Informed Choice in Parenting Coordination: Ten Reasons Why Parenting Coordinators in Ontario Should Not (Necessarily) Provide Reports to the Court

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September 2012

Parenting coordination in Ontario is a private conflict resolution process for high conflict parents.

It is provided by professionals who are specially trained to work with high conflict, to understand the developmental and emotional needs of children and to deliver this unique hybrid of coaching, mediation and arbitration.

The underlying principle is a continuous focus on children's best interests.

The process is designed to help parents implement and comply with court orders or parenting plans, to make timely decisions in a manner consistent with the developmental and psychological needs of the children, to reduce the damaging conflict between the parents and to diminish patterns of needless litigation. (American Psychological Association (APA) 2012).

The process is well-established in many US jurisdictions that have parenting coordination legislation and court-connected programs. In those jurisdictions, the rules for the PC process, the role of the PC and, importantly, the terms (if any) on which PCs are permitted to file a report with the court are defined by the statute and/or the program. Judicial monitoring of the program, the PCs and their work is seen in those jurisdictions as essential to protect parents, children and PCs. (Association of Family and Conciliation Courts (AFCC) Guidelines, 2005; Fieldstone, Lee, Baker and McHale, 2012).

Ontario has no legislation governing parenting coordination. The only Canadian jurisdiction that has a PC statute is British Columbia, whose statute comes into force in March 2013. Although judges will be empowered to order parties into parenting coordination, the statute is silent on the role, if any, that the PC will have in reporting to the court. This suggests that PCs in BC will have no "reporting to the court" function.

Parenting coordination is a highly specialized process. PCs seek to elicit parental compliance with the parenting plan through conflict diagnosis, education, conflict management, coaching, and mediation. They will routinely interview children and are authorized by the parents to keep that information confidential if appropriate. They also will speak with any other persons whose information about the children will help the parties or the PC make good decisions. In the jurisdictions where the process is governed by statute, they also act as case managers as part of their court-connected function. When necessary, PCs will make binding decisions if the parents cannot resolve issues themselves. (Fidler 2012)

Because PCs work with some of the highest conflict cases, the process works best when the PC's personality and skills are strong enough to keep both parents engaged and incentivized to participate. But the process is also structured with two built-in elements designed to achieve

accountability and an incentive to good-faith participation: the possibility of an arbitrated decision with costs consequences, and, in many jurisdictions, the possibility that the PC will report back to the court about what has happened in the process.

This paper suggests that Ontario parenting coordinators and their clients may not always wish to include this reporting function, and explains why. It is also, however, not suggesting that there is anything wrong with open PC process as it is established currently in Ontario. But parties should have the option of making an informed choice for a closed PC process.

Open and Closed Processes

The terms “open” mediation refers to that process where a mediator, usually with a mental health background, is retained by the parties, often in high conflict cases, to mediate and, if the mediation is unsuccessful, to prepare a report at the request of either party. The report can be filed in court. There is a range of things such reports might include, from summaries of what was discussed and what was agreed, to observations of and judgements on the behaviour of the parties. It is believed that this “reporting” function will help keep parties honest in the mediation process. As such, it is not a confidential process between the parties and the mediator.

The challenge with such open mediation processes is that neither party may be fully committed to the mediation as a result, and the failure of the mediation may be a self-fulfilling prophecy. Also, many mediation agreements do not provide clients with a great deal of detail about what kinds of things the mediator can report about, leaving the clients potentially vulnerable to an exercise of power by the mediator that they did not realize they were giving him or her.

Parenting coordination is, by necessity, not an entirely confidential process. It is important, for example, for a PC to speak with children and teachers and caregivers and others and take that information into consideration when making decisions. There cannot be confidentiality therefore in the PC-third party relationships. But there is no compelling reason for PCs to, as a matter of course, report to the court about what the parties did and said, particularly because PCs also have the power to make binding decisions. There may be many situations where parties wish to work with a PC but do not want him or her to be able to report what happened to a court.

The US jurisdictions that have PC legislation or programs have a broad range of confidentiality/open provisions. Some provide for full confidentiality between the PC and parties, while others provide for limited or full reports to the court. (Parks, Tindall & Yingling, 2011).

To help ensure consistent best practices, the AFCC (Association of Family and Conciliation Courts) in 2005, and later the APA (in 2012) released guidelines for Parenting Coordination. Both sets of guidelines are based on the “open” model but do not prohibit a confidential process.

In Ontario, PC practice has developed as an “open” process. Depending on the wording of the particular PC agreement, parenting coordinators in Ontario may be authorized to prepare reports, make observations and recommendations to the court, and/or attend as a witness. This practice has flourished largely under the direction of highly skilled and child-focused mental health professionals who are experienced with open processes and the creation of reports where appropriate. Their experience includes open mediation and assessments, both of which result in the creation of reports to the court and possible cross- examination as witnesses. Open parenting coordination is therefore a logical extension for such skilled professionals.

However, many potential parenting coordinators, particularly those with a legal background, are neither experienced nor comfortable with the concept of an open process. These professionals may be more comfortable with and effective in a process that relies on its procedures for evidence, hearings and arbitral decisions as the primary means of ensuring accountability.

Some reasons for the option of confidential, closed parenting coordination:

1. Ontario does not have a PC program. There is no legislation or court direction dealing with the process. The rules of parenting coordination are entirely established by private contract. There is no “reporting to the court” function that is such an essential component of PC practice in some American jurisdictions.

