

Family

Tips for family lawyers negotiating parenting co-ordination clauses

By Hilary Linton and Lindsay Kertland



Hilary Linton



Lindsay Kertland

(October 18, 2022, 12:49 PM EDT) -- It is common these days for lawyers to recommend to their clients, when negotiating parenting plans, that they agree to retain a parenting co-ordinator (PC) to help resolve future disputes.

We have found that in some cases the clients and even their lawyers are not entirely clear on the role of the PC. This lack of clarity can lead to confusing and even unenforceable terms in minutes of settlement or consent order. This can in turn lead to problems and delays in retaining the PC and executing the PC agreement.

Here are our top 10 tips for lawyers advising their clients about the pros and cons of a parenting co-ordinator:

1. Remember that the PC provides "secondary arbitration" under the *Family Law Act*. That means that a PC will not deal with major parenting plan terms. The PC's role is to interpret, manage and help implement the parenting plan once it is agreed on or court-ordered. Be familiar with the provisions of ss. 59.6 and 59.7 of the *Family Law Act*.
2. It is a good idea to attach an executed PC agreement to the minutes of settlement or parenting plan — provided it is actually the right agreement for your client, and further provided that it acknowledges that it is subject to screening by the PC. There are many different ways of providing PC services; not all PC agreements are the same, and none will deliver enforceable arbitration awards without prior screening. (More below.)
3. Although PC agreements, as secondary arbitration, do not technically require independent legal advice in order to deliver enforceable arbitration awards, it is strongly advised that parties signing a PC agreement receive independent legal advice at the time they sign it. Parent buy-in to the PC process is the most important factor in predicting its success. We have found again and again that once the parents understand the process, they are better able to work with it productively.
4. Do not rely on the agreement to retain a PC as the PC agreement, even if the PC agreement is appended to the parenting plan. That is because the regulation under the *Arbitration Act* makes it clear that absent screening for power imbalances and suitability for parenting co-ordination, which is evidenced by the PC's signed certificate on the agreement, the PC cannot make enforceable awards. Make sure the clients are committed to attending an intake/screening meeting so that their PC process can be properly constituted. Do not allow a PC to purport to act on a file until that has been done.
5. Know the kind of parenting co-ordination process you want for your client. Some PCs offer "open" parenting co-ordination, where the PC can report to court or provide evidence, to the extent provided in the PC agreement. "Closed" parenting co-ordination is very different; it is more like confidential mediation-arbitration where the process remains private subject to the enforcement or appeal of an award or one of the enumerated exceptions to confidentiality and

without prejudice communications. It is important to choose the right kind of PC process for your client's circumstances. Parent confidence in their PC process is the most significant indicator of success, so be sure to discuss these options with your client and invite interviews with a range of PCs who have different practices.

6. Understand that not all PCs do things the same way. Some are more parent-education focused; they will likely want to be more interventionist in the day-to-day communications of the parents; or provide more hands-on coaching and spend more time and resources on monitoring and seeking to improve the dynamics of the co-parenting relationship. These processes may be more telephone or e-mail based, and may be more crisis-focused. Other PCs will offer a more structured, written process that includes organized documentary disclosure, required procedural steps and more formal, if summary, proceedings. These PCs are likely to work more with tightly structured procedural requirements for parent participation. Some PCs work alone; others in teams. Be sure to consider the kind of process that is likely to best suit the needs of your client.

7. Remember that even though you and opposing counsel may think the matter is well-suited to the parenting co-ordination process, the PC may disagree. PCs are required by law to screen each client, confidentially, and assess whether the case is appropriate for the process before accepting the file. As with all private adjudication processes, the family dispute resolution professional might "screen it out" — without blaming either party — for a wide range of reasons. PCs should not explain their reasons for screening a matter out — it is within their discretion. And please note: PCs and mediator-arbitrators are required to screen matters out if they become inappropriate for private adjudication as the matter progresses. A good example is if a party runs out of funds to pay for the process.

8. Pay careful attention to the PC's jurisdiction. The more detail the better. PCs are often called upon to interpret their own jurisdiction; please make it as easy as possible for all to know what that is. It will help the parents have confidence in the process and minimize the number of things they might disagree about.

9. Draft the clauses appointing the PC with care. They should include, at least, the specific jurisdiction of the PC, whether it is open or closed PC, the process for selecting a PC, a back-up PC (always a good idea), timelines for initiating steps, remedies for non-compliance, duration of the appointment (generally two years) and the process for making consent awards. Our next article sets out a useful checklist.

10. Remember that parenting co-ordination is unregulated in Ontario other than the minimal requirements found in the *Arbitration Act*, Regulation 134/07 and *Family Law Act*. It is a complex process that can be expensive and ineffective if not done in the best way for each family. Parenting co-ordination is not a panacea for all high-conflict parents; in fact, it is often least effective for the ones who may need it the most. Choosing the right PC, the right process and anticipating all the hurdles at the time of signing the parenting agreement are important steps to take for the sake of the parents, the children, the PC and for counsel.

This is part one of a two-part series.

Hilary Linton and Lindsay Kertland work together on the parenting co-ordination team at Riverdale Mediation in Toronto and virtually.

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