

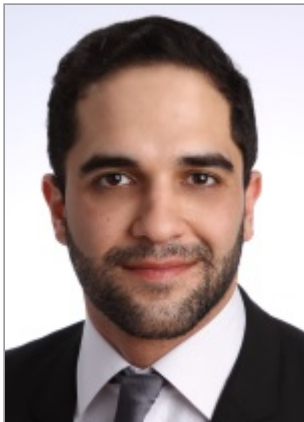
Family

Latest developments in parenting co-ordination law: More case law

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(August 31, 2022, 11:11 AM EDT) -- With court delays limiting options for parents who have child-related disputes, parenting co-ordination is increasingly an appealing alternative. In part one, we gave a brief outline of parenting co-ordination and discussed whether a clause in a separation agreement that requires the parties to retain a parenting co-ordinator is enforceable, using examples from case law.

In part two, we provide more of the latest case law about the evolving practice of parenting co-ordination.

What are the key steps to retaining a parenting co-ordinator?

Parents should each have a confidential intake meeting with the proposed parenting co-ordinator before making a commitment. During this meeting they are each screened for any power imbalances that might impact their suitability for private adjudication.

Parenting co-ordination (PC) agreements are typically for two-or-more year terms. Before they sign a parenting co-ordination agreement, parents are screened by the parenting co-ordinator for anything that might prejudice them in a private adjudicative process.

This can include their ability to fund or manage the commitments of the process; their capacity to fully and safely participate without fear of retaliation; mental illness or trauma that could impact their procedural needs; any risk of harm to children as a result of a parent's participation; the likelihood that remedies unavailable to a private adjudicator might be needed; their respective readiness and governability; and so on.

The PC agreement defines the parenting co-ordinator's jurisdiction and procedures. Independent legal advice is required by most parenting co-ordinators, though it is not mandated for secondary arbitration.

Once the PC agreement is finalized, either parent may seek the assistance of the parenting co-ordinator to resolve disputes in the manner prescribed by their PC agreement during its term.

Is the PC process confidential?

That depends on the type of process provided for in the PC agreement.

In Ontario there is no parenting co-ordination legislation or court directive governing the practice. It is a voluntary process governed by private contract, the *Arbitration Act*, the *Family Law Act* and Reg. 134/07.

Some parenting co-ordinators in Ontario offer an "open" process, where communications from the parenting co-ordinator and between the parents may be shared with the court, and the parenting co-ordinator may be asked to write a report or testify in court. Others offer a "closed" process, where all

communications are confidential and without prejudice, subject to being relevant on an appeal or motion to set an award aside.

In the recent case of *Zyrmiak v. McNamee* 2020 ONSC 5850, involving a closed PC agreement, the court did not permit a parent to refer to discussions from the PC process in their affidavit, citing settlement privilege. In *Jirova v. Benincasa* 2018 ONSC 534, the court dealt with a PC agreement that, except for the screening process, was open and therefore not protected by settlement privilege. In *Joachim v. Joachim* 2021 ONSC 8584, a 2021 decision, the court permitted a parent to call the parenting co-ordinator as a witness pursuant to the terms of an open PC agreement.

In a 2022 decision *R.L. v. M.F.* 2022 ONSC 789, the court declined to grant a parent's request to have counsel appointed for the children. The court noted that, in addition to other interventions that effectively achieved the desired goal, a parenting co-ordinator had reported to the court on her findings.

Counsel advising their clients on PC agreements will want to consider carefully which process best meets the needs of their clients.

Is a PC always appropriate in high-conflict cases?

Counsel and parties will sometimes agree to a parenting co-ordinator in the highest conflict matters as a means of supporting shared decision-making. Although the process can be a better alternative to court in many cases, sharing parental decision-making with reliance on a parenting co-ordinator to broker differences will not always be the best option for the children.

In its 2021 decision *A.R.N. v. M.A.P.* 2021 ONSC 7676, the court declined to award shared decision-making with a parenting co-ordinator to manage disputes. Noting the strong lack of trust between the parents, the court found that:

The conflict and lack of cooperation and coordination are so pervasive that, if there were joint decision-making, every single decision, no matter how small, would likely be referred to the parenting coordinator and, pending a resolution, the children would be in limbo.

In the 2021 decision *A.P. v. P.P.* 2021 ONSC 7424, Justice David Price held that declining to consent to parenting co-ordination was not unreasonable behaviour justifying a costs sanction given that private dispute resolution is voluntary in family law matters and is not always appropriate.

Can a PC be ordered by the court?

Courts in Ontario do not have jurisdiction to order any voluntary dispute resolution process, including parenting co-ordination, without the consent of the parties. This was confirmed in the recent decision of *Sue-A-Quan v. Duarte* 2022 ONSC 1859. However, there are other recent decisions where a parenting co-ordinator has been ordered by the court: see the 2021 decisions in *A.E. v. A.B.* 2021 ONSC 7302 and *Altman v. Altman* 2021 ONSC 6610.

In summary, the case law, though not always consistent, is helping parenting co-ordinators and counsel better tailor this process to meet the needs of parents in conflict. For additional guidance, an Ontario organization, the Family Dispute Resolution Institute of Ontario, offers guidelines for the practice and a roster of certified parenting co-ordinators.

This is part two of a two-part series. Part one: Latest developments in parenting co-ordination law.

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