

SUPREME COURT OF COLORADO
Office of the Chief Justice
DIRECTIVE CONCERNING COURT APPOINTMENTS
OF DECISION-MAKERS PURSUANT TO §14-10-128.3, C.R.S.

I. INTRODUCTION

This directive is adopted to assist the administration of justice by providing explanation and commentary on the statutory duties set forth by §14-10-128.3, C.R.S. (2005) for the appointment, qualifications and training of decision-makers.

House Bill 05-1171 passed by the General Assembly during the 2005 session created statutory authority for parenting coordinators and decision-makers, and clarified the existing statutory provision concerning arbitrators set forth at §14-10-128.5, C.R.S..

The purpose of these guidelines is to provide a guide to interpretation on the statutory duties set forth by §14-10-128.3, C.R.S. (2005) to those serving as DMs, to the courts who are approving the agreement of the parties for the appointment of a DM, and to the parties/parents who are agreeing to the appointment of a DM as to the responsibilities of each when such an appointment is made in order to better serve the families of Colorado. The comments set forth with each guideline explain and illustrate the meaning and purpose of the guideline, and are intended as a guide to that interpretation.

These guidelines have been drafted with the knowledge that these roles may be filled by people from different professions and backgrounds.

II. APPLICABLE STATUTES

- A. These guidelines provide commentary on the statutory responsibilities of DMs, the courts appointing DMs, and the parties contracting with DMs pursuant to §14-10-128.3, C.R.S.
- B. The standards and responsibilities for arbitrators appointed pursuant to §14-10-128.5, C.R.S. are set forth in detail in the Uniform Arbitration Act in part 2 of article 22 of title 13, C.R.S. The standards and responsibilities for parenting coordinators (“PCs”) are set forth in §14-10-128.1, C.R.S.

III. DECISION-MAKER (DM) GUIDELINES

A. DM AUTHORITY

§14-10-128.3(1) [At]any time after the entry of an order concerning parental responsibilities and upon written consent of both parties, the court may appoint a qualified domestic relations decision-maker and grant to the decision-maker binding authority to resolve disputes between the parties as

to implementation or clarification of existing orders concerning the parties' minor or dependent children, including but not limited to disputes concerning parenting time, specific disputed parental decisions, and child support. A decision-maker shall have the authority to make binding determinations to implement or clarify the provisions of a pre-existing court order in a manner that is consistent with the substantive intent of the court order. The decision-maker appointed pursuant to the provisions of this section may be the same person as the parenting coordinator appointed pursuant to section 14-10-128.1.

COMMENT

When the conditions of §14-10-128.3, C.R.S. are met, the court should appoint a qualified DM to assist parties with the implementation or clarification of existing court orders. An original decision as to parental responsibilities cannot come from a decision maker. In addition, the role of the decision maker has no applicability with respect to the establishment of temporary orders or other preliminary matters. The court should monitor any complaints concerning that person's services. Parties and children deserve to have decision-making services conducted in the manner least harmful to them and most likely to provide assistance to the family to implement existing orders. If issues are raised concerning competency or any other concerns, the court should inquire and provide an opportunity to remedy any act or omission that was not willful and wanton.

The DM can clarify an existing order, but cannot otherwise modify, change or abridge existing court orders. A DM must be careful to assure both fairness and the appearance of fairness, allowing the parties relatively equal and comparable opportunities to present their perspectives. The DM should inform parties that Decision-Making is distinct and separate from other forms of alternative dispute resolution, from forensic services such as parental responsibility evaluations or child and family investigations and from the practice of law. A DM should avoid multiple relationships which could reasonably be expected to impair objectivity, impartiality, competence or effectiveness. Prior therapeutic relationships, for example, will be compromised, and pre-existing alliances and loyalties that a therapist or attorney or other professional have established will impair neutrality and impartiality. The DM may have served as the child and family investigator, mediator or med-arbiter. In some cases a CFI (formerly known as special advocate), a mediator or a med-arbiter may agree to move to the separate role of DM after all of his or her duties as CFI, mediator or med-arbiter are completed and the appointment has been terminated by the court. This move should only occur with the informed consent of both of the parties and the CFI, mediator or med-arbiter. The CFI, mediator or med-arbiter who accepts an appointment as a DM should not afterwards be appointed as a CFI or a child's legal representative. A DM may subsequently move to the separate role of mediator or med-arbiter by signed agreement of the parties.