   As such, parenting coordination in Ontario is entirely a process of party self-determination. Parties are free to contract for the process that best meets their needs. There is no direction given by the courts to PCs about how, when and why to report. There is no statutory protection for PCs, as in jurisdictions that have an established PC program, nor the guidance and immunity that comes with it.

2. Open parenting coordination process has grown up in the context of court programs and statutes. In the jurisdictions that have such programs, research shows that judges and lawyers highly value the ability of PCs to report to the court.(see point #8 below). The reporting function of the PC, whether the PC can make recommendations and whether the PC can attend court as a witness are all defined in the various programs or statutes. In the absence of such direction in Ontario, the details of the “open” nature of the process are left to the parties and the PC to negotiate in their contracts. This creates the opportunity for parents and PCs to craft a process that best suits their needs.

3. Creating a report on a process as complex as parenting coordination is itself a complex task that is fraught with risk, for the parties and for the PC. The recent Ontario Superior Court decision in *Sehota and Sehota* evidences the risks that might be inherent in the creation of such reports in jurisdictions that do not provide for court-ordered or sanctioned PC reports. Although PCs are well-trained, knowledgeable professionals, they and their clients would be better served with legislation governing the creation of reports and presentation of recommendations and evidence, as in other jurisdictions. Absent such direction, open PC processes put a heavy burden on the PC.

4. Many mediators believe that confidential dispute resolution processes are more likely than open ones to encourage parties to solve their own problems. All conflict resolution processes, even ones designed for the most difficult people, have the potential to empower parties to resolve their own conflicts. Such processes work best when they are 'safe' places for the parties to have difficult conversations. Any process that is open, by definition, jeopardizes that safety. Parties seeking to use or even manipulate the PC process to obtain a supportive report are less likely to accomplish its intended purposes. By closing the process, neither party has anything to gain or lose by participating… other than getting their problems solved. The parties may well be more willing and enabled to do the hard work of compromise that is essential to successful parenting coordination.

5. If the parents cannot compromise, parenting coordinators have the ability to make binding decisions. The PC process is beautifully designed to facilitate quick, effective and fair decision-making. PCs are given a broad array of evidentiary and decision-making tools and procedural flexibility that other mediator-arbitrators do not have. PCs can obtain or receive the evidence they need to make informed decisions in relatively streamlined and child-focused ways. Those decisions can be made part of a court record if required.

   A closed process has both the "carrot" of confidentiality of difficult conversations, and the "stick" of an arbitrated decision with an adverse costs award. Accountability is achieved through the creation of a record of decisions made rather than through the possibility of a report to the court.

6. Research suggests that PCs in other jurisdictions, most of whom are mental health professionals, may be less comfortable with the arbitral aspect of their role than PCs in Ontario. (Hayes, 2010; though note Hayes, Grady and Brantley (2012) more recently suggest that any such reluctance to arbitrate may be dissipating)**.** In Ontario, parenting coordinators are governed by the rigorous rules that apply to all family arbitrators. PCs in this jurisdiction must have substantial and on-going training in family law, arbitration law and procedure. They are required to take training in-- and ensure that all clients are effectively screened for-- power imbalances that might make the process unsafe or unsuitable. As a result, parenting coordinators in this jurisdiction are well equipped to be effective arbitrators when required.

7. Reports to the court may not be actually necessary in most cases. The information contained in the PC's report can, in many cases, be put before the court in other ways, including but not limited to the record of arbitrated decisions. (see *Taylor v. Taylor* for example.) In those cases where the parties are certain that they will need the PC to be able to report to the court (eg/ child protection issues; coercive control; severe mental health or other clinical risks) then the parties should be screened out of the confidential PC process and into an open process provided by a qualified mental health professional.

8. Experts in the field acknowledge that reporting to the court in Ontario is rare in practice (Fidler, 2012). This can be distinguished from the US experience where, in the PC statute-jurisdiction of Florida (it formerly had a court-administered PC program), 77% of judges reported that PCs provided information to the court. Most judges found the reports to be appropriate and helpful, giving them substantial weight. (Fieldstone et al, 2012). However, this is in the context of a court process that may be quite different from ours. It is also argued that the reporting function is necessary to keep the process accountable to the court and on behalf of the children. (Fidler 2012). This is no doubt true in some cases. However, an arbitration award, including an adverse order on costs, may be equally effective in achieving these goals in many cases.

9. PC processes that are open have the potential to be more expensive. Parties must be prepared for the possibility that one will request a report, which must be paid for by one or both. The PC court attendance is an additional fee. If the court instead has a record of arbitral awards, there are no such extra costs other than the administrative cost of converting an arbitral award into a court order.

10. Parenting coordination is a stressful practice. PCs take the cases that are too tough for most mediators and lawyers. They are dedicated professionals who are committed to creating a process that will be least harmful to children. The demand for this work is growing exponentially. There is a risk that parenting coordinators will 'burn out' from the demands that are put on them by the parties, the lawyers, and the system. The job of the PC might be more manageable if he or she is not facing the additional pressure of writing and being cross examined on reports, or having to quit a file because the parties have insufficient funds to pay for the report or cross examination.

    Because open parenting coordination is the current standard recognized by the AFCC, APA and most practitioners, many clients and most parenting coordinators will continue to prefer an open PC process. But the advantages of a closed process, to the parties and the PC, should not be overlooked. The purposes that an open process seeks to achieve can, in the right cases, be met equally effectively in other ways in a closed process.

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