

# PARENTING COORDINATION IN BRITISH COLUMBIA: THE LEGAL FRAMEWORK

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## A. INTRODUCTION

In those jurisdictions where parenting coordination services have been established, parenting coordination is either a creature of legislation, as is the case in California, or a creature of informal convention, as is the case in Ontario. There is no statutory or regulatory authority in British Columbia governing parenting coordination, nor is the implementation of a parenting coordination service among the recommendations of the Family Justice Reform Working Group's recent report, *A New Justice System for Families and Children*.<sup>2</sup>

The legal framework of any parenting coordination service in this province therefore depends on how such a service is conceptualized:

- 1) Is parenting coordination a cooperative, but perhaps directed and tightly managed, process of mediation?
- 2) Is parenting coordination a process of arbitration in which parents grant the coordinator decision-making authority over a defined parameter of issues?

Mediation, although referenced in the *Divorce Act*<sup>3</sup>, the Provincial Court (Family) Rules<sup>4</sup> and the *Child, Family and Community Service Act*,<sup>5</sup> is a process which has been adopted by custom and consensus, and is not the subject of any legislation nor subject to any regulation. In fact, the closest formal definition of mediation is found in the Law Society's *Professional Conduct Handbook* at Appendix 2:

“‘family law mediation’ means a process by which two adult persons (‘participants’) attempt, with the assistance of an impartial person (the family law mediator), to reach a consensual settlement of issues relating to their marriage, cohabitation, separation or divorce;”

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<sup>1</sup> Originally prepared on 11 January 2007; updated on 9 November 2007 and 25 March 2008.

<sup>2</sup> BC Justice Review Task Force, Ministry of the Attorney General, May 2005. It should be noted that parenting coordination is discussed in Chapter 6 of the discussion papers released for public comment in the course of the Attorney General's *Family Relations Act* Review (<http://www.ag.gov.bc.ca/legislation/#parenting>), and is advocated by the British Columbia branch of the Canadian Bar Association in its responsive submission ([http://www.cba.org/BC/pdf/submissions/fra\\_review\\_09\\_07\\_07.pdf](http://www.cba.org/BC/pdf/submissions/fra_review_09_07_07.pdf)).

<sup>3</sup> RSC 1985, c. 3 (2nd Supp), s. 9(2)

<sup>4</sup> BC Reg 417/98, Rules 5, 6 and 7

<sup>5</sup> RSBC 1996, c. 46, ss. 22 and 23

This definition reflects the common understanding of the mediation process: mediation, while a powerful tool, is nothing more than assisted negotiation, and the mediator has no power to impose settlement.

In arbitration, on the other hand, the arbitrator does have the power to impose a resolution, as a result of the voluntarily surrender of this authority by the parties to the dispute. As a result of the granting of this quasi-judicial power, arbitration, unlike mediation, is subject to extensive regulation – in this province, the *Commercial Arbitration Act*.<sup>6</sup>

A mediation model of parenting coordination must rely on the good grace and common sense of the parties, not to mention the coordinator's powers of persuasion, to resolve parenting disputes. In the author's opinion, an inherently cooperative approach such as this is unlikely to prove efficient in handling the disputes of high-conflict parents.<sup>7</sup> These parents have battled their way through a trial, without conclusive effect, and exhausted their savings on legal fees yet continue to fight and argue; a purely cooperative approach will not work.

On the premise that effective parenting coordination requires the assignment of some coercive authority to the coordinator, this paper will review the legal framework of arbitative parenting coordination in British Columbia.

## **B. STATUTORY FRAMEWORK**

Neither the *Family Relations Act*<sup>8</sup> nor the *Divorce Act* provide for parenting coordination, arbitration or any other means of alternative dispute resolution. While the Supreme Court Rules<sup>9</sup> are similarly silent, the Provincial Court (Family) Rules are not and make extensive reference to the use of mediation and other out of court settlement processes.

In the absence of any provincial legislation specific to the arbitration of family law disputes, parenting coordination in British Columbia will be governed by the *Commercial Arbitration Act*.

### **1. The Provincial Court (Family) Rules**

Rule 5, which applies only to the Kelowna, Surrey and Vancouver courts,<sup>10</sup> requires parties to meet with a family justice counsellor prior to their first appearance in court. Rule 5(4) allows the counsellor to refer the parties to, *inter alia*:

- (b) a program, approved by the Attorney General, designed to help parties identify and consider post-separation issues involving children;
- (d) mediation with a private mediator;

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<sup>6</sup> RSBC 1996, c. 55

<sup>7</sup> For an excellent overview of high-conflict separation, its consequences and its indicia, see Glenn A. Gilmour, *High-Conflict Separation and Divorce: Options for Consideration* (Ottawa: Department of Justice, 2004) (<http://canada.justice.gc.ca/en/ps/pad/reports/2004-FCY-1/index.html>).

