts Declaration of Rights states in full:

Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; comfortably to the laws.

*Id.*

<sup>2</sup> See Elizabeth F. Beyer, *A Pragmatic Look at Mediation and Collaborative Law as Alternatives to Family Law Litigation*, 40 ST. MARY'S L.J. 303, 309 n.23 (2008) (citing Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation Settlements*, 46 STAN. L. REV. 1339, 1340 (1994)) (recognizing that 85% to 95% of family law cases mostly settle by using arbitration); see also *Preparing for Family Mediation*, AMERICAN BAR ASSOCIATION SECTION OF DISPUTE RESOLUTION, 2 (2012), [https://www.americanbar.org/content/dam/aba/images/dispute\\_resolution/Mediation\\_Guide\\_Family.pdf](https://www.americanbar.org/content/dam/aba/images/dispute_resolution/Mediation_Guide_Family.pdf) (reaffirming mediation normally produces long-lasting solution using collaborative problem solving). See generally John Lande, *The Movement Toward Early Case Handling in Courts and Private Dispute Resolution*, 24 OHIO ST. J. ON DISP. RESOL. 81, 84 (2008) (stating most cases settle without trial through alternative means); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 461 (2004), <http://epstein.wustl.edu/research/courses/judpol.Galanter.pdf> (tracking steady increase in alternative dispute resolution methods replacing trial hearings).

the full course of a case.<sup>3</sup> In *Bower v. Bournay-Bower*,<sup>4</sup> the Supreme Judicial Court (“SJC”) considered whether a judge has the inherent judicial authority in appointing a parent coordinator to make binding agreements regarding child custody without unanimous consent of both parties.<sup>5</sup> After considering the operational boundaries of probate and family courts, the SJC held that the judge exceeded her inherent judicial authority in appointing a parent coordinator without the approval of both parties, thereby limiting the use of this essential tool and failing to recognize the issues plaguing the probate and family courts caused by overflowing dockets.<sup>6</sup> Additionally, this ruling opens the opportunity for creating standards for future litigation regarding the scope of authority, which will also be discussed in this case comment.<sup>7</sup>

Michelle A. Bournay-Bower (“Bournay-Bower”) and William J. Bower (“Bower”), parents of four minor children, filed for divorce in March of 2009 after nineteen years of marriage.<sup>8</sup> Following more than two years of litigation, a judgment for *divorce nisi* was entered, which included stipulations for shared legal custody of the parties’ children.<sup>9</sup> When judgment for divorce was entered in 2011, each party filed cross-complaints for contempt alleging that the other failed to comply with terms set forth in the parenting plan.<sup>10</sup> Bower’s complaint requested Bournay-Bower submit to parent coordination and be bound by the parent

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<sup>3</sup> See Brief of Appellant at 13-14, *Bower v. Bournay-Bower*, 15 N.E.3d 745 (Mass. 2014) (No. SJC-11478) (agreeing use of parent coordinators permissible through unanimous consent).

<sup>4</sup> 15 N.E.3d 745 (Mass. 2014).

<sup>5</sup> *Id.* at 745.

<sup>6</sup> *Id.* at 752-53; see *Probate and Family Court Department Annual Report Statistics*, ADMINISTRATIVE OFFICE OF THE PROBATE AND FAMILY COURT (2015) [hereinafter *Probate and Family Court Department Annual Report Statistics*] <http://www.mass.gov/courts/docs/courts-and-judges/courts/probate-and-family-court/summarystats2015.pdf> (last visited February 8, 2016) (tracking divorces filed in Massachusetts in 2015).

<sup>7</sup> See *In re Moe*, 432 N.E.2d 712, 717-19 (1982) (citing flexibility of judges in probate and family courts to protect best interests of parties).

<sup>8</sup> See *Bournay-Bower*, 15 N.E.3d at 747 (indicating parties, initial start of divorce proceedings); see also Brief for Appellee William J. Bower at 5, *Bower v. Bournay-Bower*, 15 N.E.3d 745 (Mass. 2014) (No. SJC-11478) (finalizing divorce in May 2011).

<sup>9</sup> See *Bournay-Bower*, 15 N.E.3d at 747 (detailing judgment of joint legal custody over minors). The parenting plan detailed holiday schedules and daily custody routines relating to the cooperation, consultation, and communication between the parties. Brief for Appellee, *supra* note 8, at 5.

