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BRIGHT, C. J., concurring in part and dissenting in part. I fully concur with parts I and III of the well reasoned majority opinion. I disagree, however, with the majority's conclusion in part II of the opinion that the court's November 18, 2021 visitation order as to the parties' son, R, constituted an impermissible delegation of the court's authority to the plaintiff father, R. H. To the contrary, I believe that the court, after awarding sole legal custody of both minor children to the plaintiff—which award the defendant mother, M. H., does not challenge on appeal—properly exercised its authority pursuant to General Statutes § 46b-56 by crafting a visitation order that gave the defendant the opportunity to maintain and improve her relationship with R while protecting R's best interests. In my view, the impermissible delegation of authority cases on which the majority relies are inapplicable to a visitation order affording a sole legal and custodial parent discretion over the noncustodial parent's visitation with the child. Instead, because § 46b-56 authorizes the court to issue such an order, the relevant inquiry is whether the court abused its discretion in doing so. In addition, I am concerned that the majority's holding, by reading a limitation into § 46b-56 that I do not believe exists, will discourage judges from exercising the broad discretion our legislature afforded them in settling disputed custody issues in the best interests of the child. Accordingly, I would affirm the court's judgment as to the visitation order regarding R and, therefore, respectfully dissent from part II of the majority opinion.[1]

The majority opinion comprehensively sets forth the relevant facts and procedural history, so I will not repeat them here. It is particularly unnecessary to do so because my disagreement with the analysis in part II of the majority opinion is as to the application of law. Consequently, I begin with the well established law regarding custody and visitation decisions. Subsection (a) of § 46b-56 authorizes the Superior Court in any action involving the custody or care of minor children, including a divorce action brought under General Statutes § 46b-45, to "make or modify any proper order regarding the custody, care, education, visitation and support of the children . . . according to its best judgment upon the facts of the case and subject to such conditions and limitations as it deems equitable. . . ." "In making or modifying any order as provided in subsection (a) of this section, the rights and responsibilities of both parents shall be considered and the court shall enter orders accordingly that serve the best interests of the child and provide the child with the active and consistent involvement of both parents commensurate with their abilities and interests. Such orders may include, but shall not be limited to . . . (3) the award

of sole custody to one parent with appropriate parenting time for the noncustodial parent where sole custody is in the best interests of the child; or (4) any other custody arrangements as the court may determine to be in the best interests of the child." General Statutes § 46b-56 (b). Section 46b-56 (c) sets forth a nonexhaustive list of seventeen factors that the court may consider in determining what custody and/or visitation order is in the child's best interests.

Accordingly, pursuant to § 46b-56, a trial court has broad discretion to award either parent sole physical and legal custody of a child and to place parameters on a noncustodial parent's visitation with the child, including limiting the amount of visitation, determining that visitation will be supervised, and conditioning visitation on compliance with certain requirements, including participation in therapy or counseling and alcohol or drug testing. See, e.g., *Dempsey* v. *Cappuccino*, 200 Conn. App. 653, 656, 240 A.3d 1072 (2020) (court's visitation order required that defendant's visitation with minor child be supervised at home of defendant's parents and that he submit to periodic hair follicle drug testing and to blood alcohol tests before and during parenting time). The court also may deny the noncustodial parent any visitation. See, e.g., *Franklin* v. *Dunham*, 8 Conn. App. 30, 32, 510 A.2d 1007 (1986) (court granted custody to father with no visitation rights for mother).

Given that the court can deny visitation completely, effectively leaving the custodial parent with complete control over the noncustodial parent's access to the child, logic dictates that the court has the authority to craft a visitation order that, under the facts and circumstances, places limits on such control. As our Supreme Court has stated regarding custody issues, "decision-making in family disputes requires flexible, individualized adjudication of the particular facts of each case without the constraint of objective guidelines." (Internal quotation marks omitted.) *Yontef* v. *Yontef*, 185 Conn. 275, 278, 440 A.2d 899 (1981). The flexibility that our trial courts have on issues of custody and visitation is not judicially created but is expressly set forth in § 46b-56 (a), which provides that the court should make such decisions "according to its best judgment upon the facts of the case *and subject to such conditions and limitations as it deems equitable.*"[2] (Emphasis added.)

Given the many factors the court may consider and weigh and the wide range of orders it is authorized to issue, we afford great deference to a court's custody and visitation determinations. "Our standard of review of a trial court's decision regarding custody [and] visitation . . . orders is one of abuse of discretion. . . . [T]he trial court's decision on the matter of custody is committed to the exercise of its sound discretion and

its decision cannot be overridden unless an abuse of that discretion is clear. . . . The controlling principle in a determination respecting custody is that the court shall be guided by the best interests of the child. . . . In determining what is in the best interests of the child, the court is vested with a broad discretion. . . . [T]he authority to exercise the judicial discretion under the circumstances revealed by the finding is not conferred upon this court, but upon the trial court, and . . . we are not privileged to usurp that authority or to substitute ourselves for the trial court. . . . A mere difference of opinion or judgment cannot justify our intervention. Nothing short of a conviction that the action of the trial court is one which discloses a clear abuse of discretion can warrant our interference. . . .