<sup>8</sup> RSBC 1996, c. 128

<sup>9</sup> BC Reg 221/90

<sup>10</sup> See Rule 1(2)

- (e) any other service or agency that may assist the parties.

The Provincial Court (Family) Rules give the bench a fairly wide latitude to refer parties to alternative processes. Rules 6(3) and 7(4) both allow the court to “refer the matter to private mediation,” with the consent of the parties, and “make any other order or give any direction that the judge considers appropriate.” Rule 7(4)(e) additionally allows the court to “adjourn the case for purposes of mediation.”

Although not stated in the Rules, the judge at an appearance or Family Case Conference may also make any non-binding recommendation to the parties he or she thinks appropriate.

## 2. The Supreme Court Rules

Rule 60E(11) describes the purposes of Judicial Case Conferences, which include:

- (b) exploring ways in which the issues in dispute may be resolved other than by way of trial;
- (f) considering any other matters that may aid in the resolution of the proceeding.

Rule 60E(12) sets out the powers of the judge or master presiding at a Judicial Case Conference. In addition to certain procedural orders, the judge or master may also make “any other order with the consent of the parties.” As is the case in the Provincial Court, the judge or master may also make any non-binding recommendation to the parties he or she thinks appropriate.

## 3. The Commercial Arbitration Act

The *Commercial Arbitration Act* governs all arbitration in British Columbia, including family law arbitration. The relevant provisions of the act include the following:

- 1) “Arbitrator” is defined as “a person who, under this Act or an arbitration agreement, resolves a dispute that has been referred to the person.” The decisions are the arbitrator are referred to as “awards,” and awards may be both interim and final in nature. [s. 1]
- 2) In addition to commercial arbitration agreements, the act applies to “any other arbitration agreement.” [s. 2(1)(c)]
- 3) “A provision of an arbitration agreement that removes the jurisdiction of a court under the *Divorce Act* (Canada) or the *Family Relations Act* has no effect.” [s. 2(2)]
- 4) An arbitrator may demand the production of documents he or she considers to be relevant. [s. 5]

- 5) An arbitrator may examine a party under oath and must admit all evidence that would be admissible in court. [s. 6] An arbitrator may call and hear the evidence of non-party witnesses on his or her own motion. [s. 24(1)]
- 6) “An arbitrator may make an interim award respecting any matter on which the arbitrator may make a final award.” [s. 9]
- 7) “The award of the arbitrator is final and binding on all parties to the award.” [s. 14]
- 8) An arbitrator’s appointment may not be revoked except by court order. [s. 16(1)]
- 9) Where an arbitration agreement requires the appointment of an arbitrator and the parties cannot agree on the arbitrator, the court may appoint an arbitrator. [s. 17(3)]
- 10) “An arbitrator must adjudicate the matter before the arbitrator by reference to law unless the parties ... agree that the matter may be decided on equitable grounds, grounds of conscience or some other basis.”<sup>11</sup> [s. 23]

In the author’s view, the traditional assumption that s. 2(2) defeats arbitration as an effective dispute resolution in British Columbia is incorrect. While this section plainly provides that a family law arbitration agreement may not operate to remove the jurisdiction of the court,<sup>12</sup> it does not operate to actually bar the arbitration of family law disputes. Moreover, the same basic principle applies to, and has not deterred the use of, negotiation, mediation and collaborative law as means of resolving interparental disputes, and cohabitation agreements, marriage agreement, separation agreements and parenting agreements as means of recording settlement without the involvement of the courts.<sup>13</sup>

### C. JURISDICTIONAL ISSUES

It is clear that the parties may mutually agree to undertake an arbitral dispute resolution process and that the Rules offer the court many opportunities to forcefully encourage parties to make such a mutual agreement. It is not clear whether the court has the authority to direct parents to participate in parenting coordination over the objection of one or both parties. The issue here

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<sup>11</sup> This provision is worded broadly enough that the parties to an arbitration may select the principles that will apply to the determination of their dispute, such as, for example, Islamic *sharia* law.

Ontario’s *Arbitration Act*, RSO 1991, c. 17 contains a provision with similar language but without an overriding clause preserving the authority of the court. This is what occasioned all the hubbub over *sharia* law in 2006. With the coming into force of the *Family Law Statute Amendment Act*, SO 2006, c. 1, however, the *Arbitration Act* will be amended to make this provision inapplicable to family law arbitrations and will additionally provide, at s. 32(4), that:

“in a family arbitration, the arbitral tribunal shall apply the substantive law of Ontario, unless the parties expressly designate the substantive law of another Canadian jurisdiction, in which case that substantive law shall be applied.”

<sup>12</sup> Applied to this effect in *Merrell v. Merrell* (1987), 11 RFL (3d) 18 (BCSC).