<sup>10</sup> See *Bournay-Bower*, 15 N.E.3d at 747 (detailing facts of underlying case); Brief for Appellee, *supra* note 8, at 5 (detailing parties’ complaints for contempt). Bower alleged that Bournay-Bower failed to consult him seventeen times on major matters involving the children, whereas Bournay-Bower alleged Bower failed to communicate with her about issues relating to their children’s health and well-being four times. Brief for Appellee, *supra* note 8, at 6.

coordinator's decisions.<sup>11</sup> The judge allowed Bower's motion, over Bournay-Bower's objection, and ordered the parties to submit to binding mediation.<sup>12</sup>

After the appointment of the parent coordinator, the initial judge who presided over this matter retired and the ongoing case was reassigned to another judge.<sup>13</sup> On February 6, 2012, Bower filed complaints for contempt against Bournay-Bower alleging that she failed to comply with the Parent Coordinator's Agreement, as ordered by the first judge.<sup>14</sup> Upon reviewing the circumstances of the case, the succeeding judge adhered to the retired judge's decision with regards to binding mandatory alternate dispute resolution to resolve parenting time and custody issues.<sup>15</sup> In response, Bournay-Bower challenged the judge's decision arguing it was outside the scope of judicial authority.<sup>16</sup> The SJC transferred this case *sua sponte*, and ultimately concluded that the judge surpassed her inherent

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<sup>11</sup> See *Bournay-Bower*, 15 N.E.3d at 747 (stating Bower sought binding mandatory alternative dispute resolution). The judge declined to hear the contempt complaints and instead, she focused on appointing a parent coordinator and vesting her with binding authority. *Id.* The judge explained that she wanted to try to get "a system in effect" and "get out of this cycle where you gather up a bunch of stuff, you come in like a volcano overflowing, and all the bad stuff has actually already happened, and I can't get a handle on how it happened." Brief for Appellee, *supra* note 8, at 9-10.

<sup>12</sup> See Brief for Appellee, *supra* note 8, at 6 (granting authority to parent coordinator after both sides argued vigorously regarding parent schedule). The judge made it clear that the parties must follow the parent coordinator's decisions on matters of custody and visitation "as if they were court orders." *Bournay-Bower*, 15 N.E.3d at 748. In rendering this decision, Judge Harms believed it was more effective to appoint a parent coordinator, "before . . . [he spends] seven hours listening to 17,000 complaints." Brief for Appellee, *supra* note 8, at 8.

<sup>13</sup> See *Bournay-Bower*, 15 N.E.3d at 748 (explaining transition of judges during the case).

<sup>14</sup> See Brief of Appellee, *supra* note 8, at 4 (arguing that Bournay-Bower did not comply with agreement established by parent coordinator).

<sup>15</sup> See *Bournay-Bower*, 15 N.E.3d at 748 (reaffirming parent coordinator's binding authority given by previous judge); see also Brief of Appellant, *supra* note 3, at 8-9 (outlining parent coordinator's authority). The judge's Clarified Order specified that the Parent Coordinator has binding authority to issue rulings, but if either party was unsatisfied by the rulings, the unsatisfied party could obtain a contrary order from the court in the time between the Parent Coordinator's decision and when the decision was to be in effect. See *Bournay-Bower*, 15 N.E.3d at 748 (explaining scope of parent coordinator).

<sup>16</sup> See *Bournay-Bower*, 15 N.E.3d at 751 (describing Bournay-Bower's argument for refusing binding parent coordinator's binding decisions). Bournay-Bower contested the judge's decision on grounds statute of court rule that exists making it permissible to compel a party to adhere to decisions of a parent coordinator absent agreement of both parties. *Id.* Conversely, Bowers asserted that parent coordinators are commonly utilized in Massachusetts Probate and Family Courts, and therefore, the judge's discretion was proper because there was no statute that prohibited such action. *Id.* The judge issued a *Clarified Order* as final judgment, however, within it, she acknowledged Bournay-Bower's right to appeal her authority. Brief of Appellant, *supra* note 3, at 9-10.

authority, thus making it an unlawful delegation of her judicial authority.<sup>17</sup> The SJC vacated the order of granting the parent coordinator binding authority and any subsequent orders that are determined by parent coordinators without consent of both parties shall have no effect.<sup>18</sup>

With divorce becoming increasingly common in the United States, ADR is being utilized with increased frequency in family law cases in order to preserve limited judicial resources and unburden back-logged courts.<sup>19</sup> Modern American family dynamics of recent years pushed this particular ADR phenomenon into focus, forcing the judicial system to turn to ADR services to preserve an over-extended court system's resources.<sup>20</sup>

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<sup>17</sup> See *Bournay-Bower*, 15 N.E.3d at 748 (determining order was so broad in scope, thus constituting unlawful delegation of judge's inherent authority).

<sup>18</sup> See *id.* (vacating order appointing parent coordinator as well as subsequent judgment). The SJC ruled that the inherent powers of the Commonwealth have particular boundaries that must align with the individual right to the "impartial interpretation of laws and administration of justice." *Id.* at 753 (quoting MASS. CONST. pt. 1, art. XXIX). The SJC believes that judicial powers should not be exercised in a manner that undermines constitutional rights. *Id.* at 748.

