
“PARENTING COORDINATORS”

A PRACTICAL TOOL
IN THE CONTINUING
CHALLENGE
TO
ENHANCE THE WELLBEING
OF CHILDREN
IN HIGH CONFLICT DIVORCE

PREPARED BY CRAIG NEVILLE

SEPTEMBER 26, 2007

INTRODUCTION

As family lawyers we have all been involved in high conflict custody disputes that never seem to end and leave us with the sense that there have got to be more (and better) tools available than just the court system to assist families in these cases. It seemed appropriate, (to me at least), that we prepare a paper talking about the work currently being done by a group of volunteers who are developing a program for, and a roster of, trained parenting coordinators ("PCs") to assist families staggering out of the litigation process. We propose PCs be considered as another tool for dealing with the fallout from high conflict custody cases, not before or during the litigation process but after the trial and decision have been pronounced. (This summary of my thoughts, however, is only my own take on what is happening and is not intended to reflect the views of the steering committee or anyone else for that matter).

We don't offer solutions to the dilemmas which face us as litigators within that process itself, but the group which is working on creating this program and roster of PCs has some ideas for more effectively dealing with the fallout from high conflict custody litigation. These ideas involve the appointment of a PC in difficult but appropriate cases to provide a more cost effective approach for ongoing conflict resolution for angry and frustrated parents still reeling from defeat in the courts (or coping with an unsatisfying victory).

THE NEED

None of us who practice family law on a daily basis has any doubt about the destructive nature of custody disputes, and the long term consequences of such disputes, upon the healthy development of children. (I have appended the indexes from the first of two sessions we have had with Dr. Joan Kelly who was in Vancouver discussing PC programming with us in the spring, which indexes include several articles and research pieces, both historic and more recent,

dealing with her work and that of others insofar as it relates to the consequences for children of high conflict custody proceedings).

By way of example, here are some of Dr. Kelly's observations from her own research and that of others she cites in the papers provided to us:

- 2-3 years after divorce, 25% of children do not see their fathers
- Of children who were informed of the pending separation of their parents:
 - 23% had no one talk to them about the separation
 - 44% only had mother talk to them about the separation
 - 17% had their parents together talk to them
 - 45% had one or two comments shared with them about the separation, and
 - only 5% felt fully informed and were invited to ask questions about the separation
- Post divorce parental conflict remains high 2-3 years after divorce in 8-15% of families and "psychiatric illness and personality disorders are disproportionate among this group"
- Between 25% and 45% of young adults reported having moved following separation
- 3/4 of divorced men and 2/3 of women remarry while 1/3 of children will live in a new cohabiting or remarried family (with one half of those new cohabitations lasting less than one year)
- A study involving students in the U.S. showed that 43% of these students in married families felt dad was highly involved and only 14% of students from separated/divorced families felt the same way
- Another study of students found that 2/3 missed not having their fathers more involved, 47% wanted more time with their fathers, and 1/3 questioned whether their fathers loved them.

Studies and research, like statistics generally, can be used, abused, and crafted to fit any number of theories, (and there remains substance to the notion that there are lies, damned lies, and statistics). Nonetheless, the theme arising from years of research (now including research involving adult children of divorce), and numerous studies, is that we could be doing much better in how we support families in divorce where children are involved.

Good parents are too often marginalised in the litigation process or, even where they are successful in court, find themselves consistently on the “losing” side of post trial child related disputes involving everything from counselling to recreational activities, and holidays to special events. Attrition is often the former spouse’s weapon of choice followed by, or accompanied with, the prospect of financial ruin. We think PCs could play a significant role in addressing these challenges.

BACKGROUND

A steering committee consisting of Phyllis Kenney, John-Paul Boyd, Nancy Cameron, and a Registered Clinical Counsellor, Deborah Brakeley, took a leadership role in bringing Dr. Joan Kelly to Vancouver in January of this year to talk about PCs or “special masters” (as they are referred to when appointed by the court in California). After that January session the steering committee proposed the creation of a number of subcommittees to address legal issues, standards, insurance, decision making processes, and qualification/education for PCs.

Dr. Kelly then held a second workshop in April designed to provide training, on interviewing children, for lawyers and health care professionals working as PCs. The training focused on obtaining the views of children, addressing child development issues, and crafting appropriate parenting plans using current child development research.

The next step was to schedule a session in May to address principles of natural justice which was primarily focused on the health care professionals seeking to become engaged as PCs since this is an area in which they do not ordinarily receive professional training.

The intention of the steering committee was to have a session in June to finalise a number of organisational and professional matters with a view to having a roster of PCs available for the fall of 2007 to assist, post divorce, in the management of issues arising in high conflict custody matters. That session did not take place but progress continued with the creation of a “draft roster”, draft agreement for parents and PCs, and templates for the decision making processes in which PCs will be involved. A society is expected to be formed in the months ahead to do further work on the regulatory aspects of this work and to address continuing education and professional development for the people wanting to engage in this work.