"The trial court has the opportunity to view the parties [firsthand] and is therefore in the best position to assess the circumstances surrounding a dissolution action, in which such personal factors as the demeanor and attitude of the parties are so significant. . . . [E]very reasonable presumption should be given in favor of the correctness of [the trial court's] action. . . . We are limited in our review to determining whether the trial court abused its broad discretion to award custody based upon the best interests of the child as reasonably supported by the evidence. . . . We further note that a trial court's factual findings may be reversed on appeal only if they are clearly erroneous. To the extent that [a party] claims that the trial court should have credited certain evidence over other evidence that the court did credit, it is well settled that such matters are exclusively within the province of the trial court." (Citation omitted; internal quotation marks omitted.) *Weaver* v. *Sena*, 199 Conn. App. 852, 859–60, 238 A.3d 103 (2020).

In the present case, the court, after considering the evidence before it and applying the factors in § 46b-56 (c), ordered that the plaintiff have sole legal and physical custody of the parties' children. The defendant does not challenge that order in this appeal. Thus, the court vested the plaintiff with full decision-making authority for his children, complemented with providing the defendant an avenue by which she could incrementally increase her visitation with R. It is only this part of the court's comprehensive custody and visitation order that is at issue in this appeal. The defendant does not argue, and the majority does not hold, that the visitation order constitutes an abuse of discretion because it is not in R's best interests or because it does not reflect that the court properly considered the evidence and properly applied the statutory factors. Instead, the sole infirmity the majority identifies with the order is that it constitutes an impermissible delegation of the court's authority. I disagree.[3]

The court's November 18, 2021 order provides in rele-

vant part that the defendant would have supervised visits with R, but only "[a]fter the [defendant] has engaged in at least four sessions with her mental health professional and the same has been confirmed in writing to the [plaintiff] by the mental health professional . . . . The first three in-person visits shall occur within sixty days after [the plaintiff] has received such confirmation, shall be no longer than one hour each, and shall be supervised by a professional supervisor selected and paid for by the [plaintiff]." The order further provides that, "[u]nless the [plaintiff] reasonably determines, after consultation with [R's] therapist, that the supervised visits are causing negative behavioral or emotional consequences for [R], then the [defendant] shall thereafter be entitled to reasonable, incrementally increased, unsupervised visitation with [R] on a schedule approved by the [plaintiff] from time to time. If at any time the [plaintiff] reasonably determines, after consultation with [R's] therapist, that the unsupervised visits are causing negative behavioral or emotional consequences for [R], then the [plaintiff] may either suspend the [defendant's] visitation or reinstate the requirement of supervision of the visits by a third party of his choice, with [the plaintiff] responsible for the cost of supervision, if any . . . ."[4]

The majority concludes that this part of the court's order constitutes an impermissible delegation of the court's authority "because the court effectively delegated to the plaintiff, in consultation with the child's therapist, the authority to suspend or terminate the defendant's visitation with R and its attendant obligation to consider the best interests of R pursuant to § 46b-56 (c) . . . ." The majority then attempts to distinguish the order in the present case from the visitation provision that this court affirmed in *Zilkha* v. *Zilkha*, 180 Conn. App. 143, 171–73, 183 A.3d 64, cert. denied, 328 Conn. 937, 183 A.3d 1175 (2018), which afforded the father no right to visitation but left to the children the discretion to engage in visitation. In *Zilkha*, "[w]ith respect to future access by the defendant to the children, the [trial] court stated that '[s]uch access as may evolve between [the defendant], his extended family and [his two children] during the less than three years remaining before [the children] are eighteen shall be voluntary and at [the children's] choosing and direction. Minimally, it shall be by quarterly written reports provided by the children about their lives to their father. Hopefully, it will progress to more access and, ultimately, personal contact on a regular basis. Should the children wish to progress at some point in the future to normal access, [the plaintiff] must permit alternate weekend overnight access from Friday through Sunday, some hours during the week after school, as well as uninterrupted vacation time in the summer for up to three weeks. All such access is to be unsupervised. . . .