<sup>19</sup> See Marsha Garrison, *Reviving Marriage: Could We? Should We?*, 10 J.L. & FAM. STUD. 279, 283-88 (2008) (explaining no-fault divorce, immaturity, social norms attributing to United States' high divorce rate). Throughout the past several years, Massachusetts has experienced a staggering influx of divorce cases filed, as well as other family law matters. See *Probate and Family Court Department Annual Report Statistics*, *supra* note 6 (detailing amount of divorce cases filed). In 2004, there were 19,764 divorces and by 2015, there were 23,954 filings. *Id.*; *Probate and Family Court Department Annual Report Statistics Fiscal Year Ending 2004*, ADMINISTRATIVE OFFICE OF THE PROBATE AND FAMILY COURT (2004), <http://www.mass.gov/courts/docs/courts-and-judges/courts/probate-and-family-court/stats2004-combined.pdf>; see *Loebel v. Loebel*, 933 N.E.2d 1018, 1023 (Mass. App. Ct. 2010) (describing how judge adopts GAL's suggestions to appoint parent coordinator for mediations between parents); *R.S. v. M.P.*, 894 N.E.2d 634, 636 (Mass. App. Ct. 2008) (using mediation for custody issues); *D.C. v. J.S.*, 790 N.E.2d 686, 689 (Mass. App. Ct. 2003) (emphasizing judge's belief that mediation was indispensable to managing split family). Jurisdictions outside of Massachusetts have also put an emphasis on appointing neutral third parties to resolve family and probate matters. See CAL. CIV. PROC. CODE § 638 (2016) (establishing judge's ability to appoint referees when parties agree); COLO. REV. STAT. § 14-10-128.1(2015) (promulgating courts can appoint parenting coordinator if in children's best interest, regardless of parent consent); LA. REV. STAT. § 9:358.1-358.9 (2015) (allowing court to appoint parent coordinator); MINN. STAT. § 518.1751 (2015) (permitting court to appoint parenting time expeditor); N.C. GEN. STAT. § 50-91 (2015) (establishing court may appoint parenting coordinator during child custody actions); OKLA. STAT. tit. 43, § 120.3 (2015) (allowing court to appoint parenting coordinator on its own motion); S.D. CODIFIED LAWS § 25-4-63 (2015) (granting court's ability to appoint parenting coordinators to assist in resolving contentious issues); TEX. FAM. CODE §§ 153.0071 (2015) (permitting court to refer suit to arbitration under certain circumstances); see also *Jordan v. Jordan*, 14 A.3d 1136, 1153 n.14 (D.C. 2011) (referencing thirty jurisdictions in twenty-seven states using statutes or court rules in appointing coordinators).

<sup>20</sup> See Nancy Ver Steegh, *Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process*, 42 FAM. L. Q. 659, 659-61 (2008) (explaining how overextended and declining court resources encourages ADR services in child custody proceedings); see also *Bar Association of Norfolk County Programs for 2015/2016: Conciliation Program of the Bar Association of Norfolk County*, NORFOLK BAR ASSOCIATION,

The numerous family law and domestic relation matters have created court congestion and has led to increased usage of ADR methods.<sup>21</sup> Courts favor ADR because they are experiencing a substantial increase in the number of *pro se* parties.<sup>22</sup> Moreover, courts recognize that using ADR methods aids litigants in arriving at solutions more efficiently while protecting the best interests of the parties' children by decreasing stressful, high-conflict litigation during a child's formative years where they are most at risk for experiencing resounding traumatic harm to their well-being.<sup>23</sup> The reverberating effects of constant, high-conflict litigation effects children long after their formative years of development, and can stress the nuances of parent-child relationships.<sup>24</sup>

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<http://www.norfolkbarassn.org/programs/> (last visited February 8, 2016) (detailing conciliation program in ADR aimed at combatting court congestion by *pro se* litigants).

<sup>21</sup> See CHARLES P. KINDREGAN, JR. ET AL., 2 MASS. PRACTICE, FAMILY LAW AND PRACTICE § 42:4 *Appointment of Parent Coordinators*, Westlaw (database updated Aug. 2015) (discussing alternative avenues for resolution in over-crowded family and probate courts).

<sup>22</sup> See *id.* (discussing policy reasons for appointing parent coordinators in divorce proceedings). Due to budget cuts, the number of law clerks has been significantly reduced, hurting the ability of judges to research and prepare decisions and findings in a timely manner. See Dan Ring, *Massachusetts Courts in Crisis Thanks to Recent Budget Cuts, Top Judges Say*, MASSLIVE (Apr. 12, 2012, 9:33 PM),

[http://www.masslive.com/news/index.ssf/2012/04/top\\_massachusetts\\_judges\\_said.html](http://www.masslive.com/news/index.ssf/2012/04/top_massachusetts_judges_said.html)

(detailing effects of budget cuts on family court resources. Consequently, Paula M. Carey, Chief Justice of the Probate and Family Court, believes “[judges] really can’t deliver justice the way it should be.” *Id.*

