

Resolving High-Conflict Custody Cases

Parenting coordinators can offer a way out of repeated recourse to court - COMMENTARY

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Judges, lawyers and psychologists struggle to deal with a small subset of custody cases that involve a high level of ongoing conflict between the parents.

Even after an initial custody order is entered, the parents in these cases frequently return to court, whether for contempt, special relief or modification actions.

The disputes are frequently over issues other than primary physical custody or major medical decisions. For example, the parents may disagree on times and places for transitions between households, whether there should be temporary variations to the schedule to accommodate special events, participation in extracurricular activities, child care arrangement or exchange of information about the child. These cases monopolize the time of attorneys who handle them, and they take up a disproportionate share of the time of the courts.

Worst of all, the children in these cases often suffer as a result of the frequent conflict between their parents. This phenomenon is not unique to Pennsylvania, nor even to the United States. Fortunately, certain other states and certain provinces in Canada took the lead in developing a tool parenting coordination for addressing these "high-conflict" cases.

Two years ago, in September 2006, the Pennsylvania Bar Institute and the Pennsylvania Psychological Association joined forces to present a continuing education program entitled Parent Coordinators in Pennsylvania: Handling High Conflict Custody Cases ("Parenting coordinator" rather than "parent coordinator" is now the preferred term). At that time, a few counties and judges had taken the lead in appointing parenting coordinators to work with some families. However, since that time, the use of parenting coordinators has exploded. Judges in at least 15 counties have entered orders appointing parenting coordinators (including multiple judges in a number of those counties), and the rate at which parenting coordinators are being appointed has been increasing dramatically. Clearly, there has been a pent-up demand for this new (to Pennsylvania) method of handling high-conflict custody situations.

The Association of Family and Conciliation Courts, in its Guidelines for Parenting Coordination, has defined parenting coordination as "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." As this definition makes clear, parenting coordination is intended as a tool to be used after a custody order (or "parenting plan") has been put in place. Parenting coordinators generally first try to resolve issues arising out of the custody order through facilitation, mediation, consultation, coaching and education. However, if it is apparent to the parenting coordinator that continued similar efforts are unlikely to resolve an issue, the parenting coordinator has the authority to resolve the dispute by making a decision. It is this decision-making power that sets the parenting coordinator apart from mediators or co-parent counselors.

Increased Acceptance

Given the increased acceptance and use of parenting coordinators, it is important for the bench and bar to understand more about parenting coordination. Ideally, parenting coordination will be used in a manner that reflects the state-of-the-art of the development of this tool.

Following up on the September 2006 continuing education conference, an interdisciplinary Parenting Coordination Task Force was formed. This ad hoc committee that arose as an offshoot of the Commission of Justice Initiatives/ Changing the Culture of Custody Committee, and it consists of judges, family law attorneys, court administrators and psychologists from across the state. The members of the Parenting Coordination Task Force are: Stephen J. Anderer, J.D., Ph.D., the author of this column; Rachael L. Baturin, MPH, J.D.; Judge Robert G. Bigham; Steven Cohen, Ph.D.; Kimberly Cox, Esq.; Mark B. Dischell, Esq.; John C. Howett, Jr., Esq.; Jane Iannuzzelli, M.Ed., M.A.; Marla Isaacs, Ph.D.; Samuel Knapp, Ed.D.; Judge Robert J. Matthews; Eve Orlow, Ed.D., M.S.; Judge Katherine B.L. Platt; Arnold Shienvold, Ph.D.; Michele Southworth, J.D., LMFT; David J. Steerman, Esq.; Cynthia K. Stoltz, Esq.; Ann Marie Termini, Ed.S., M.S., LPC; Judge Jeannine Turgeon; and Judge David N. Wecht. Its mission was to research and implement a protocol for the utilization in Pennsylvania of the process known as parenting coordination in exceptionally high conflict child custody cases. To that end, the Task Force worked to produce a model Order of Court and proposed Rule of Civil Procedure on parenting coordination that is being considered by the Pennsylvania

Supreme Court Domestic Relations Procedural Rules Committee. If this order and rule are approved, the procedures will be unified throughout the Commonwealth.

Questions have been raised as to whether the state Supreme Court can authorize the courts of common pleas to delegate authority to parenting coordinators as envisioned by the proposed rule and order, and specifically whether that authority can be delegated to parenting coordinators who are not lawyers. The conclusions of the task force are that the authority can be delegated and that it can be delegated to non-lawyers. A brief summary of the reasons for that conclusion is set forth below.

The Pennsylvania Rules of Civil Procedure provide that judges can delegate certain custody decision-making tasks to masters. The Supreme Court has already determined that the Pennsylvania courts may delegate certain tasks to masters when those tasks are something less than determinations of legal, physical or shared custody. Pa.R.C.P. 1920.51(a)(2) (i); *Van Dine v. Gyuriska*, 713 A.2d 1104 (Pa. 1998). In addition, courts may delegate certain tasks to attorneys for children who have been appointed under Pennsylvania Rule of Civil Procedure 1915.11.

