Parenting Coordinator: Understanding This New Role

by Beth Henson

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This month's article was written by Beth Henson, an attorney whose practice is limited to family law dispute resolution—(303) 346-3700. *The author wishes to give special thanks to Barbara Ann Bartlett, J.D., Tulsa, Oklahoma, for her kindness in allowing use of her excellent summary of parenting coordination programs for this article.*

This article discusses the creation of the roles of parenting coordinators, domestic relations decision-makers, and CRS § 14-10-128.5 arbitrators, and provides a brief overview of parenting coordination legislation in other states.

For years, many Colorado courts have appointed parenting coordinators in family law cases. Until 2005, there was no statute that established or defined the role of a parenting coordinator, and the result was a lack of uniformity and agreement as to what such role entailed. However, House Bill 05-1171 ("H.B. 1171"), which was signed into law by Governor Owens in June 2005, provides a framework for professional intervention in family law cases that includes parenting coordinators, domestic relations decision-makers ("decision-makers"), and arbitrators.

The driving goal behind H.B. 1171 was a desire to provide resources for intervention and assistance to parties in high-conflict cases. Thus, the hope is that such parties will not be forced to resort to formal court proceedings to resolve every single dispute or disagreement that arises. H.B. 1171 is structured in such a way as to provide three levels of intervention in a high-conflict case, from the lowest level of intervention to the highest. This allows an individualized approach to each case.

This article discusses the roles and qualifications of parenting coordinators, decision-makers, and CRS § 14-10-128.5 arbitrators. It also provides a brief overview of parenting coordination legislation in other states.

Parenting Coordinator

The first level of intervention is set forth in CRS § 14-10-128.1, which creates the "parenting coordinator."[1] The parenting coordinator is defined as a neutral third party who assists in the resolution of disputes between the parties concerning parental responsibilities, including but not limited to implementation of court-ordered parenting plans. The parenting coordinator must be an individual with appropriate training and qualifications, and must have a perspective acceptable to the court.[2] This description is intentionally vague, in recognition of the fact that there are differing levels of resources for parenting coordinators in different parts of the state. This language allows courts discretion in choosing a parenting coordinator.

Appointing a Parenting Coordinator

A parenting coordinator can be appointed at any time after the entry of an order regarding parental responsibilities by agreement of the parties, on the request of one party, or by the court on its own motion.[3] However, in the absence of an agreement by the parties, to appoint a parenting coordinator the court must make findings that the parties have failed to adequately implement their parenting plan and that mediation is inappropriate or has been unsuccessful. The court must consider the effect of any documented evidence of domestic violence on the parties' ability to engage in parenting coordination.[4] The question has been raised as to whether a parenting coordinator can be appointed at permanent orders if there is an existing

temporary order concerning the allocation of parental rights and responsibilities. The statute is silent on this issue, but the argument in favor of appointing a parenting coordinator at permanent orders seemingly could be made.

Duties of Parenting Coordinator

The duties of the parenting coordinator are noted in the new statute. Such duties include, but are not limited to: (1) assisting the parties in creating agreed-upon, structured guidelines for implementing their parenting plan; (2) developing guidelines for communication between the parties; (3) suggesting resources for the parties in learning communication skills; (4) informing the parties of resources for developing improved parenting skills; (5) assisting the parties in identifying the sources and causes of conflict between them; and (6) assisting the parties in developing parenting strategies to minimize conflict.[5]

There are certain restrictions on the appointment of parenting coordinators. For example, a person cannot be appointed as a parenting coordinator in a case if the same person served as an evaluator[6] or a legal representative of the child[7] in the same case. Conversely, once a person has acted as a parenting coordinator in a case, he or she cannot subsequently be appointed as an evaluator or representative of the child in the same case.[8]

If a person has served as a special advocate or a child and family investigator in a case,[9] such person can serve as a parenting coordinator only on agreement of the parties. However, if a person serves as a parenting coordinator in a case, such person cannot serve as a special advocate in the same case.[10] This is important because the parenting coordinator has an ongoing relationship with the parties. When a special advocate is appointed to a case, it is preferred that he or she begin with a fresh perspective, without having viewed the day-to-day conflicts and interactions of the parties that a parenting coordinator likely will see.