<sup>23</sup> See Dana E. Prescott, *When Co-Parenting Falters: Parenting Coordinators, Parents-In-Conflict, and the Delegation of Judicial Authority*, 20 ME. BAR.J. 240, 241 (2005) (explaining progressive trends for using parent coordinators). Generally, there are four driving factors that pressure the court into utilizing parent coordinators. *Id.* First, economic costs of divorce and family dislocation drive the rates of private civil litigation and force parties to court. *Id.* Second, chronic conflict between parents places their children at risk for resounding traumatic emotional, economic, academic, physical, and psychological harm to their well-being. *Id.* Third, family and probate courts are overwhelmed, and lack the immediate resources necessary to protect a child's best interest during divorce proceedings. *Id.* Finally, parent coordinating helps minimize conflict and promote parental cooperation, which cuts the costs on re-litigation rates. *Id.*; see Elizabeth Kruse, *ADR, Technology, and New Court Rules – Family Law Trends for the Twenty-First Century*, 21. J. AM. ACAD. MATRIM. L. 207, 216 (2008) (“According to AFCC Task Force on Parenting Coordination, the essential purpose of parenting coordination, ‘is a child-focused alternative dispute resolution process in which a mental health or legal professional with mediation training and experience assists high-conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a timely manner . . .’”). Seventy-five percent of children experience divorce by age three, and more than half by age six. Kruse, *supra*, at 215-16. Chronic, high-conflict litigation between disputing parents presents a strong probability of long-term negative effects on the children like depression, anxiety, and posttraumatic stress disorder. *Id.* at 216.

<sup>24</sup> See Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 VA. J. SOC. POL'Y & L. 129, 139 (2002) (comparing parent-child relationships between litigation with mediation methods). A study found divorced and separated parents who use mediation to resolve parenting disputes were

Recognizing the increasing popularity and positive results from using parent coordinators, some states set specified parameters defining their role as “quasi-judicial officers.”<sup>25</sup> Typically, a parent coordinator assists litigants in reaching resolutions for disagreements pertaining to decisions involving children, such as their child’s education, activities, and discipline.<sup>26</sup> The parent coordinator’s main goal is to facilitate decision-making, which helps families avoid going through the emotional and lengthy process of the adversarial court system, so that the children’s lives can proceed as seamlessly and conflict-free as possible.<sup>27</sup> Furthermore, by using parent coordinators, judges have an efficient and effective alternative to handle contentious cases that also saves litigants from paying legal fees many can ill afford.<sup>28</sup>

Despite the increasing use of parent coordinators in family law proceedings, Massachusetts lacks a statute or a court rule recognizing the role—and boundaries—of a parent coordinator in the courtroom.<sup>29</sup>

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more involved with their children twelve years after the high-conflict disputes compared to parents who litigated their grievances regarding their children. *Id.*

<sup>25</sup> See AFCC Task Force on Parenting Coordination, *Special Issue: Child Protection in the 21<sup>st</sup> Century: Special Report: Parenting Coordination: Implementation Issues*, 41 FAM. CT. REV. 533, 557-58 (2003) (determining Massachusetts parent coordinators to be “quasi-judicial officers”). Proposed legislation delegates parent coordinators as quasi-judicial officers, “with continuing authority to act during the designated term of service.” *Id.* at 558. Although legislation is pending, enough Massachusetts cases involving parent coordinators encouraged this official, broader, and authoritative title. *Id.*

<sup>26</sup> See *id.* at 543-45 (explaining issues parent coordinator is can assist in resolving); see also *Katzman v. Healy*, 933 N.E.2d 156, 160 (2010) (acknowledging unexpected events, like health emergencies, should be incorporated into parent agreements). Parenthood is not neatly divided into clean-cut sleeping, waking, and school categories, and parent agreements should allow room for fluidity in unplanned occurrences. AFCC Task Force on Parenting Coordination, *supra* note 25, at 543-45. ADR promotes parental cooperation in the face of unexpected events and emergencies that can be nearly impossible to address by going through the adversarial system of family court. See *id.* at n.6 (agreeing that parent coordinator would be appropriate resource when considering modifying custody).

<sup>27</sup> See PHILIP M. STAHL, CONDUCTING CUSTODY EVALUATIONS: FROM BASIC TO COMPLEX ISSUES 160 (Kassie Graves et. al. eds., 2011) (elaborating on parent coordinator’s major objectives). Parent coordinators strive to unclog congested court dockets from high-conflict families by focusing on seeking resolutions in a timely manner. *Id.* More importantly, parent coordinators assist families in resolving their differences more quickly, thus allowing children to manage the nuances of their evolving family dynamic and transition successfully. *Id.*

<sup>28</sup> See Ver Steegh, *supra* note 20, at 671 (detailing high fees for litigation procedures); see also Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case for Divorce*, 88 YALE L.J. 950, 971-73 (1979) (detailing transaction cost of divorce). Calculating legal fees in family law proceedings is difficult to measure because in divorce, costs generally tend to be higher when minors are involved, due to the fact that the parties and court must consider the additional intense emotional allocation issues associated with custody proceedings. See Mnookin & Kornhauser, *supra* at 972-73 (discussing costs associated with divorces).