The Pennsylvania Rules of Civil Procedure and the Pennsylvania Domestic Relations Code currently provide that judges can delegate certain child custody-related tasks to non-lawyers. Consistent with Rule 1920.51, which allows for the appointment of masters in custody cases, Pennsylvania Rule of Civil Procedure 1915.4-2 provides that in custody matters, the courts may make use of "conference officers" to conduct office conferences and "hearing officers" to conduct hearings. Hearing officers, who are to conduct record hearings, must be lawyers pursuant to Pa.R.C.P. 1915.4-2(b)(1), but there is no requirement that conference officers be lawyers. See Pa.R.C.P. 1915.4-2(a). Conference officers "may make a recommendation to the parties relating to partial custody of visitation of the child or children." Pa.R.C.P. 1915.4-2(a)(3).

The Pennsylvania Domestic Relations Code also authorizes the delegation of certain child custody-related tasks to non-lawyers. Specifically, the Code provides that the court may require parents to attend counseling and may consider the recommendations of counselors before making a custody decision. 23 Pa.C.S.A. 5305 The counseling sessions "may include, but shall not be limited to, discussions of the responsibilities and decision making arrangements involved in both sole and shared custody and the suitability of each arrangement to the capabilities of each parent or both parents" Id Furthermore, the court may require the counselor to submit a report. Id. The counselors who are appointed under 23 Pa.C.S.A. 5305 presumably will be mental health professionals, not lawyers. Similarly, Pennsylvania Rule of Civil Procedure 1915.8(a) provides that the court may order custody litigants to submit to and fully participate in an evaluation by an appropriate expert. The expert is expected to prepare a report "setting out the findings, results of all tests made, diagnosis and conclusions," and shall generally submit the report directly to the court. Pa.R.C.P. 1915.8(b). In appointing an expert, the court is delegating certain fact-finding tasks to the expert, albeit with the court retaining ultimate oversight.

Pennsylvania Rule of Civil Procedure 1515 previously stated that courts may employ experts that are necessary to aid in the proper disposition of an action. The Pennsylvania Civil Rules Committee rescinded that rule not because the courts were no longer permitted to employ experts as necessary but because "the court has inherent power to appoint such persons as are necessary to enable or facilitate the court in deciding cases" Pennsylvania Civil Rules Committee, Consolidation of The Action in Equity with the Civil Action: Explanatory Comment (2004).

The authority that is being delegated is limited. Under the proposed rule of civil procedure for parenting coordination, the authority that is being delegated is specifically limited. Parenting coordinators may not be given the authority to change legal custody, primary physical custody or the power to institute an equally shared physical custody arrangement where such an arrangement did not exist. Because the power that is being delegated is limited, there is less reason to be concerned about the court delegating that power, and there is less reason for the court to be concerned about the power being delegated to non-lawyers. In fact, some Pennsylvania courts have held that some of the types of issues that may be decided by parenting coordinators need not be decided by courts at all. See *Livingston v. Lando*, 32 Pa. D. & C. 4th 182 (1996); *Boatwright v. Boatwright*, No. A06-00-62842-C-19 (C.P. Bucks 2005).

The judge makes the ultimate decision. Under the proposed rule of civil procedure for parenting coordination, the decisions that are made by the parenting coordinator are ultimately subject to review by the appointing court. Because a judge reviews the decisions of the parenting coordinator and has the power to overturn those decisions, there is less reason to be concerned about delegation and about delegation to nonlawyers. In fact, Pennsylvania law specifically allows for arbitration of child custody decisions as long as the arbitrator's decision is not binding-that is, as long as the parties retain the ability to challenge the decision of the arbitrator in court. *Miller v Miller*, 62A.2d 1161 (Pa. Super. 1993).

Common pleas courts throughout Pennsylvania have determined that they have the power to appoint parenting coordinators, with some courts appointing non-lawyers . At least one Pennsylvania county, Erie, has adopted local rules allowing for the appointment of a parenting coordinator. See Erie County Rules of Civil Procedure 1940.10 1940.16. Pursuant to those rules, the parenting coordinator "shall either be an attorney licensed to practice law in Pennsylvania with significant family law experience, or a Master's level family therapist, counselor, or licensed social worker, with substantial experience in family conflict cases" Erie R.C.P. 1940.11. As noted above, judges in at least 15 counties have entered orders appointing parenting coordinators. In most of these counties, the judges have appointed mental health professionals as parenting coordinators; they have not only appointed lawyers. Similarly, at least eighteen Pennsylvania common pleas courts have determined that they may delegate certain tasks to Court Appointed Special Advocates ("CASA"), who need not be lawyers. Court Appointed Special Advocates are trained volunteers who may be authorized by a judge to speak for the best interests of abused and neglected children in court.

