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Family

New parenting co-ordination case law: Clarifying or confusing?

By **Hilary Linton**

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(June 30, 2023, 1:51 PM EDT) -- Parenting co-ordination (PC) is a wonderful resource for parents who need help settling post-parenting plan disputes. It can be highly successful for parents and children alike where the service is designed to meet the needs of the family, the child's voices are heard and the cost is affordable.

But two recent and somewhat conflicting Superior Court of Justice decisions demonstrate why many in Ontario are confused about it.

A quick overview:

PC is, in Ontario, a voluntary conflict resolution process. It is most often defined as a hybrid mediation-arbitration process for parents who cannot interpret their parenting plan without assistance.

Parenting co-ordinators use education, coaching, mediation, referrals, Hear the Child/Voice of the Child Reports, opinions, guidance, support and, if all else fails, adjudication.

Unlike other jurisdictions, in Ontario there is no PC statute, regulation, rule or court directive to define its scope, nor to stipulate training, insurance and procedural standards.

There is only the Regulation under the *Arbitration Act* (Ont. Reg. 134/07) that sets out limited requirements for family arbitrators and family arbitration agreements and related provisions in the *Family Law Act*.

Most PC agreements are for two-or-more year periods. Parenting co-ordinators charge by the hour. Unlike mediation, there is no government subsidy for this service. Unless the parenting co-ordinator screens the matter out because it is no longer appropriate (for almost any reason, including inability to pay or parent non-co-operation), the parents must use the parenting co-ordinator rather than a court to resolve parenting plan disagreements for the term of the agreement.

If the fit is right, PC is therefore a great way to offer families an effective dispute resolution process.

But PC is clearly not for everyone. Some of the highest-conflict parents are often not good candidates for governability reasons, as are parents experiencing ongoing coercion and control. For a great many, the cost of the service over time becomes unsustainable.

Correct screening for suitability is therefore crucial, and it is one of the few elements of the process mandated by the Regulation. Absent appropriate screening, the parenting co-ordinator's award is unenforceable.

Because PC is not defined in Ontario, many different ways of doing it have evolved. And because the requirements that do exist under the Regulation — screening particularly — are relatively new concepts in family law, case law has been inconsistent, and sometimes unhelpful, in clarifying the procedural elements of the practice.

The three issues that lead to the most confusion are:

1. **Does PC include arbitration or not?** PC is widely considered to be a form of "secondary arbitration" as defined by s. 59.7 of the *Family Law Act*. Arbitration is an essential element of the process as it is generally understood and practised in Ontario. But because the process is not defined by statute or practice direction, technically it need not include an adjudicative element. In many other jurisdictions PCs can cajole, suggest, recommend and report to the court — giving them great power — but they cannot adjudicate.

   This question was addressed recently by Justice Deborah Chappel in *S.V.G. v. V. G.*, [2023] O.J. No. 2424, where the court found it had jurisdiction to order parties into PC without arbitration. While the service contemplated in that decision may be useful, it is not "parenting co-ordination" as it is generally known and practised in Ontario.

2. **Do parenting co-ordinators report to the court or not?** Although the parenting co-ordinator is in many jurisdictions considered almost an adjunct to the court in managing high conflict parenting matters in the best interests of the children, in Ontario this is not so. Many Ontario parenting co-ordinators operate on a confidential basis, similar to arbitration, because our services are provided privately, by way of contract.

   "Open" PC is provided by some, with the degree of openness defined by each parenting co-ordinator. Some report to the court, some provide reports, some can be cross-examined. It all depends on the terms of the contract between the parents and the parenting co-ordinator. This lack of consistency in practice is making it difficult to arrive at a common understanding of PC in Ontario.

3. **Can judges order parents in Ontario into PC?** There are jurisdictions in Canada (B.C. for example) where courts have legislative authority to order parents to work with a PC.

But not in Ontario.

The recent decision of Justice Marvin Kurz in *R.L. v. M.F.*, [2023] O.J. No. 2654 confirms that Ontario judges do not have jurisdiction to order parents to use a parenting co-ordinator. Justice Kurz reviews the law on the topic and confirms that courts cannot delegate decision-making authority for children. He notes that nothing in the *Divorce Act* amendment authorizing courts to order parents into a dispute resolution process changes this, given that "dispute resolution process" is defined as including "negotiation, mediation and collaborative law," all voluntary process choices.

Justice Chappel in *S.V.G. v V.G*. found that she could order parenting co-ordination provided that the PC's authority did not include arbitration. Justice Chappel concluded that PC without arbitration is a form of family dispute resolution akin to mediation, negotiation and collaborative law and found jurisdiction under the *Divorce Act* to order it.

While I support the use of parenting co-ordination (in any of the forms it might take) in the right cases, I do not think courts should order parents into a multi-year contract for costly services that they must fund privately, particularly where there is no standardized requirement for training, liability insurance, screening for suitability or other procedural requirements.

Parenting co-ordinators, even without adjudicative authority, have a great deal of power. Unless the parenting co-ordinator deems the matter unsuitable and screens it out, the parents must continue to pay the parenting co-ordinator or risk decisions being made without their involvement. Although parenting co-ordinators are required by the *Arbitration Act* regulation to screen for family violence and power imbalances, practices vary considerably absent standardized training and protocols.

Even if PC is viewed as a form of mediation, as Justice Chappel effectively held, I question whether the *Divorce Act* amendment was intended to introduce mandatory mediation in Ontario.

Section 16.1(6) reads, "Subject to provincial law, the (parenting) order may direct the parties to attend a family dispute resolution process." The *Family Law Act* does (s. 3) not authorize judges to order parties into mediation unless they consent. The *Family Law Rules* (Rule 17(8)(b)(iii)) provide a

regime for judges to order parties at a conference to mediation intakes, which are free, but not to mediation. Unlike PC, mediation is either free or subsidized by the government, and parents can terminate it at any time if the process is not helpful.

Family law dispute resolution is complex and sophisticated. Ontario has chosen to not make it mandatory. Absent enforceable standards for training, insurance, screening protocols and risk management, courts in my view should not be mandating parents to participate in anything other than mediation intake meetings with court-connected service providers, who are subject to extensive regulation by the Ministry of the Attorney General.

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