<sup>29</sup> See MASS. SUP. JUD. CT. R. 1:18 (governing rules for court-connected dispute resolution

Nevertheless, Massachusetts routinely recognizes their role, and uses this method accordingly, making use of parent coordinators in Massachusetts's family courts increasingly common.<sup>30</sup> Rather than increasing conflict by constantly going through the adversarial system, parent coordinators have the potential to decrease the conflict that arises in family court because they are able to expedite the process of arriving at a workable agreement between both parties.<sup>31</sup> Since Massachusetts does not have a definitive set of statutes, governing laws, or court rules addressing the role of parent coordinators, the Commonwealth uses other jurisdictions' viewpoints and definitions of parent coordinators to help with determining their roles and expectations.<sup>32</sup>

In *Bower v. Bournay-Bower*, the SJC considered whether granting a court appointed parent coordinator with binding authority absent a unanimous agreement from both parties was within the judge's judicial

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services). Rule 1:18 sets forth a comprehensive scheme for ADR services, but does not define the boundaries or maximum authority parent coordinators have in family and probate court issues. *See id.* at 6(d) (permitting any Trial Court authority to mandate dispute resolution in civil cases).

<sup>30</sup> *See Healy*, 933 N.E.2d at 159 (illustrating how judge accepted guardian's scheduling recommendation to judge); *Lobel v. Lobel*, 933 N.E.2d 1018, 1023 n.6 (Mass. App. Ct. 2010) (suggesting use of parent coordinator regarding custody decisions related to child permitted); *Tamaro v. O'Brien*, 921 N.E.2d 127, 129 (Mass. App. Ct. 2010) (determining parent coordination needed in addressing separation agreement); *R.S. v. M.P.*, 894 N.E.2d 634, 638 n.8 (Mass. App. Ct. 2008) (appointing parent coordinators provides convenient and efficient decision making resolutions); *see also* Andrea R. Barter, *Commonwealth looks to legitimize roles of parent coordinators who strive to help divorcing families*, MASS. LAW J., Nov. 2003, <http://www.massbar.org/publications/lawyers-journal/2003/november/commonwealth-looks-to-legitimize-roles> (finding families who agree to parent coordination increases favorable outcomes). Multiple ADR services are not effective enough to alleviate issues arising from high-conflict divorce. Barter, *supra*. However, parent coordination serves as an alternative to end "the revolving door of litigation." *Id.*

<sup>31</sup> *See* Barter, *supra* note 30 (using parent coordinators promotes workable agreements between parties instead of extended litigation).

<sup>32</sup> *See generally* *Jordan v. Jordan*, 14 A.3d 1136, 1153 (D.C. 2011) (naming thirty jurisdictions that appoint parent coordinators through statute or court rule). Other jurisdictions make the role of a parent coordinator a hybrid of mediation and arbitration. *Id.* at 1153. If resolution is futile, the parent coordinator has authority to issue a binding decision. *Id.* *See generally* MINN. STAT. § 518.1751(1b)(c) (2001) ("a neutral person [is] authorized to use a mediation-arbitration process to resolve parenting time disputes [and the] parenting time expeditor shall [make a decision] resolv[ing] [the] dispute"); ARIZ. FAM. L. PROC. R. 74(B) (2015) ("The court may appoint a third party as a parenting coordinator . . . only if each parent has agreed to the appointment . . . the parents agree to be bound by the decisions made by the parenting coordinator."); *Compare* FLA. STAT. § 61.125(1) (2015) (binding decisions must be limited within the scope of the court's order), *with* N.C. GEN. STAT. § 50-92(b) (2013) ("the court may authorize a parenting coordinator to decide issues regarding the implementation of the parenting plan that are not specifically governed by the court order and which the parties are unable to resolve. The parties must comply with the parenting coordinator's decision until the court reviews the decision.").

scope of authority.<sup>33</sup> The SJC examined the breadth of judicial decision-making authority and determined that the powers vested within those appointed are vital to maintaining an effective and efficient judicial system.<sup>34</sup> In effect, the Massachusetts legislature vested the Probate and Family Courts with exclusive jurisdiction to decide contested issues concerning the care, custody, and maintenance of minor children in divorce actions.<sup>35</sup>

In confronting emotional and difficult issues, such as custody, judges must keep the best interests of the children at the forefront of their decision.<sup>36</sup> Addressing such sensitive issues provides family and probate judges with an inherent authority to refer parties to parent coordinators when dealing with issues pertaining to minor children.<sup>37</sup> Based on the parties' long history demonstrating their inability to parent cooperatively, the judge appointed a parent coordinator to make binding decisions regarding their custody issues, but the SJC held that doing so

<sup>33</sup> See *Bournay-Bower*, 15 N.E.3d at 751 (detailing Bournay-Bower's challenge of judge's Clarified Order without unanimous agreement from both parties).