The parties/parents must consent in writing to the appointment of a DM. Once a DM is appointed, the parties/parents should cooperate in providing necessary information to the DM. Depending on the case, the DM may need information from collateral sources such as

teachers or therapists; may need to review school, medical, or other records; may need to check criminal histories or obtain drug testing; or may require other case-specific information or evaluations.

B. DM COMMUNICATIONS

§14-10-128.3(2) The decision-maker's procedures for making determinations should be in writing and should be approved by the parties prior to the time the decision-maker begins to resolve a dispute of the parties. If a party is unable or unwilling to agree to the decision-maker's procedures, the decision-maker should be allowed to withdraw from the matter.

(3) All decisions made by the decision-maker pursuant to this section shall be in writing, dated, and signed by the decision-maker. Decisions of the decision-maker shall be filed with the court and mailed to the parties or to counsel for the parties, if any, no later than twenty days after the date the decision is issued. All decisions shall be effective immediately upon issuance and shall continue in effect until vacated, corrected, or modified by the decision-maker or until an order is entered by a court pursuant to a de novo hearing under subsection (4) of this section.

COMMENT

When first appointed, a DM should provide the parties with written information that sets forth his or her procedures, including the nature and scope of the services to be provided to the parties. The initial information should describe the DM's policies, procedures, qualifications, and reporting obligations, as well as how a party can contact the court should a concern or complaint about the DM arise. The information should include the nature of the services provided, the DM's qualifications, where complaints should be directed, fees and billing procedures, how communication will be handled, how sensitive information will be handled, and the DM's reporting obligations. For example, the DM should detail the DM's policies regarding phone calls and e-mail communication, *ex parte* communication with parties and/or counsel, interviewing children, contacting collaterals or other professionals in the case, setting appointments, time-frame for entry of decisions, etc. Before beginning a case, the DM and the parties should execute the written agreement of the DM, acknowledging the acceptance by the parties of the DM's procedures. In the event a party is unable or unwilling to agree to the DM's procedures and does not execute the written agreement, the DM should request permission of the Court to withdraw. It is also the responsibility of a DM to provide specific information to the parties regarding fees, billing policies, and procedures used if there is non-payment of fees. A DM should provide periodic billing statements to the parties, listing all services performed and detailing the time spent and the charges incurred.

A DM should have no contact with the court during the course of his or her appointment except for the following reasons: to obtain information from the court concerning the order of appointment or applicable legal standards, to inform the court of the refusal of a party to participate or to pay, or to file agreements of the parties with the Court or written decisions of

the DM, or for confirmation of decisions as Court Orders. DMs should have no private or *ex parte* communications with the court. An *ex parte* communication is any communication in which at least one party does not have notice and an opportunity to participate in the communication.

The DM should file all decisions in writing with the Court and should include findings of fact and rationale for the decision, if appropriate. In doing so, the DM will refrain from quoting information learned from various professionals involved with the family, such as a child's or parent's therapist, school teacher, etc., to the extent necessary to protect the integrity of the professional relationship.

The parties/parents should carefully review the DM's written procedures and decisions and notify the DM immediately if there are questions or concerns.

The judge should avoid *ex parte* communications with the DM. In accordance with Canon 3 of the Colorado Code of Judicial Conduct, a "judge should accord to every person who is legally interested in a proceeding, or his or her lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding."

C. DE NOVO REVIEW

§14-10-128.3(4)(a) A party may file a motion with the court requesting that a decision of the decision-maker be modified by the court pursuant to a de novo hearing. A motion for a de novo hearing shall be filed no later than thirty days after the date the decision is issued pursuant to subsection (3) of this section.

(b) If a court, in its discretion based on the pleadings filed, grants a party's request for a de novo hearing to modify the decision of the decision-maker and the court substantially upholds the decision of the decision-maker, the party that requested the de novo hearing shall pay the fees and costs of the other party and shall pay the fees and costs incurred by the decision-maker in connection with the request for de novo hearing, unless the court finds that it would be manifestly unjust.

COMMENT

For guidelines on enforcement of orders concerning payment of the DM, see Court Oversight, below.

D. ORDER OF APPOINTMENT

§14-10-128.3(5) A court order appointing a decision-maker shall be for a specified term; except that the court order shall not appoint a decision-maker for a period of longer than two years. If an order fails to specify the length of the court-ordered appointment, it shall be construed to be two

years from the date of appointment. Upon agreement of the parties, the court may extend, modify, or terminate the appointment, including extending the appointment beyond two years from the date of the original appointment. The court may terminate the appointment of the decision-maker at any time for good cause. The court shall allow the decision-maker to withdraw at any time.