THE PROGRAM

An AFCC (Association of Family and Conciliation Courts) task force on parenting coordination originally began discussing the creation of a set of standards for parenting coordination in 2001-2002. Some jurisdictions had been using PCs prior thereto but this appears to have been the first concerted effort to create some guidelines and formalise the designation.

By 2005 guidelines had been established in the U.S. to govern this work and it has evolved from there.

The AFCC's Overview to the Guidelines for Parenting Coordination summarises what the program is all about::

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, educating parents about children's needs, and with prior approval of the parties and/or the court, making decisions within the scope of the court order or appointment contract.

The overall objective of parenting coordination is to assist high conflict parents to implement their parenting plan, to monitor compliance with the details of the plan, to resolve conflicts regarding their children and the parenting plan in a timely manner, and to protect and sustain safe, healthy and meaningful parent-child relationships. Parenting coordination is a quasi-legal, mental health, alternative dispute resolution (ADR) process that combines assessment, education, case management, conflict management and sometimes decision-making functions.

In British Columbia it is expected that, unlike in California, the appointment of PCs will only be by agreement of the parties and PCs will find their jurisdiction under the Commercial Arbitration Act. It's worth noting that anecdotally there are some recent B.C. decisions in which parents have been advised to retain a PC even though the designation has not formally found its way into our lexicon.

John-Paul Boyd has prepared a paper on the jurisdiction issue and I have, with his permission, appended it to this paper.

So it is anticipated in B.C. that parents will have to agree on the appointment of a PC and such appointment will be expected to cover a period of 12 to 24 months.

We are in the final stages of drafting a Parenting Coordination agreement for use by parents and PCs in B.C. and expect to have this document completed for consideration at the end of September. It will encompass the following:

- Introductory principles governing the agreement and the participation of the parents
- Terms relating to the duration of the appointment and the limitations on the parents' right to terminate the agreement,
- The role and function of the PC,
- The nature and extent of the services to be performed by the PC,
- The obligations on the participants
- Details of the consensus building (mediation/negotiation) role of the PC
- Details of the arbitration role of the PC
- Duty to report issues of abuse
- Limited right of appeal
- Fees and disbursements

It is expected that the Parenting Coordination agreement will be quite detailed. For example, we are currently having some interesting discussions as a committee about the extent of the jurisdiction that PCs could acquire by consent of the parties. In the California model, the courts retain the sole jurisdiction to address issues relating to primary care, changes to custody itself, mobility etc. We are discussing whether the parents ought to be able to grant consent to have PCs address all issues relating to custody or just those of a more limited nature such as:

- disputes over holidays,
- pick up and drop off,
- travel,
- education,
- medical and dental issues,
- clothing

- diet
- transportation
- bedtimes
- discipline
- changes in schedules
- participation in extracurricular activities, etc

By way of example, In one recent week, as counsel, I was confronted with post trial/settlement issues relating to non emergency x rays (and the failure to engage in prior discussion about the issue), ear piercing for a nine year old boy, and hair highlights for a 10 year old girl. I had an email from a client whose 12 year old who was going to just die if she didn't get to go to her church sleep over on the weekend. Her mom refused to let her go on the last one without any explanation. Dad felt an application to court was required. These are obviously issues that can be more satisfactorily resolved using ADR and more specifically, where urgency is involved, PCs (who will have, as noted below, powers as arbitrators). The disputes noted above all arise out of long standing conflicts, post divorce, in which one, or both, of the parents continues to let fester a long past custody. The cost associated with having two lawyers, or the court, resolve such disputes is enormous.

Fundamental to the potential success of this initiative is the role of the PC with respect to contact with the children at the centre of these disputes. The PC agreement will include agreement of the parents that the PC will be at liberty not only to meet with and talk to teachers, counsellors, psychologists etc but to meet with the children themselves both at the beginning of the "contract" and while addressing conflicts from time to time which arise between the parents.

Given that our PC agreement is still being drafted, I have attached the agreement which is now being used in Ontario. It provides a flavour of what we expect our

agreement to look like when it is finalised although we are making efforts to keep our agreement considerably shorter.

What will distinguish the PC from mediators and those utilising the collaborative model is that there is an arbitration component to the agreement which enables the parties to provide the PC with authority to arbitrate issues which cannot be mediated or successfully negotiated. While it remains to be seen, it is likely that this will be the tool which is most effective for dealing with high conflict continuing disputes particularly given the power the PC will have to interview children in the process.

We have developed a draft template for the arbitration component of the work done by PCs which we hope will ensure some uniformity in the arbitration process. Included in arbitrated decisions will be:

- a brief background to the dispute,
- the process the PC engaged in to consider the issue,
- the decision, and
- the rationale for the decision.

Both the College of Psychologists (or the BCPA) and the Law Society have confirmed that our professional liability insurance coverage will apply to work being done by PCs.

It is early in the process and much is to be discussed and reviewed before PCs become available to us in our capacity as counsel for the parents. It is clear, of course, that this initiative will not provide a solution for all children in high conflict disputes. It is a tool, as with mediation and collaborative law, which will be helpful when used selectively in appropriate circumstances.

We look forward to working with the courts and with families to see if this new initiative can find a place as an option in the ADR process.