" 'The court cautions [the defendant] not to read any

legal entitlement to direct access in any fashion to his children through these orders. Visitation is always for the children's benefit. *In this unusual high conflict family and, given* [*the children's*] *age, the court has made it exclusively the minor children's legal entitlement.*' " (Emphasis in original.) Id., 165–66.[5]

The majority reasons that, unlike the court in *Zilkha*, the court in the present case determined that the defendant was " 'entitled to reasonable, incrementally increased, unsupervised visitation with R . . . .' " According to the majority, once the court granted the defendant this incremental entitlement, only the court—not the plaintiff after consultation with R's therapist—could take it away. In reaching this conclusion, the majority relies on cases in which this court has held that a court may not delegate custody or visitation decisions to nonjudicial entities such as a therapist or an attorney for the minor child. It also relies on this court's discussion of a claim of impermissible delegation to a parent of authority over visitation in a case in which we were not asked to decide and did not decide whether the prohibition on delegation applied to discretion over visitation given to the custodial parent. I disagree both with the majority's interpretation of the court's visitation order as to R and with its application of our nondelegation cases to the order in this case.

I begin with the interpretation of the court's order, which is a question of law. See *Lawrence* v. *Cords*, 165 Conn. App. 473, 484, 139 A.3d 778 (construction of order or judgment is question of law), cert. denied, 322 Conn. 907, 140 A.3d 221 (2016). First, it is important to note that the order did not delegate any authority over the defendant's visitation to R's therapist. The order unambiguously gives the plaintiff, not R's therapist, discretion to suspend the defendant's visitation. The requirement that the plaintiff consult with R's therapist before suspending visitation is merely a limit the court placed on the plaintiff's discretion to suspend the defendant's visitation with R. Given that the court had the authority, pursuant to § 46b-56 (a), to order no visitation for the defendant and thereby give the plaintiff complete discretion over the defendant's visitation with R, I do not view its order restricting that discretion by requiring consultation with R's therapist as an impermissible delegation of the court's authority.

Second, I disagree with the majority's reliance on the defendant's " 'entitle[ment]' " to visitation. The court's statement that "the [defendant] shall thereafter be *entitled* to reasonable, incrementally increased, unsupervised visitation with [R]" must be read in context of the entire order. (Emphasis added; internal quotation marks omitted.) See *Fisher* v. *Big Y Foods, Inc.*, 298 Conn. 414, 424–25, 3 A.3d 919 (2010) ("an opinion must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding"); see

also *Fisher* v. *Fisher*, 4 Conn. App. 97, 100, 492 A.2d 525 (1985) ("[w]e must read the language of a trial court in the context of its entire memorandum of decision, declining to find reversible error solely because of what may be an inappropriate choice of words"). As an initial matter, the court never determined that the defendant was unconditionally entitled to unsupervised visits with R. The " 'entitled to' " language on which the majority relies is conditioned on the plaintiff reasonably concluding, in consultation with R's therapist, that the limited supervised visitation ordered by the court is not " 'causing negative behavioral or emotional consequences for [R] . . . .' " Otherwise, there is no "entitlement" to unsupervised visits.

Similarly, the court's order gives the plaintiff the discretion to suspend unsupervised visits once they start for the same reason that the plaintiff is permitted to not allow the visits in the first place. Alternatively, given the evidence the court heard regarding the defendant's behavior, mental health issues, and struggles with alcohol, as discussed at length in the majority opinion, the order gives the plaintiff the discretion to reinstate the requirement of supervision. At the same time, the court recognized the importance of the defendant maintaining a relationship with R and sought to allow her to do so. The court balanced these competing interests by creating an avenue for the defendant to visit with R, giving the plaintiff discretion to stop or restrict visits if they were negatively affecting R, and placing limits on the plaintiff's discretion to do so. Accordingly, read in the proper context, the order is nothing more than the court's effort to limit the discretion the plaintiff has over the defendant's visitation with R. Thus, under the court's order as to R, the plaintiff is permitted to exercise limited discretion over the defendant's visitation.

Finally, I disagree with the majority's attempt to distinguish this court's decision in *Zilkha* because in *Zilkha* " 'the court likewise decided that the defendant should not have any right to visitation.' The court's order [in the present case] makes clear on its face, however, that the defendant was granted a specific right to visitation." In footnote 13 of the majority opinion, the majority reasons that, "[i]n *Zilkha*, this court held that the trial court did not improperly delegate its authority because the court plainly decided that the defendant had *no right* to visitation. . . . This [court] made clear that the father's right to visitation was not left up to the children. Rather, the court simply noted that, should the teenage children want to voluntarily visit their father, they were free to do so."[6] (Citation omitted; emphasis in original.)

In my view, the majority elevates form over substance. Applying the majority's reasoning, a court's order that "the noncustodial parent has no right to visitation, unless permitted by the custodial parent" is

permissible because it starts by ordering that there is no right to visitation. On the other hand, a court's order that "the noncustodial parent has the right to visitation as permitted by the noncustodial parent" is an impermissible delegation of authority because it begins by acknowledging the noncustodial parent's right to visitation. This is a distinction without a difference, as there can be no question that both orders have the exact same substantive effect—the noncustodial parent may visit with the children only if the custodial parent allows it. I do not believe that our legislature intended to have the question of the court's authority to issue equitable custody and visitation orders turn on the grammatical structure of the court's order.