Terms, Fees, and Testimony

When a court appoints a parenting coordinator, the order of appointment should specify a term of appointment, as long as such term is not longer than two years. If the order of appointment is silent as to the term, the term is construed to be two years. If the parties agree, the court can extend, modify, or terminate the appointment. The court may terminate the parenting coordinator's appointment for good cause at any time, and the parenting coordinator can withdraw at any time.[11]

The court order of appointment shall allocate responsibility for the parenting coordinator's fees between the parties. The parties can agree to each party's responsibility for fees, or the court can enter its own order as to how such fees will be shared. The state is not responsible for payment of the parenting coordinator's fees.[12]

In a judicial, administrative, or other similar proceeding between the parties, a parenting coordinator shall not be competent to testify and may not be required to produce records as to his or her interactions with the parties to the same extent as a judge acting in a judicial capacity.[13] However, this does not prevent the parenting coordinator from testifying or producing records as needed in an action by the parenting coordinator to collect fees from a party.[14]

The parenting coordinator must comply with any applicable provisions of the Colorado Supreme Court Chief Justice Directives, as well as with any other practice or ethical standards that regulate the parenting coordinator.[15] In other words, if the parenting coordinator is an attorney, he or she must abide by the Colorado Rules of Professional Conduct. If the parenting coordinator is a mental health professional, he or she must abide by the applicable professional standards.

Domestic Relations Decision-Maker

Although a parenting coordinator can be very useful, some high-conflict cases require more intervention and a firmer hand than that of a parenting coordinator. The newly created CRS § 14-10-128.3 describes the role of the domestic relations decision-maker.

The decision-maker is an individual who is given binding authority to resolve disputes between the parties as to the implementation or clarification of existing orders regarding the parties' children, including but not limited to: (1) disputes concerning parenting time; (2) specific disputed parental decisions; and (3) child support. The implementation and clarification of the pre-existing court order by the decision-maker must be consistent with the substantive intent of the court order. The decision-maker can be appointed only with the written consent of both parties and after entry of an order regarding responsibilities.[16] The written agreement between the parties and the decision-maker should set forth the scope of the decision-maker's duties.

Role of Decision-Maker

It is extremely important that family law practitioners understand that the decision-maker's role is to make decisions for the parties in implementing the parenting plan that already exists. The decision-maker is not to make any binding decisions that modify the substantive order that already exists or that change the substantive rights the parties have under the existing court order. A more formal procedure exists for any process that modifies the parties' rights (Such procedure is discussed in the next section entitled "CRS § 14-10-128.5 Arbitrator."). Use of a decision-maker can be valuable in obtaining the speedy resolution of minor disputes, so the parties and their children can move forward instead of becoming mired in further court proceedings.

An example of a situation in which a decision-maker would get involved is as follows: the parties' parenting plan states that the children will be with Mother on Christmas Eve and with Father on Christmas Day. However, the parenting plan is silent as to the exchange times and the parties cannot agree. The decision-maker can make a binding decision as to the exchange time, as long as Mother still has the children on Christmas Eve and Father still has them on Christmas Day. The decision-maker could not decide that the children will spend Christmas Eve and Christmas Day with Mother, because this decision would alter Father's substantive right to spend Christmas Day with the children.

A decision-maker can be the same person as the parenting coordinator.[17] When a decision-maker is appointed by agreement of the parties, the parties should consider whether such person also should fulfill the educational and facilitative role of the parenting coordinator. A decision-maker can be appointed by agreement of the parties even if they have an arbitrator appointed under CRS § 14-10-128.5.[18]

Decision-Maker Procedures

Section (2) of CRS § 14-10-128.3 provides that the decision-maker's procedures for making decisions must be in writing and approved by the parties. If a party is unable or unwilling to agree to the decision-maker's procedures, the deci-

sion-maker may withdraw.[19] This critical provision was included to assure that the expectations regarding the decision-maker's role and procedures were the same between the parties and the decision-maker in advance of any action being taken by the decision-maker. It allows the parties to craft an agreement with the decision-maker that sets forth exactly what authority the decision-maker has and how decisions will be made.

For example, the written procedures can state that the decision-maker has authority over disputed education issues, but not over disputed medical or religious decisions. The written agreement also can specify, among other things, whether the decision-maker can have *ex parte* contact with the parties, whether the decision-maker is expected to contact collateral sources at the request of the parties, and how the decision-maker requires disputes to be presented.