There is no prohibition on the delegation to non-lawyers . There is no explicit prohibition in Pennsylvania law on the delegation to non-lawyers of the types of partial custody-related disputes that are handled by parenting coordinators.

Other areas of Pennsylvania law provide for delegation to non-lawyers . Pennsylvania's Magisterial District Judges (formerly known as District Justices) have been given the authority to hear and render decisions in a variety of civil and criminal matters. 42 Pa.C.S. 1515(a); 23 Pa.C.S. 6101-6118. Despite the judicial role they occupy, Magisterial District Judges are not required to be members of the bar. Pa.Const.art.V, 12(b); 42 Pa.C.S. 3101. Judges of the Traffic Court in Philadelphia are not required to be members of the bar either. Pa.Const.art.V, 12(b).

Non-lawyers also are appointed to, and serve in, quasi-judicial positions on Professional Licensing Boards (e.g., the State Boards of Psychology; Social Workers, Marriage and Family Therapists and Professional Counselors; Medicine; Accountancy; Certified Real Estate Appraisers; etc.), the Pennsylvania Labor Relations Board, the Pennsylvania Judicial Conduct Board, the Pennsylvania Board of Property Assessment, County Boards of Elections and Township Boards of Supervisors, among other boards. Some of the members of the boards are professionals e.g., accountants, psychologists, etc. and some members are lay people. These boards make decisions that are legally binding if they are not overturned through an appeal to a Pennsylvania court.

The Child Protective Services Law and the Juvenile Act give non-lawyers-including treating or examining physicians and directors of hospitals and medical institutions--substantial power, including the power to take children into protective custody. 23 Pa.C.S.A. 6315(a), 42 Pa.C.S.A. 6324; see also *Adkins v Luzerne Co. Children & Youth*, 2005 WL 2129921 (M.D. Pa. September 2, 2005).

Other states delegate the authority to non-lawyers. At least seventeen states have parenting coordination through a specific statute, court rules, a nonspecific statute or, in five of those states, through a non-statutory program. See Pennsylvania Bar Institute, Parenting Coordinators in Pennsylvania, PBI No. 2006-4499 (2006) at 266. None of those states have mandated that parenting coordinators be attorneys. To the contrary, several states that have specific parenting coordination statutes explicitly allow judges to delegate their authority to persons other than attorneys. Similarly, some states have adopted rules that explicitly allow non-attorneys to act as parenting coordinators. Finally, there are some specific parenting coordination statutes that have decided to leave the determination of who qualifies as a parenting coordinator to the discretion of the presiding judge.

Therefore, there is precedent from other states that judges may delegate their authority to non-attorneys. On the other hand, there is no precedent for limiting the role of parenting coordinators to just attorneys.

Parenting coordination is an established and accepted role for mental health professionals. Guidelines for parenting coordination were developed by an interdisciplinary task force of the Association of Family and Conciliation Courts, and those guidelines have been published. AFCC Task Force on Parenting Coordination, Guidelines for Parenting Coordination, 44 Family Court Review 164-181 (2005). In addition, the American Psychological Association has established a task force to develop guidelines on parenting coordination for psychologists.

Numerous books and articles have been published in the professional literature describing the role and duties of parenting coordinators. This literature clearly establishes that both mental health professionals and attorneys may serve as parenting coordinators.

Under the proposed rule, mental health professionals who serve as parenting coordinators must receive extensive training . The proposed rule provides that mental health professionals who serve as parenting coordinators must be licensed and must have a master's degree (or equivalent or higher degree) and must have practiced at least 5 years. In addition, he or she must have extensive training as specified in the rule, including specific training relating to

parenting coordination and family law. Given this extensive training, mental health professionals who are appointed should be well-prepared for the responsibilities of the parenting coordination role.

Mental health professionals serving as parenting coordinators are subject to oversight by the courts and to regulation by their respective state boards and the Bureau of Professional and Occupational Affairs . Parenting coordinators must answer to the courts that appoint them and may review their decisions, whether they are lawyers or mental health professionals. To the extent that they violate their professional obligations, both groups are subject to discipline through their respective licensing bodies. Parenting coordinators who are licensed mental health professionals are regulated by their state boards and the Bureau of Professional and Occupational Affairs. They may be subject to professional disciplinary actions for violation of their professional obligations while serving in the role of parenting coordinator.

Pennsylvania law permits the Supreme Court to authorize the common pleas courts to appoint mental health professionals as parenting coordinators. The state Supreme Court not only can, but should issue a rule allowing for the appointment of well-trained mental health professionals and defining the duties and limits of the parenting coordination role. Doing so will enable the common pleas courts to better serve Pennsylvania families of by using a tool that has been used successfully here and throughout the country.

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