I also disagree with the majority's application of the decisions proscribing the delegation of judicial authority to nonjudicial entities in the present case. The majority cites *Valante* v. *Valante*, 180 Conn. 528, 532–33, 429 A.2d 964 (1980), *Nashid* v. *Andrawis*, 83 Conn. App. 115, 119, 847 A.2d 1098, cert. denied, 270 Conn. 912, 853 A.2d 528 (2004), and *Weinstein* v. *Weinstein*, 18 Conn. App. 622, 628–29, 561 A.2d 443 (1989), as examples of cases in which "our appellate courts have made clear that a court may not delegate its statutory decision-making authority to a nonjudicial entity." In *Zilkha*, this court specifically rejected the defendant's reliance on those three historical cases in support of his argument that the visitation order in that case constituted an impermissible delegation of judicial authority: "The present case is wholly inapposite to those cited by the defendant. In each of the cases cited by the defendant, the court removed itself entirely from the decision-making process by permitting legal issues to be resolved through binding arbitration that was subject to limited judicial review; see *Nashid* v. *Andrawis*, supra, 120–21; or by delegating the court's authority and obligation to render a binding decision to a family relations officer; see *Valante* v. *Valante*, supra, 532–33; or to a guardian ad litem. See *Weinstein* v. *Weinstein*, supra, 628–29. Unlike in those cases, the court in [*Zilkha*] properly considered and fully resolved the custody and visitation issues before it by rendering a decision on the defendant's motions and the relief requested therein." *Zilkha* v. *Zilkha*, supra, 180 Conn. App. 171–72.

In my view, the same is true in the present case. The court did not remove itself entirely from the decision-making process; it heard the plaintiff's motion and the defendant's opposition and crafted a visitation order that gave the defendant the opportunity to maintain and improve her relationship with R while protecting R's best interests. In this way, the court properly exercised its authority pursuant to § 46b-56 based on the best interests of the child.

The majority also likens the court's order in the present case to the trial court's order in *Kyle S.* v. *Jayne*

K., 182 Conn. App. 353, 190 A.3d 68 (2018), which this court determined to be an impermissible delegation of judicial authority. Id., 372–73. I believe that the orders in the two cases are materially different. In *Kyle S.*, "[t]he court stated that it would rely on [the therapist of the parties' minor child, T] to dictate the scope of Kyle S.'s [contact] with T in a therapeutic setting. The court specifically noted . . . *I am restricting that contact so that the mental health professional can be in charge.*" (Emphasis in original; internal quotation marks omitted.) Id., 361. This court concluded that the trial court's order constituted an impermissible delegation of authority because "[T's therapist] was to 'dictate' the scope of the contact between Kyle S. and T, and [T's therapist] was authorized to increase or decrease said contact as he saw fit. The court also noted that [T's therapist] was 'in charge.' . . . Put another way, the court in [*Kyle S.*] improperly removed itself from the decision-making process by permitting [T's therapist] to decide the nature and scope of Kyle S.'s contact with T." (Citations omitted.) Id., 372–73.

For the reasons I previously have discussed, the order in the present case does not delegate any authority to R's therapist, who cannot dictate the scope of the defendant's contact with R, and the court certainly did not put the therapist in charge, as the trial court did in *Kyle S.* Again, in the present case, all the court did when determining what was in R's best interests was give the plaintiff limited discretion over the defendant's visitation. Consequently, this case is readily distinguishable from *Kyle S.*, in which the therapist was given sole discretion over the nature of the party's visitation.

Finally, the majority's reliance on this court's recent decision in *Lehane* v. *Murray*, 215 Conn. App. 305, 283 A.3d 62 (2022), is misplaced, as that case did not resolve the question presented here. In *Lehane*, the trial court, after hearing several postdissolution motions regarding custody and visitation, issued an order granting the defendant sole physical custody of the parties' child, J. Id., 308. The court also ordered "that the plaintiff shall have parental access to the minor child every other weekend and every Wednesday overnight, and that the defendant may alter, change or modify [that] schedule, along with the location, date and time of the exchanges." (Internal quotation marks omitted.) Id. On appeal, the plaintiff argued that the visitation order constituted an impermissible delegation of the court's authority to the defendant to " 'decide the nature and scope' " of the plaintiff's access to her son. Id., 316.