Parties have a serious responsibility to create a decision-making process that works for their needs and expectations, and the importance of the written procedures cannot be over-emphasized. It is very important that counsel for a party who is appointing a decision-maker review the agreement between the parties and the decision-maker before it is signed by his or her client.

The requirement for defined procedures also benefits the decision-maker. As stated above, parent coordinators were appointed routinely even prior to the enactment of H.B. 1171, and it was not uncommon for parties to agree to appoint a parent coordinator without having contacted the parent coordinator in advance. Decision-makers likely will be appointed by the parties without the parties having talked to the decision-maker or having reviewed procedures in advance. Under this provision, if the parties' expectations or needs conflict with the decision-maker's chosen procedures, the decision-maker cannot be forced to remain on the case and can withdraw.

For example, the parties agree to appoint Dr. Knowitall as their decision-maker. However, when the parties discuss procedures with Dr. Knowitall, they find that they need someone who is willing to visit and observe the children in school, and Dr. Knowitall has a strict practice of not disrupting a child's school environment. Dr. Knowitall can withdraw from the case and the parties can find someone who can better meet their needs.

The written decisions made by the decision-maker must be dated and signed. Such decisions shall be filed with the court and mailed to parties or counsel within twenty days of issuance.[20] A party may file a motion with the court asking for a *de novo* hearing to modify the decision-maker's decision within thirty days of the issuance of the decision.[21] The court has discretion to grant or deny the request for the *de novo* hearing. If a *de novo* hearing is held and the court substantially upholds the decision of the decision-maker, the party that requested the *de novo* hearing must pay the fees and costs of the other party, as well as those incurred by the decision-maker, if any, unless such result would be manifestly unjust.[22]

The decision-maker is granted certain levels of immunity. He or she is immune from liability for any claim for injury arising out of an act or omission occurring during the performance of his or her duties or during performance of an act that he or she reasonably believed was within the scope of his or her duties. Such immu-

nity does not apply if the act or omission was willful and wanton.[23] However, it is important to note that this immunity does not shield a decision-maker from a claim regarding the reasonableness or accuracy of his or her fees.[24]

Like a parenting coordinator, in a judicial, administrative, or other similar proceeding, a decision-maker is not competent to testify and may not be required to produce records to the same extent as a judge acting in a judicial capacity. However, there are certain exceptions to this provision. This provision does not apply: (1) if testimony or documents are needed to determine a claim by the decision-maker against a party; (2) if testimony or documents are needed to determine a claim by a party against the decision-maker; and (3) when both parties have agreed in writing to allow the decision-maker to testify.[25] The decision-maker must comply with any applicable provisions of the Chief Justice Directives, as well as any other practice or ethical standards that regulate the decision-maker.[26]

CRS § 14-10-128.5 Arbitrator

Arbitration of child-related issues as described in CRS § 14-10-128.5 existed prior to the enactment of H.B. 1171, but important clarifications have been made to the statute. As was previously set forth in CRS § 14-10-128.5, with the consent of the parties, the court may appoint an arbitrator to resolve disputes concerning the parties' children. These disputes include, but are not limited to, parenting time, nonrecurring adjustments to child support, and disputed parental decisions.[27]

Authority of Arbitrator

There are several references to the Uniform Arbitration Act[28] in CRS § 14-10-128.5. Many dispute resolution professionals believe that these references imply that the CRS § 14-10-128.5 arbitrator is to comply with the Uniform Arbitration Act. Arbitration under CRS § 14-10-128.5 is intended to be a more formal procedure than that to which the decision-maker is required to adhere. This formal procedure is intended to provide more due process than is provided by a decision-maker, because the arbitrator generally has the authority to modify the substantive rights of the parties. Like the decision-maker, the written agreement between the parties and the arbitrator is vitally important in setting forth the arbitrator's authority and limitations.