<sup>13</sup> See, for example, *Miglin v. Miglin*, 2003 SCC 24 on spousal support, *T.(T.L.A.) v. T.(W.W.)* (1996), 24 RFL (4th) 51 (BCCA) on property division, *A.L. and J.L. v. D.K. and M.W.*, 2000 BCCA 455 on custody and access, and *Lavoie v. Yawrenko* (1992), 44 RFL (3d) 89 (BCCA) on child support.

is straightforward: can the court delegate authority expressly granted to it by statute to a non-judicial decision-maker?

No help on this point is to be found in the Provincial Court Rules, and the constitutionally limited jurisdiction of this court would require a legislative amendment to the *Family Relations Act* or the *Provincial Court Act*<sup>14</sup> before it could appoint a parenting coordinator without the consent of both parties.

The Supreme Court, on the other hand, as a court constituted under s. 96 of the *Constitution Act, 1867* is a creature of inherent jurisdiction, in addition to that authority expressly assigned to it by statute, and may exercise its *parens patriae* authority and ability to direct its own processes as it sees fit, bearing in mind, of course, the risk of appeal.

Moreover, Rule 32(1) of the Supreme Court Rules provides regulatory authority allowing the court to “direct an inquiry ... to be held by a ... special referee” at any stage of a proceeding and make the results of the inquiry, pursuant to Rule 32(2), binding on the parties.<sup>15</sup> Rule 1(8) defines a special referee as “any person, other than a master or registrar, appointed by the court,”<sup>16</sup> and Rule 32 would therefore allow the court to delegate its authority on parenting issues to anyone it deems appropriate.

Rule 32(5), however, unfortunately describes a Rule 32(1) inquiry as a “hearing,” which may invoke a level of procedural formality rendering special referee appointments unsuited for parenting coordination.<sup>17</sup> Two points may be raised in reply: firstly, Rule 32(11) allows the court to give “special directions as to the manner in which an inquiry ... is to be taken or made;” and, secondly, the *Commercial Arbitration Act* demands procedural formalities of its own which address the requirements of the subrule.

#### **D. CASE AUTHORITIES**

There is, unfortunately, a dearth of British Columbia cases involving arbitration in a family law context. What cause authorities exist, however, show a willingness to embrace arbitration as a dispute resolution model, contrary to the hesitancy engaged in the bar by s. 2(2) of the *Commercial Arbitration Act*, and, in some of these cases, the mode of arbitration directed by the court bears a striking resemblance to parenting coordination:

- 1) In *Crawford v. Crawford*,<sup>18</sup> the court held that “matrimonial matters may properly be the subject of arbitration.”
- 2) In *Saxon v. Saxon*,<sup>19</sup> a county court judge, with the consent of the parties, dealt with an issue beyond his jurisdiction as an arbitrator. The award was upheld on appeal.

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<sup>14</sup> RSBC 1996, c. 379

<sup>15</sup> SCR Rule 53(6) provides that the decisions of special referees are appealable to the court.

<sup>16</sup> Of 107 British Columbia judgments QuickLaw retrieved on the subject of special referees in late 2007, eight were family law actions. All eight of these judgments concerned purely financial issues.

<sup>17</sup> In particular, see the adverse decision of *Norton v. Norton* (1989), 19 RFL (3d) 181 (BCCA).

<sup>18</sup> (1973) 10 RFL 1 (BCSC) at para 7

<sup>19</sup> (1978), 8 CPC 240 (BCCA)

- 3) In *McManus v. McManus*,<sup>20</sup> the parties were “strongly recommended” to attempt arbitration to resolve their dispute before returning to court.
- 4) In *Pickelein v. Gillmore*<sup>21</sup> and *Green v. Green*,<sup>22</sup> arbitration was suggested by the court as a means of resolving disputes relating to the valuation and division of assets.
- 5) In *Dietrich v. Kujbida*,<sup>23</sup> the parties were directed to complete the arbitration process they had agreed to before the court would hear claims relating to the family assets:

“In my view, having agreed to settle the property issues between them by binding arbitration, the parties should follow through on that process, and I direct that they do so within the next six months.”

- 6) In *L.G.G. v. D.K.G.*,<sup>24</sup> the parties were ordered to resolve access disputes by arbitration conducted by the child’s counsellor.
- 7) In *L.M.W. v. S.F.R. and M.F.M.*,<sup>25</sup> the court forbade the parties from returning to court to settle the child’s residency until they had attempted to reach agreement through counselling, mediation and binding arbitration.
- 8) In *P.V. v. D.B.*,<sup>26</sup> the court awarded joint custody and joint guardianship to two highly combative parents, and, regarding future guardianship disputes, held that:

“I direct that a neutral third party of their choosing act as arbitrator to reach decisions concerning [the child] where the parents cannot agree.”