Significantly, the defendant in *Lehane* did not argue that the court had the authority to give him the discretion to alter the nature and scope of the plaintiff's visitation. Instead, he denied that he had been granted such authority, arguing that he was "not 'in charge' of determining [the plaintiff's] contact with J. . . . Unlike

[in] *Kyle S.*, the court did not delegate the decision of what contact [the plaintiff] would have with J to [the defendant]. The trial court ordered the access to which the [p]laintiff was entitled and did not order any mechanism by which [the defendant] could terminate that access." (Citations omitted.) *Lehane* v. *Murray*, Conn. Appellate Court Briefs & Appendices, May Term, 2022, Appellee's Brief p. 9. Consequently, in *Lehane*, we were not asked to address the issue that is before us in the present case. We instead addressed the issue as presented to us—whether the court's order permitted the defendant to limit the nature and scope of the plaintiff's visitation. See *Lehane* v. *Murray*, supra, 215 Conn. App. 316–18. Because we concluded that it did not, we never had to decide whether it would have been proper for the court to permit the defendant to do so. See id. The court in *Lehane*, like the defendant in his appellate brief, thus distinguished our earlier decision in *Kyle S.* "because, [in *Lehane*], the court's order allowing the defendant to 'alter, modify or change' the plaintiff's visitation schedule does not give him the authority to 'decide the nature and scope' of her relationship with their son. Rather, after fully and carefully considering the evidence presented by the parties, as well as making the requisite findings regarding the best interest of the minor child, the court exercised its judicial decision-making authority in determining the nature and scope of the plaintiff's parenting access and affording the defendant only a limited amount of discretion to modify the visitation schedule." (Footnote omitted.) Id., 316–17.

In reaching this conclusion, we noted that *Lehane* was "also distinguishable from other cases in which this court or our Supreme Court has reversed a family court's order on the ground that the court had improperly delegated its core decision-making function to another party, such as, for instance, *Nashid* v. *Andrawis*, [supra, 83 Conn. App. 120–22], in which the court removed itself entirely from the decision-making process by permitting legal issues to be resolved through binding arbitration that was subject to limited judicial review, or *Valante* v. *Valante*, [supra, 180 Conn. 532–33], in which the court delegated its authority to render a binding decision to a family relations officer." *Lehane* v. *Murray*, supra, 215 Conn. App. 316–17 n.6. We further noted that "the court did not give decision-making authority to a third-party therapist or a mediator but, rather, afforded the father of the child, as the sole legal and physical custodian, the latitude to adjust the mother's visitation schedule in accordance with the child's needs. The court's order is consistent with the well established principle that the care of children resides first with their parents in order to fulfill a function the state can neither supply nor impede. See *Prince* v. *Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 88 L. Ed. 645 (1944). Indeed, 'the interest of parents in the

care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by [the United States Supreme] Court.' *Troxel* v. *Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); see also *Roth* v. *Weston*, 259 Conn. 202, 216, 789 A.2d 431 (2002) (same). In affording the defendant the limited discretion to adjust the plaintiff's visitation schedule, the court recognized the need for the parties to prioritize their roles as mother and father, rather than plaintiff and defendant." *Lehane* v. *Murray*, supra, 317 n.7.

Thus, I view the holding in *Lehane* to be much narrower than does the majority. We did not hold that a court impermissibly delegates its authority when it gives the custodial parent the discretion to limit, modify, or suspend visitation. In fact, we clearly indicated that delegation of such discretion to a parent is materially different than delegation of authority to a third party. See id. The majority, however, does not recognize any difference between those two situations and notes that "the overwhelming majority of jurisdictions" agree that a court improperly delegates its authority to a custodial parent when it allows the custodial parent to control the noncustodial parent's right to visitation. See footnote 11 of the majority opinion.

I believe that any reliance on those decisions is misplaced. First, in several of those jurisdictions, a court improperly delegates its judicial authority when it allows the children to determine whether visitation with a parent will occur. See, e.g., *In re S.H.*, 111 Cal. App. 4th 310, 318, 3 Cal. Rptr. 3d 465 (2003) ("[t]he discretion to determine whether any visitation occurs at all must remain with the court, not social workers and therapists, and certainly not with the children" (internal quotation marks omitted)); *In re Marriage of Jenkins*, Docket No. 22-0656, 2023 WL 382301, *3 (Iowa App. January 25, 2023) (court improperly delegated authority to mother and *children* to determine whether visitation with father would occur); *In re Izrael J.*, 149 App. Div. 3d 630, 630, 51 N.Y.S.3d 88 (2017) ("court may not delegate its authority to determine visitation to either a parent or *a child*" (emphasis added; internal quotation marks omitted)). Thus, those cases are contrary to our holding in *Zilkha* v. *Zilkha*, supra, 180 Conn. App. 172, expressly rejecting an improper delegation claim as to teenage children.