(6) A court order appointing a decision-maker shall include apportionment of the responsibility for payment of all of the decision-maker's fees between the parties. The state shall not be responsible for payment of fees to a decision-maker appointed pursuant to this section.

COMMENT

A DM must ensure that there is a properly executed court order of appointment prior to providing services that sets forth the scope of his or her role. It should include with specificity the decisions that fall within the DM's scope of authority. If the DM is unable to assist the parties by implementing or clarifying the provisions of the existing court order, the DM should notify the court and counsel or parties and await further direction from the court.

If there is a conflict between the requirements of the order and the DM's professional ethical constraints or obligations, then s/he should take steps to ensure that the conflict is resolved. If, for example, the order requires the DM to act beyond the scope of his or her competence or statutory authority, or to perform contradictory multiple roles, then the court and counsel should be informed. If the conflict cannot be resolved then the DM should request removal from the case. If the order sets fees and retainer amounts that conflict with the DM's business practices, s/he should inform the court and request modification of the order or withdrawal from the case. These issues should be addressed immediately upon notice of appointment and before beginning any work on the case.

The court should appoint DMs for specified terms not to exceed two years, and the court should terminate the DM appointment at the end of the term, unless all parties and the DM agree to continue the term and notify the court accordingly. The court order should set forth the scope of service and term of the DM's appointment. If required by circumstances unforeseen at the time of appointment, the DM and/or parties can return to the court to request expansion on the order of appointment. The court order appointing a DM should include apportionment between the parties of the responsibility for payment of all fees. The state should not be responsible for the payment of any DM fees. The court should enforce its orders for payment by all available means. DMs are entitled to receive adequate and predictable compensation. It is the responsibility of the court to enforce its orders concerning payment of DMs through its contempt power. When non-payment or partial payment issues arise, the DM may notify the court regarding the non-payment issue and ask for guidance. The court, at its discretion, should determine what course of action is appropriate, including finding parties in contempt, or reallocating the parties' division of fees.

The parties/parents should review and understand the court order and should make timely payment for the DM's services.

E. COURT OVERSIGHT

§14-10-128.3(7)(a) A decision-maker shall be immune from liability in any claim for injury that arises out of an act or omission of the decision-maker occurring during the performance of his or her duties or during the performance of an act that the decision-maker reasonably believed was within the scope of his or her duties unless the act or omission causing such injury was willful and wanton.

(b) Nothing in this subsection (7) shall be construed to bar a party from asserting a claim related to the reasonableness or accuracy of any fee charged or time billed by a decision-maker.

(c)(I) In a judicial proceeding, administrative proceeding, or other similar proceeding, a decision-maker shall not be competent to testify and may not be required to produce records as to any statement, conduct, or decision, that occurred during the decision-maker's appointment, to the same extent as a judge of a court of this state acting in a judicial capacity.

(II) This paragraph (c) shall not apply:

(A) To the extent testimony or production of records by the decision-maker is necessary to determine the claim of the decision-maker against a party; or

(B) To the extent testimony or production of records by the decision-maker is necessary to determine a claim of a party against a decision-maker; or

(C) When both parties have agreed, in writing, to authorize the decision-maker to testify.

(d) If a person commences a civil action against a decision-maker arising from the services of the decision-maker, or if a person seeks to compel a decision-maker to testify or produce records in violation of paragraph (c) of this subsection (7), and the court decides that the decision-maker is immune from civil liability or that the decision-maker is not competent to testify, the court shall award to the decision-maker reasonable attorney fees and reasonable expenses of litigation.

COMMENT

In a judicial proceeding, administrative proceeding or other similar proceeding between the parties, a DM shall not be required to produce records or to testify as to any statement, conduct, or decision that occurred during the DM's appointment. The following exceptions to confidentiality are recognized:

1. A DM may produce records if such production is necessary to determine a claim of the DM against a party or the claim of a party against the DM.
2. A DM may testify if all parties agree in writing to authorize testimony.
3. In cases in which the DM suspects or knows that the child/ren are being neglected or abused, the DM should take the steps required to ensure that law enforcement and/or the department of social services is informed, and should take whatever additional steps are believed necessary to protect the children.

4. All decisions made by the DM should be in writing and filed with the Court as required by statute. Findings of fact based upon information disclosed in the decision-making process may be included in such written decisions.