<sup>34</sup> See Brief for Amici Curiae Massachusetts Law Review Institute, Community Legal Services and Counseling Center, Greater Boston Legal Services, Harvard Legal Aid Bureau, Justice Center of Southeast Massachusetts, Metrowest Legal Services & The Second Step at 10, *Bower v. Bournay-Bower*, 15 N.E.3d 745 (2014) (No. SJC-11478) [hereinafter Brief for Amici Curiae], available at [http://masscases.com/briefs/sjc/469/469mass690/SJC-11478\\_05\\_Amicus\\_MA\\_Law\\_Reform\\_Brief.pdf](http://masscases.com/briefs/sjc/469/469mass690/SJC-11478_05_Amicus_MA_Law_Reform_Brief.pdf) ("To ensure fairness when people avail themselves of [the court's 'awesome powers over the life, liberty and property of every citizen'], the court system maintains robust procedural safeguards, and judges are selected by a process that involves careful scrutiny of qualifications and temperament."). The court system's judicial function is fundamental to the Government's structure. *Id.*; see *Superintendent of Belchertown State Sch. v. Saikewicz* 370 N.E.2d 417, 433 (2008) (appointing guardian ad litem to protect best interests of persons within powers of probate court). *But see* Standing Order 1-06: Case Management and Time Standards for Cases Filed in the Probate and Family Court Department (2006) [hereinafter *Standing Order 1-06*], available at <http://www.mass.gov/courts/case-legal-res-/rules-of-court/probate/pfc-orders/1-06.html> (encouraging parties to reach agreement during pre-trial).

<sup>35</sup> See MASS. GEN. LAWS ch. 215, § 2-6 (stating family court's jurisdictional boundaries concerning child's care, custody, and maintenance). A reason why Massachusetts probate and family courts are so overworked and congested is because they handle increasingly complex cases and have jurisdiction over all domestic relation matters. See Barbara A. Babb, *Special Issue: Unified Family Court: Reevaluating Where We Stand: A Comprehensive Survey of America's Family Justice Systems*, 46 FAM. CT. REV. 230, 232-33 (2008) (noting different forms of family court in United States).

<sup>36</sup> See *supra* notes 23-24 and accompanying text (highlighting negative effects on minor children caused by high-conflict disputes); see also *Blixt v. Blixt*, 774 N.E.2d 1052, 1060 (Mass. 2003) (considering best interests of child in weighing decision to grant sole custody to mother); *Custody of Kali*, 792 N.E.2d 635, 638 (Mass. 2003) (considering parental roles when deciding best interest of child).

<sup>37</sup> See *In re Moe*, 432 N.E.2d 712, 717-19 (1982) (citing flexibility of judges in probate and family courts to protect best interests of parties).

impermissibly passed the core of “binding decision-making authority” to a third party when that authority must remain solely with the court.<sup>38</sup>

In this instant case, the SJC found that appointing a parent coordinator and making the coordinator’s decision binding was not appropriate because both parties did not agree to be bound by the parent coordinator’s decisions and treat the decisions as if they were court orders.<sup>39</sup> The SJC believed that compelling Bournay-Bower to submit to a parent coordinator’s binding decision violated Article 29 of the Massachusetts Declaration of Rights, and the right to seek recourse as provided by Article 11.<sup>40</sup> Ignoring Bournay-Bower’s right to seek recourse under the law, and instead compelling her to submit to binding-decisions of a parent coordinator rather than a judge, made the appointment of a parent coordinator unconstitutional.<sup>41</sup> The SJC highlights that judges have authority and obligation to make a decision, rather than passing off that judgment to a third-party individual.<sup>42</sup>

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<sup>38</sup> See *Bournay-Bower*, 15 N.E.3d at 754 (binding parties to parent coordinator authority does not fall within judge’s inherent authority); see also *Gustin v. Gustin*, 652 N.E.2d 610, 612 (Mass. 1995) (prohibiting judge from compelling parties to submit to binding arbitration without mutual consent). But see *Eccleston v. Bankosky*, 780 N.E.2d 1266, 1275 (Mass. 2003) (providing for equitable relief for a vulnerable class); sources cited *supra* note 20 (explaining benefits of ADR in probate and family court). Tailoring probate and family court’s flexible inherent powers is appropriate when the interests of justice are served to protect vulnerable children who are involved in parties’ disputes. *Eccleston*, 780 N.E.2d at 1275. But see Brief for Appellee, *supra* note 8, at 23 (clarifying Judge’s intentions of parent coordinator authority). The Judge did not intentionally forfeit her delegation duties, but rather appointed a parent coordinator in hopes to offer the parties an expeditious process, in contrast to the lengthy court proceedings. See Brief for Appellee, *supra* note 8, at 16 (explaining Judge Harms reason for appointing a parent coordinator). The Judge hoped that a parent coordinator could serve as a positive coach for the parties and settle their disputes before going to court because, “if it’s not big enough to fight about, then you let it go.” *Id.* (internal quotations omitted).

<sup>39</sup> See *Bournay-Bower*, 15 N.E.3d at 748 (explaining holding regarding both parent’s consent).

<sup>40</sup> See *Bournay-Bower*, 15 N.E.3d at 753 (2014) (explaining rights evoked by judge’s order to submit to parent coordinator’s decisions); see also MASS. CONST. pt. 1, art. 29 (“It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit.”).