Second, the Alabama and Arkansas decisions cited by the majority recognize that there is no categorical bar to affording discretion to the custodial parent over visitation. See *Pratt* v. *Pratt*, 56 So. 3d 638, 643 (Ala. Civ. App. 2010) ("a visitation order awarding " 'reasonable visitation with the minor children at the discretion of the [custodial parent]' " *generally should not be allowed*" (emphasis added)); *Brooks* v. *Shepherd*, Docket No. CA 98-1526, 1999 WL 1031263, *6 (Ark. App. November 10,

1999) (The court noted that "[a]n unlawful delegation of judicial authority does not occur where the court retains the ultimate decision making responsibility. . . . *Nor is it an unlawful delegation of judicial authority when the trial court grants discretion to those individuals charged with the psychological well-being to determine when visitation with a non-custodial parent is appropriate*." (Citation omitted; emphasis added.)).

North Dakota also recognizes the propriety of such orders under certain circumstances: "Giving the custodial parent such complete discretionary authority over the manner and timing of visitation should be used only when there is a demonstrated need to protect the children from the potential for physical or emotional harm *and* where . . . the custodial parent has demonstrated that he or she is deeply concerned that the children, for the children's benefit, maintain a relationship with the noncustodial parent." (Emphasis in original; internal quotation marks omitted.) *Wigginton* v. *Wigginton*, 692 N.W.2d 108, 112–13 (N.D. 2005).[7]

The majority places particular emphasis on the reasoning of the Virginia Court of Appeals in *Rainey* v. *Rainey*, 74 Va. App. 359, 387, 869 S.E.2d 66 (2022), in which the court held that, because "the governing statutes squarely place the obligation to make contested visitation decisions on the judiciary, delegation of this responsibility to third parties or parents is unauthorized." In my view, however, our statute affords a court more discretion in issuing an order regarding custody and visitation than that afforded to a court in Virginia.

For example, although § 46b-56 (a) provides that "the court may assign parental responsibility for raising the child to the parents jointly, or may award custody to either parent or to a third party, according to its best judgment upon the facts of the case and subject to such conditions and limitations as it deems equitable," § 20-124.2 (A) of the Virginia Code does not provide a similar directive. See Va. Code Ann. § 20-124.2 (A) (Cum. Supp. 2020). Moreover, although both statutes require a court to consider the best interests of the child in issuing or modifying a custody or visitation order, Virginia law provides that a court "shall" consider nine factors and "shall" set forth its findings regarding "the relevant factors . . . ." Va. Code Ann. § 20-124.3 (Cum. Supp. 2020). Section 46b-56 (c), in contrast, provides that a court "may consider, but shall not be limited to, one or more of" seventeen factors and "is not required to assign any weight to any of the factors that it considers, but shall articulate the basis for its decision." These distinctions indicate that greater discretion is afforded to courts deciding custody and visitation issues in Connecticut than in Virginia.

Moreover, although the Virginia Court of Appeals reached its conclusion as a matter of statutory interpre-

tation, the court also delved into certain policy considerations, as does the majority in the present case. Specifically, the majority explains that, "given the often contentious nature of postdissolution relationships, permitting a custodial parent to decide visitation arguably poses even more significant concerns than a rule permitting objective third parties, such as guardians ad litem or therapists, to decide the issue." Although that consideration is relevant to whether a court abuses its discretion in issuing a visitation order that affords the custodial parent discretion as to the noncustodial parent's visitation in certain circumstances, it should have no bearing on whether the court's visitation order constitutes an impermissible delegation of the court's authority. Had the legislature decided, as a matter of policy, that a custodial parent is precluded from having discretion as to the noncustodial parent's visitation, it could have stated so expressly. The statute, however, contains no such restriction.[8]

Accordingly, because § 46b-56 authorizes the court's order in the present case, I am not persuaded by the reasoning of the Virginia Court of Appeals that a court improperly delegates its authority to determine visitation when it affords the custodial parent discretion over the noncustodial parent's access to a child. Such reasoning "ignores the presumption that parents act in the best interests of their children." *Roth* v. *Weston*, supra, 259 Conn. 222.

I want to reiterate that I appreciate the appellate jurisprudence applying the nondelegation doctrine to nonjudicial entities, e.g., attorneys for the minor children, therapists, guardians ad litem, family relations officers, as our legislature has made clear that if parents cannot decide what is in the best interests of their child, then it is the court's responsibility to do so. See General Statutes § 46b-56 (b). In my view, the court in the present case performed its responsibility and did not run afoul of the nondelegation doctrine. It first granted sole legal custody of the parties' children to the plaintiff, which the defendant does not challenge on appeal. See *Ireland* v. *Ireland*, 246 Conn. 413, 426, 717 A.2d 676 (1998) ("it should be presumed that when primary physical custody was entrusted to the custodial parent, the court making that determination considered that parent to be the proper parent to make the day-to-day decisions affecting the welfare of the child"). It then properly ordered that the plaintiff, R's custodial parent, would have discretion over the defendant's access to R. Furthermore, the court did so in a way that provided clear guidelines on how the plaintiff may exercise that discretion.