Before H.B. 1171 was enacted, parties had the right to request a "*de novo* review," but there was no consensus as to what type of review was required.[29] H.B. 1171 now refers to a "*de novo* hearing," which can be granted or denied at the discretion of the court. H.B. 1171 also added a deadline of thirty days by which a party must file a request for a *de novo* hearing. Similar to a *de novo* hearing on a decision-maker's decision, if after a *de novo* hearing the court substantially upholds the arbitrator's decision, the party that requested the *de novo* hearing shall pay the fees and costs of the other party, as well as those incurred by the arbitrator, if any, unless such result would be manifestly unjust.[30]

Other States

Colorado joins a handful of states that have parenting coordination legislation. Oklahoma was the first state to approve such legislation; it passed the Parenting Coordinator Act in 2001 and amended it in 2003. In Oklahoma and Colorado, a parenting coordinator can be appointed without the consent of the parties in a high-conflict case. However, in Oklahoma but not Colorado, the parenting coordinator appointed without consent of the parties is authorized by statute to make certain binding decisions on the parties, as long as the decisions are only minor departures from the parenting plan. Oklahoma also was the first state to face a constitutional challenge to its parent coordinator legislation. The statute passed an equal protection challenge, as well as substantive and procedural due process tests.[31]

Other states that have parenting coordination statutes include Idaho and Oregon; Texas and North Carolina passed parent coordination legislation in 2005. In addition, other states have statutory roles that are similar to parenting coordinators, although they do not use the same terminology. Minnesota has a program where "expeditors" are appointed to arbitrate parenting plans. Arizona has "family court advisors" to monitor compliance with custody and visitation orders. California creates "special masters" and "referees" to act in the role of parenting coordinators. These professionals can hear and determine any or all issues on agreement of the

parties. If the parties do not agree, a referee can be appointed for the limited purposes of determining questions of fact or gathering information. Ohio and Wisconsin use their arbitration statutes to facilitate parenting coordination.[32]

Conclusion

The intent of H.B. 1171 was to provide needed resources for high-conflict cases without imposing excessive authority over the parties without their consent. The lowest level of intervention, parenting coordinators, can be appointed without the consent of the parties, but parenting coordinators have no binding authority over the parties. Their role is to try to facilitate more cooperative parenting. The next two levels, decision-makers and CRS § 14-10-128.5 arbitrators, have authority to make certain decisions as provided by statute, but must be given this authority by the parties. The hope is that appointment of a parenting coordinator, decision-maker, and/or CRS § 14-10-128.5 arbitrator will give cases more individualized and immediate attention than the courts can provide, to the benefit of the children.

NOTES

1. CRS § 14-10-128.1.
2. *Id.*
3. *Id.*
4. CRS § 14-10-128.1(2).
5. CRS § 14-10-128.1(3).
6. CRS § 14-10-127.
7. CRS § 14-10-116.
8. CRS § 14-10-128.1(4)(a).
9. House Bill 05-1171 ("H.B. 1171"), which was signed by Governor Owens in June 2005, changes the name of the "special advocate" to "child and family investigator." The role remains essentially the same. However, because H.B. 1171 refers to "special advocates," that term is used in this article.
10. CRS § 14-10-128.1(4)(b).
11. CRS § 14-10-128.1(5).
12. CRS § 14-10-128.1(6).
13. CRS § 14-10-128.1(7). Although it seems clear that a parenting coordinator cannot be called into court to testify, it is not clear whether the parenting coordinator can be contacted as a collateral source in an investigation being conducted by a special advocate or evaluator. There also is a question of whether the phrase "may not be required to produce records" implies the converse—that the parenting coordinator can choose to do so.
14. CRS § 14-10-128.1(7).
15. CRS § 14-10-128.1(8).
16. CRS § 14-10-128.3(1).
17. *Id.*
18. *Id.*
19. CRS § 14-10-128.3(2).
20. CRS § 14-10-128.3(3).
21. CRS § 14-10-128.3(4)(a). The statute is not clear as to whether the date of "issuance" is the date the decision is made or the date it is signed.
22. CRS § 14-10-128.3(4)(b).
23. CRS § 14-10-128.3(7)(a).
24. CRS § 14-10-128.3(7)(b).
25. CRS § 14-10-128.3(c).
26. CRS § 114-10-128.5(8).
27. CRS § 114-10-128.5(1).
28. CRS §§ 13-22-201 *et seq.*
29. CRS § 14-10-128.5.
30. CRS § 114-10-128.5(2).
31. *Barnes v. Barnes*, 107 P.3d 560 (Okla. 2005).
32. Bartlett, "Summary of the States with Parenting Coordinator Legislation," in progress. n