<sup>41</sup> See MASS. CONST. pt. 1, art. XI (protecting citizen’s due process rights, providing recourse for injuries to or wrongs to persons). But see *Jordan v. Jordan*, 14 A.3d 1136, 1160 (D.C. 2011) (holding parent coordinator decisions do not violate parent’s due process rights). The procedural due process requirement is flexible and adapts to the particular issues at hand. *Jordan*, 14 A.3d at 1159. A parent coordinator only exercises power in limited capacity during day-to-day disputes because they require immediate resolution, which one cannot receive in court proceedings. *Id.*

<sup>42</sup> See *Gustin v. Gustin*, 652 N.E.2d 610, 612 (Mass. 1995) (recognizing judges do not have power to compel parties to binding arbitration); see also *Gill v. DiGiovanni*, 612 N.E.2d 1205, 1206 (Mass. 1993) (binding separation agreement gives no right to compel or elect arbitration);

Probate and family judges utilize their flexible, inherent authority to appoint parent coordinators under appropriate circumstances; therefore, the SJC's reasoning fails to recognize the realities plaguing the probate and family courts as it limits the judges' abilities to conserve the court's declining resources and lengthens the times it takes to resolve cases efficiently to allow for families to heal.<sup>43</sup> Instead of appropriately acknowledging the progressive trends of family and probate courts' use of ADR methods, the SJC concluded that in order to act in the best interests of persons involved, appointing a parent coordinator and allowing their decisions to be binding was unlawful because there was not unanimous consent; however, this is problematic because the contentious nature of family law matters can cloud the better judgment of the parties, making unanimous consent unachievable in many cases.<sup>44</sup>

Although parties to domestic relations action possess the ability to exercise their constitutional right to be offered a fair hearing before the court, this decision fails to consider the interests of *all* persons involved, namely, the children.<sup>45</sup> Chronic conflict between parents places the children, who are essentially the center of the issue and most effected, at

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Julia Reischel, 'Parent coordinators' Unique form of post-divorce ADR embraced by some, denounced by others, MASS. LAW. WKLY., June 1, 2009, <http://www.masslawyersweekly.com/2009/06/01/8216parent-coordinators/> (suggesting parent coordinator's inappropriate authority in family court). *But see* Kimberly C. Emery & Robert E. Emery, *Who Knows What is Best for Children? Honoring Agreements and Contracts Between Parties Who Live Apart*, 77 LAW & CONTEMP. PROBS. 151, 172 (2014) (noting judges have authority to rule in best interest of parties' children); Matthew J. Sullivan, *Parenting Coordination: Coming of Age?*, 51 FAM. CT. REV. 56, 56 (2013) (pointing out benefits, like efficiency, when using ADR methods).

<sup>43</sup> See Ver Steegh, *supra* note 20, at 669-70 (emphasizing importance of ADR methods to preserve overextended probate and family courts); *see also* D.C. v. J.S., 790 N.E.2d 686, 689 (Mass. App. Ct. 2003) (relaying trial judge's emphasis on mediation). Parent coordinators alleviate the already over-crowded family and probate court system by providing effective and efficient resolutions regarding the welfare of minors. *See* Sullivan, *supra* note 42, at 58-60 (describing role of parenting coordinators).

<sup>44</sup> *See Bournay-Bower*, 15 N.E.3d at 754 (determining unlawful delegation of judicial authority violated Bournay-Bower's best interests); *see also supra* note 18 and accompanying text (suggesting authoritative powers given to parent coordinator was so broad in scope, it was unlawful). *But see* Ver Steegh, *supra* note 20, at 669-70 (using ADR services allows for efficient resolutions in custody disputes).

<sup>45</sup> *See* CHARLES P. KINDREGAN, JR. ET AL., 2 MASS. PRACTICE, FAMILY LAW AND PRACTICE § 43:4 *Obtaining Records*, Westlaw (database updated Aug. 2015) (discussing release forms for confidential information). Inherent judicial authority permits the judge to determine whether a coordinator is beneficial in solving a dispute rather than waiting. *Id.* In most cases, several months or years pass before the issue is brought to the judge again at trial. *Id.*; *see supra* notes 23-24 and accompanying text (using ADR methods over litigation helps emotional stability of minor children).

risk for painful, lasting psychological and emotional trauma.<sup>46</sup> Thus, tools given to judges, such as ADR, are essential to finding quick resolutions to prolonged family conflict.<sup>47</sup> This decision took away an essential tool from probate and family courts, which cannot be said to be serving best interests of the children.<sup>48</sup>

In an ideal judicial system, family and probate courts would have the proper resources to listen to all issues in a timely manner, yet the reality is that the system is overwhelmed; it lacks the immediate resources necessary to protect a child's best interest, therefore making parent coordinators essential in domestic relations issues.<sup>49</sup> Going forward, the future of family litigation should not be limited in providing problem-solving solutions, but permit flexibility in allocating authority, just as the judge did in this case.<sup>50</sup> Judge selection is a rigorous process involving careful scrutiny, and we should trust that their rulings consider the best interests of all persons they are expected to serve.<sup>51</sup> To ensure fairness when people avail themselves of the judge's flexible inherent powers, the SJC should reconsider prohibiting all probate and family courts from