The court, instead, could have ordered that the defendant have no visitation with R except as agreed to by the plaintiff. Such an order would have lacked the thoughtful limits the court placed on the plaintiff's dis-

cretion, but, under the majority's rationale, it would not have constituted an impermissible delegation of authority. In effect, the majority is saying that the court erred in crafting a more nuanced order that gives the defendant a better chance of maintaining and building a relationship with R than if it had used the blunter instrument of no visitation, which § 46b-56 undoubtedly authorizes the court to do. Given that the court has the statutory authority to grant the custodial parent such discretion by ordering no visitation, which order would be reviewed for an abuse of discretion, it makes little sense to me that a visitation order affording the custodial parent *less* discretion is improper *as a matter of law*. In short, I do not believe that the legislature intended § 46b-56 to be applied in such a manner.

To be clear, I am not positing that an order that affords the custodial parent unfettered discretion as to the noncustodial parent's visitation should be the usual practice of a trial court considering a custody and visitation dispute nor that such an order never would constitute an abuse of discretion. Rather, I simply note that the legislature expressly has granted Superior Court judges the authority to issue such an order if it is in the best interests of the child or children and, therefore, the determinative question is not a legal one but, rather, a discretionary one.

This brings me to my final point. I am concerned that the majority's holding in part II will result in trial judges denying visitation rather than ordering a gradual visitation schedule that could be paused in the discretion of the custodial parent on that parent's reasonable determination that the visits are negatively affecting the child. Such a result would be unfortunate for both the noncustodial parent who is denied any visitation and the child. In my view, § 46b-56 is drafted broadly to encourage, rather than discourage, the thoughtful consideration exemplified by the trial court in this case.[9] Therefore, because the defendant has not claimed that the court's order constituted an abuse of its discretion, I would affirm the court's judgment as to the visitation order with R because the court did not improperly delegate its judicial authority to the plaintiff.

Accordingly, I respectfully dissent from part II of the majority opinion and concur in parts I and III of the opinion.

[1] I also disagree with the conclusion in footnote 10 of the majority opinion that the defendant's claim that the court improperly delegated its judicial authority in the October 30, 2019 ex parte order is moot. I agree with the majority's conclusion in footnote 7 of its opinion that we are bound by this court's decision in *Kyle S.* v. *Jayne K.*, 182 Conn. App. 353, 365, 190 A.3d 68 (2018), in which we held that "a [General Statutes] § 46b-56f order is not subject to dismissal pursuant to the mootness doctrine." Because the only topics such an order addresses are custody and visitation rights, I am not persuaded by the majority's reasoning that the "portion of the § 46b-56f order pertaining to visitation" is somehow distinct from the court's October 30, 2019 ex parte order and, therefore, does not implicate "any potential collateral consequences of the ex parte order that was issued in this case." See footnote 10 of the majority opinion. Given this court's holding in *Kyle*

S., I believe that the defendant's improper delegation claim as to the October 30, 2019 ex parte order should be addressed on the merits. Therefore, I simply note that I would reject the defendant's improper delegation claim as to the ex parte order on the merits for the same reasons that I would affirm the court's November 18, 2021 visitation order as to R.

[2] The majority posits that, "if [my] interpretation were correct, there would be no logical basis for interpreting the statute to prohibit delegations to third parties other than custodial parents. That same language could only be interpreted as also permitting a court to delegate its authority over visitation orders to other third parties, such as a therapist or guardian ad litem. Such an interpretation, therefore, is contrary to this court's well established nondelegation jurisprudence." As I explain further in addressing the majority's reliance on our nondelegation cases, our precedent reflects—but the majority does not recognize—that delegation of discretion to a parent is materially different than delegation of authority to a third party.

[3] I agree with the majority that whether the court has impermissibly delegated its authority is a question of law over which we exercise plenary review. See *Zilkha* v. *Zilkha*, 180 Conn. App. 143, 170, 183 A.3d 64 ("whether the court improperly delegated its judicial authority presents a legal question over which we exercise plenary review"), cert. denied, 328 Conn. 937, 183 A.3d 1175 (2018).