## E. CONCLUSION

As is the case with all extra-judicial family law dispute resolution processes, the court’s fundamental jurisdiction over the care and control of children will be preserved in an arbitative model of parenting coordination in British Columbia. This does not prevent parents in conflict from making use of parenting coordination, nor should it prevent the court from referring parents to a parenting coordinator.<sup>27</sup>

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<sup>20</sup> [1996] BCJ No. 1558 (BCSC)

<sup>21</sup> [1995] BCJ No. 186 (BCSC) at para 29

<sup>22</sup> [1985] BCJ No. 708 (BCSC) at para 169

<sup>23</sup> 2004 BCSC 455 at para 32

<sup>24</sup> 2004 BCSC 1094 at para 59

<sup>25</sup> [1995] BCJ No. 1920 (BCPC) at para 52

<sup>26</sup> 2007 BCSC 237 at para 105

<sup>27</sup> As to compelling disputatious parents to undertake parenting coordination, I am cautiously optimistic that Rule 32 can be used to this effect by the Supreme Court. While I have been unable to discover a single case in which a special referee has been appointed to deal with non-financial issues, I see no reason why this should not be the case, and refer to the judicial creativity demonstrated in cases such as *L.G.G. v. D.K.G.*, *Saxon v. Saxon* and *P.V. v. D.B.*, *supra*.

It is true that parents engaged in parenting coordination will always have the option of asking the court for an order different than the award imposed by the parenting coordinator, and certainly the likelihood of such applications will be greater for high-conflict parents. It should be possible to deter parents from returning to court with creatively-drafted parenting coordination agreements which might, perhaps, also provide for security deposits and financial penalties. Nevertheless, it is to be hoped that the court will extend some deference the dispute resolution mechanism chosen by the parents, as it did in *Dietrich v. Kujbida*, and only interfere where:

- 1) the coordinator's award is plainly unreasonable or capricious, compared to the result likely to have obtained had the dispute been litigated rather than arbitrated;
- 2) the coordinator's award, or the manner in which the parenting coordination was conducted, breaches the principles of natural justice;<sup>28</sup> or,
- 3) the coordinator's award disregards a fundamental principle of the *Divorce Act* or the *Family Relations Act*.

## F. POSTSCRIPT

Since I first prepared this paper, for a workshop organized by Nancy Cameron, Phyllis Kenney, Deborah Brakeley and myself in early 2007, parenting coordination has become a reality for high-conflict parents, although one still in its nascence, as a result of two recent developments.

Firstly, the British Columbia Parenting Coordinators Roster<sup>29</sup> inaugurated itself with a launch on 26 September 2007 and an initial roster of 20 parenting coordinators. These parenting coordinators are lawyers, social workers, mediators, psychologists and psychiatrists whose practices cover much of British Columbia, from Victoria and Nanaimo to Lower Mainland and the Interior. All have training in mediation, extensive experience in their various fields, and attended a number of workshops and seminars about parenting coordination primarily led by Dr. Joan Kelly, a world-renowned expert on separation and divorce and one of the founders of California's own parenting coordination project.

Secondly, the courts have begun to appoint persons to act in the express capacity of parenting coordinator:

- 1) In *Firth v. Firth*,<sup>30</sup> the court, on the recommendation of a psychiatrist, appointed another psychiatrist to aid in the children's reconciliation with their father and, as a parenting coordinator, direct the manner in which the father's time with the children would resume.
- 2) In *S.L.P. v. C.W.P.*,<sup>31</sup> Pat Bond was appointed as parenting coordinator for a period of six months – during which period, the judge, who had seized herself of the matter, refused to hear any further applications – to deal with parenting issues and payment of the

<sup>28</sup> See the definition of "arbitrary error" at s. 1 of the *Commercial Arbitration Act*.

<sup>29</sup> Visit the roster's website at <http://www.bcparentingcoordinators.com>.

<sup>30</sup> 2007 BCSC 1236

<sup>31</sup> 21 December 2007, Vancouver E013528 (BCSC)

children's expenses. Three passages from the court's decision are especially worthy of reproduction:

"I ... am going to direct that both parties attend a representative of the BC Parenting Coordinators, Ms. Patricia Bond, for six months. They are to schedule an initial meeting with Ms. Bond to set a program that I hope will address these issues. They will not be entitled to return to the court on an application dealing with the manner in which either deals with expenses for the boys until they have attended this program for six months. They are to split the cost of it on an equal basis. ...

"Finally ... I will mention that I do not want the parenting coordination to be used by either party as a means of gathering evidence for the next application. That is not its purpose. The purpose is to solve your problems, not gain ammunition for the next application. ...

"Failure to attend and participate cooperatively in this program is a factor that I will consider in deciding whether any future application has merit."