The DM should inform the parties of the confidentiality and limitations on confidentiality in the decision-making processes. The underlying notes, records and other materials of a DM should not be disclosed in any proceeding except as required by statute.

The DM should not share information outside of the decision-making processes except for legitimate and allowed professional purposes. A DM should maintain confidentiality regarding the sharing of information outside of the scope of the parenting coordination and decision-making process which is obtained by the DM except as provided by court order or by written agreement of the parties.

The confidentiality requirements and exceptions for the DM are somewhat different from parenting coordinators and interested persons are advised to take note of these distinctions within §14-10-128.1 and 14-10-128.3, C.R.S..

F. PROFESSIONALISM AND QUALIFICATIONS

§14-10-128.3(8) The decision-maker should comply with any applicable provisions set forth in chief justice directives and any other practice or ethical standards established by rule, statute, or licensing board that regulates the decision-makers.

COMMENT

The DM's primary responsibility is to assist parties to resolve disputes concerning parental responsibilities. In meeting this responsibility, The DM should understand that they are working with high conflict families and should attempt to establish a positive and constructive professional working relationship with family members. The DM should be mindful of the diverse nature of families and respect cultural, individual, and role differences, including those based on age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, language, and socioeconomic status and consider these factors when working with a family. The DM should be sensitive to the separate interests, rights, wishes and concerns of the parents and other parties in a case.

The DM must remember that s/he is in – and is viewed as being in – a position of great influence over a family's future. A DM's decisions are to be based on his or her independent evaluation and assessment of a case. The DM should guard against being unduly influenced by the conclusions of other professionals who are working on or have worked on the case. The DM should strive to maintain neutrality and independence. If the DM becomes aware of an insurmountable bias or prejudice or the appearance of bias or prejudice in dealing with a case s/he should request the court to terminate the appointment with proper notice to the parties.

A DM should not serve in a matter that presents a clear conflict of interest. The DM should disclose potential conflicts of interest as soon as practical. This includes, but is not limited to, disclosure of any financial or personal interest in the outcome and any current or previous relationship with any party, counsel, witness, etc. After appropriate disclosure the DM may continue to serve if the parties agree. However, if a conflict of interest clearly impairs a DM's impartiality, the DM should withdraw regardless of the express agreement of the parties. There are times when neutrality is difficult to maintain and the DM, through no fault of his or her own, simply cannot set aside a bias or feelings that occasionally develop when working with challenging parties or high conflict families. When this occurs, the DM should request removal from the case.

Given the importance of the work to be performed, all DMs, irrespective of professional backgrounds, should accept appointments only after attaining a level of competence that includes an understanding of both the legal and psychological/social issues that are typically present in dissolution or parenting cases and should maintain and regularly update his or her training in relevant areas.

The DM should have substantial training in relevant areas prior to accepting appointments. New DMs should complete 60 hours of training in relevant areas and specifically family mediation and arbitration prior to accepting appointments. Attorneys and mental health professionals and other members of the community who are working as DMs should complete no less than 15 hours of continuing education in relevant areas every three years.

DMs achieve competence through some combination of education, specialized training, supervision, consultation, and professional experience. They have a responsibility to develop and maintain a working familiarity with the applicable law and the professional standards that govern their duties and participation in legal proceedings. Areas in which DMs should demonstrate experience, education or skills may include the following:

- Dynamics of high conflict divorce;
- The effects of divorce, single parenting, and remarriage in children, adults, and families;
- Family dynamics and dysfunction;
- Domestic violence;
- Substance abuse;
- Child development, including cognitive, personality, emotional and psychological development;
- Child and adult psychopathology;
- Child abuse;
- Interviewing techniques;
- Available services for the child/ren and parties including medical, mental health, educational, and special needs;
- Diversity issues; and
- The legal standards applicable in each case in which the DM is appointed.

Colorado Child Support Guidelines if child support determination or modification is an issue.

When a DM recognizes that an issue falls outside of his or her area of expertise, the parties should be informed and a referral should be made to an appropriate professional. The DM should inform the court and request that the order of appointment be amended.

Courts and judicial districts maintaining records of DMs and the courts appointing DMs should take the DM's training into account, and may require that current, accurate records of training and on-going education be provided to the court or judicial district upon request.

Made effective this 2nd day of January, 2008 in Denver, Colorado.

/s/

Mary J. Mullarkey, Chief