[4] It is notable that neither our Supreme Court nor this court has ever held that an order giving a custodial parent discretion over a noncustodial parent's visitation rights constitutes an impermissible delegation of authority, and a rudimentary Internet search identified several decisions over the last thirty years in which Superior Court judges have issued such orders. See *Young-Dwyer* v. *Dwyer*, Superior Court, judicial district of Hartford, Docket No. FA-17-5044357-S (March 19, 2018) ("The plaintiff [mother] shall have sole legal and physical custody of [the minor child]. The defendant may have visitation with [the child] at the plaintiff's discretion."); *Manis* v. *Newman*, Superior Court, judicial district of Waterbury, Docket No. FA-17-5018286-S (January 31, 2018) ("The plaintiff father is granted sole legal and physical custody of the minor child and [the defendant] mother shall continue to enjoy daily telephone or video conferencing with the minor child. The defendant's visitation shall be at the plaintiff's discretion."); *Brunson* v. *Yrayta*, Superior Court, judicial district of New Haven, Docket No. FA-14-4019781-S (August 21, 2015) ("The court grants sole legal and physical custody of the minor children . . . to the plaintiff [father]. . . . The defendant mother's visitation is at father's discretion."); *Boyne* v. *Boyne*, Superior Court, judicial district of Hartford, Docket No. FA-05-4018463 (June 25, 2007) ("[t]he defendant's relationship with his children has deteriorated to the extent that by agreement and court order the plaintiff [mother] has sole custody of the children and the defendant has visitation only at the discretion of the plaintiff"), rev'd in part on other grounds, 112 Conn. App. 279, 962 A.2d 818 (2009); *Abogunde* v. *Abogunde*, Superior Court, judicial district of Tolland, Docket No. FA-04-0083875-S (June 29, 2004) ("The plaintiff [mother] shall have sole custody of the minor children. Any visitation shall be at the discretion of the plaintiff and only as permitted by her, until further order of the court."); *Zavitsanos* v. *Zavitsanos*, Superior Court, judicial district of New Haven, Docket No. FA-98-0410795 (June 21, 1999) (court ordered father would have supervised visitation for one year before unsupervised visitation began and noted that, "[i]f no supervised visitation occurs, then the mother may decide to preclude the father's unsupervised visitation and summer vacation"); *Kasowitz* v. *Kasowitz*, Superior Court, judicial district of New Haven, Docket No. FA-97-0403819 (January 26, 1999) (The court ordered that "[b]oth parents shall actively participate and encourage the children to participate in the program as deemed appropriate by the therapist. If recommended [by] the therapist, the husband shall participate in substance evaluation and treatment, and visitation may be modified or terminated in the reasonable exercise of the mother's discretion for his failure to so participate."); *Lavorgna* v. *Lavorgna*, Superior Court, judicial district of Waterbury, Docket No. 106399 (March 30, 1993) ("[v]isitation for [the minor child] with the plaintiff [mother] shall be in the discretion of the defendant [father], custodian of [the minor child]"). I am certain that there are more.

[5] Given the clear language of the visitation order in *Zilkha*, I disagree with the majority's statement that "[t]his court's decision [in *Zilkha*] made clear that the father's right to visitation was not left up to the children." I simply do not see how the order can be interpreted in any way other than leaving the father's right to visitation up to the children. In fact, the court in *Zilkha*

used the same entitlement language on which the majority places so much emphasis in the present case.

[6] See footnote 5 of this concurring and dissenting opinion.

[7] The majority suggests that anything short of a categorical ban on delegation to a custodial parent does not "[provide] sufficient guidance . . . to courts or adequate assurance to noncustodial parents and the children that visitation orders will be issued according to a child's best interests." I disagree. Trial courts regularly use their discretion in crafting custody and visitation orders. As noted previously in this opinion, they are in the best position to make such determinations and we regularly review custody and visitation orders under the abuse of discretion standard. Furthermore, given that we review orders providing for no visitation under an abuse of discretion standard, I see nothing novel about reviewing a visitation order such as the one at issue in this case under such a standard. Finally, I am in no way suggesting that an order like that issued in this case should be commonplace. I agree with those courts that have held that such orders should be the exception and that the use of such an order, in the absence of circumstances justifying it, would constitute an abuse of discretion.

[8] The majority apparently reads such a restriction into § 46b-56, explaining that "a statute prohibiting third parties, including custodial parents, from deciding a noncustodial parent's right to access his or her child is neither arbitrary nor irrational. On the contrary, *the legislature's decision to prohibit such delegations serves important public policy goals*." (Emphasis added.)

[9] In footnote 15 of the majority opinion, the majority recognizes that its decision "may require courts to entertain more frequent motions concerning visitation than they might otherwise be required to decide if custodial parents were permitted to decide a noncustodial parent's right to visitation." In my view, the majority minimizes the financial and emotional burdens placed on parents and their children by repeated court hearings to adjust custody and visitation parameters. What our Supreme Court recognized more than forty years ago remains a compelling consideration today: "It is true that the parties themselves may present postjudgment motions to continue or to shift custody . . . but time is required for such motions to be calendared and heard. In the meantime, when anxieties and disappointments are likely to be great, the temptation for disruptive self-help is large." *Yontef* v. *Yontef*, supra, 185 Conn. 292.