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<sup>46</sup> See *supra* note 27 and accompanying text (applying ADR as safeguard for child's well-being). Often, disputing parents view custody as an all-or-nothing matter, seeing one as the "winner" and the other the "loser". STAHL, *supra* note 27 at 145. This mindset reinforces splitting and competition of custody. *Id.*

<sup>47</sup> See Barter, *supra* note 30 (finding families agreeing to parent coordination increases favorable outcomes). Multiple ADR services are not effective enough to alleviate issues arising from high-conflict divorce. *Id.* However, parent coordination serves as an alternative to end "the revolving door of litigation." *Id.* Rather than increasing conflict, parent coordinators have the potential to decrease the conflict that arises in family court. *Id.*; see Emery, *supra* note 42, at 172 (noting judges have authority to rule in best interest in of parties' children); Prescott, *supra* note 23, at 243-44 (explaining progressive trends for using parent coordinators). Chronic conflict between parents places their children at risk for resounding traumatic emotional, economic, academic, physical, and psychological harm to their well-being. Prescott, *supra* note 23, at 241.

<sup>48</sup> See *Matter of Quinlan*, 355 A.2d 647, 670 (N.J. 1976) (accepting court's flexible powers when dealing in the bests interest of persons in their jurisdiction); see also Brief for Appellee, *supra* note 8, at 15 (exercising careful creativity needed when handling highly charged emotions).

<sup>49</sup> See Prescott, *supra* note 23, at 241-43 (describing pressures that lead to essential use of parent coordinators in divorce proceedings); Ver Steegh, *supra* note 20, at 669-70 (declining court resources encourages greater use of ADR services in child custody proceedings). *Pro se* parties encounter several problems without proper guidance, and thus create backlog in the court system, and unnecessary extended litigation. Ver Steegh, *supra* note 20, at 669-70.

<sup>50</sup> See *Matter of Moe*, 432 N.E.2d 712, 717-19 (1982) (citing flexibility of judges in probate and family courts to protect best interests of parties). Issues in the probate and family courts should allocate a more creative and flexible use of powers, because just like every family, no one case is the same. See *id.* at 719 (providing court has flexibility to provide whatever remedy is needed for a particular case). When dealing with matters concerning a person, the court "is not limited by any narrow bounds, but it is empowered to stretch forth its arm in whatever direction its aid and protection may be needed[.]" *Id.*

<sup>51</sup> See Brief for Amici Curiae, *supra* note 34, at 10 (emphasizing careful selection of judges rigorous judge selection involving careful scrutiny).

allowing a parent coordinator's decision to be binding, even without unanimous consent, because there are several instances where parties do not want to cooperate, even when it is better for them to do so.<sup>52</sup> Since probate and family judges keep cases before them, they are familiar with the parties that continuously reappear in their chambers.<sup>53</sup> With this unique relationship established, probate and family judges should be allowed to exercise their inherent judicial authority in determining when parties should use ADR because it would result in a more effective and efficient way to resolve disputes rather than continuing litigation.<sup>54</sup> By doing so, the court system is not overwhelmed, and the parties as well as the children are not subjected to months or years of litigation in resource-strapped courts.<sup>55</sup>

The court in *Bower v. Bournay-Bower* explored the scope of authority vested in parent coordinators absent a unanimous agreement from both parties. While the SJC determined that judicial authority was unlawful, it failed to consider the well-being of *all* persons involved in the issue. It ignored the impact of prolonged litigation, depleting court-strapped resources, and the well-being of children. Permitting decision-binding authority for parent coordinators enables the family and probate court judges from being overcrowded and backlogged, and protects the well-being of children by providing immediate resources necessary for efficient resolutions. The Commonwealth should trust the authority placed in probate and family judges, when resolving cases involving children. Moreover, it should adapt to the progressive nature of family and probate court matters, and permit parent coordinators in order to protect the best interests of the children.

*Kimberly T. Aquino*

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<sup>52</sup> See *Lobel v. Lobel*, 933 N.E.2d 1018, 1023 (Mass. App. Ct. 2010 ) (using third-party suggestions for judge's binding decision allowed). Judges should be familiar with recognizing particular circumstances, like chronic disagreement between parties, and help parties get out of the resounding cycle of litigation. See Brief for Appellee, *supra* note 8, at 15 (exercising careful creativity needed when handling highly charged emotions).

<sup>53</sup> See Brief for Appellee, *supra* note 8, at 14-15 (recognizing that judges have familiarity with parties that come before them).

<sup>54</sup> CHERYL L. GARRITY & JEFFREY WOLF, OVERVIEW OF THE PROBATE & FAMILY COURT, MASS. LEGAL SERVICES, available at <http://www.masslegalservices.org/system/files/library/Chapter+02+revised+20071025.pdf> (last visited Apr. 17, 2016) (explaining how to conduct ADR conferences). Unless there is a final judgment, a new court date is assigned more often than not with the same judge presiding over the case, which allows the judge and parties to develop an ongoing familiarity with each other. *Standing Order 1-06*, *supra* note 34, at 7 (2006).

<sup>55</sup> See *supra* note 22 and accompanying text (describing overburdened court systems prolonging resolution in child custody related cases).