

Is parenting coordination arbitration?

By Madelene (Leentjie) de Jong

Parenting coordination (which is also known as facilitation in the Western Cape and as case management in Gauteng) is a child-focused alternative dispute resolution process in which a mental health or legal professional with mediation training and experience assists high-conflict parties in implementing parenting plans and resolving pre- and post-divorce parenting disputes in an immediate, non-adversarial, court-sanctioned, private forum.

The primary purpose is to reduce the negative effects of divorce and family separation on children and to protect and sustain safe, healthy and meaningful parent-child relationships.

A parenting coordinator will first attempt to facilitate resolution of disputes by agreement between the parties and, if this fails, the coordinator will often have the power to make decisions or directives regarding the disputes, which will be binding on the parties until a competent court directs otherwise or the parties jointly agree otherwise.

The coordinator's role includes assessment, education, facilitation, case management, mediation and decision-making. It is argued by mediation organisations, such as the Family Mediators' Association of the Cape (FAMAC), that when a coordinator issues a decision or directive, he or she does so based on his or her professional opinion and not as an arbitrator. This is because the coordinator is not required to afford the parties a hearing before issuing a directive and because a directive is not final and binding in the sense that an arbitration award is – it is only binding on the parties until set aside or reviewed by a court with jurisdiction in the matter.

Parenting coordination should not, therefore, be seen as a contravention of s 2 of the Arbitration Act 42 of 1965, which currently prohibits the use of arbitration in matrimonial matters.

Because a coordinator's role includes a wide range of functions, it follows that the terms 'facilitation' and 'case management', which each describes only one function of a coordinator, are too narrow and should rather be replaced with the internationally accepted term 'parenting coordination'.

As parenting coordination is a relatively new form of alternative dispute resolution, the consistent use of the term 'parenting coordination' is also advisable for the sake of comprehensiveness of professional role development and consistency of practice across South Africa.

Appointment of a coordinator

In some divisions of the High Court a coordinator is appointed as a matter of course in divorce matters in which children are involved, while in other divisions a coordinator is appointed only in matters that are chronically litigious and difficult to manage.

Parenting coordination should not, however, be overused, and a coordinator should be appointed only where the parties have clearly demonstrated their longer term inability or unwillingness to make parenting decisions on their own, to comply with parenting agreements and orders, to reduce their child-related conflicts, and to protect their children from the impact of that conflict.

In addition, there are chronically litigious and difficult cases where the parties appear to be addicted to conflict, turmoil and/or violence, such that effective parenting coordination will not be possible, and the only solution may be a very specific and rigid court order that leaves little or no room for interpretation.

In this regard, a coordinator should routinely screen prospective cases for domestic violence and decline to accept such cases if he or she does not have specialised expertise and procedures to effectively manage domestic violence cases involving imbalances of power, control and coercion.

Who to appoint as a coordinator

Although at present there are no national accreditation requirements for coordinators, a coordinator should be someone who is deemed to be suitably qualified by training, experience and education.

As far as training is concerned, a coordinator should, at least, have completed a basic 40-hour mediation training programme and be accredited by the National Accreditation Board for Family Mediators (NABFAM) through a local mediation organisation such as FAMAC, the South African Association of Mediators (SAAM) or the KwaZulu-Natal Association of Family Mediators (KAFAM).

In addition, a coordinator should preferably have specific training in the parenting coordination process, which should focus on, *inter alia* –

- the various functions of the coordinator and how to switch between these;
- issues that are appropriate and inappropriate for parenting coordination;
- characteristics of individuals who are suited and those who are not suited to participation in the parenting coordination process;
- when to refer parties to child protection services;
- how to draft, monitor and modify parenting plans;
- appropriate techniques for handling high-conflict parents, child alienation and domestic violence issues;
- when and how to use outside experts effectively;
- when and how to interface with the court system;
- grievance procedures; and
- possible ethical dilemmas.

As far as experience is concerned, a coordinator should have extensive practical experience with high-conflict families.

In practice, coordinators are mostly psychologists, social workers, mediators, family law attorneys or retired judges.

With regard to the selection of a coordinator, the parties may have the option of appointing one by agreement. If they cannot reach an agreement on the choice of a coordinator, the court might select a coordinator for the parties or a local mediation organisation could be authorised to select one. It is extremely important to match the right coordinator with the parties.

While mental health professionals are possibly better equipped to deal with children's issues, an attorney coordinator might get quicker results in persuading some parents to follow a suggested path of cooperation. For this reason, the appointment of both a mental health practitioner and a legal practitioner as co-parenting coordinators could be considered.

Basis of coordinator's appointment and scope of authority

The basis of a coordinator's appointment is either a court order, with or without the consent of the parties, or a parenting plan or settlement agreement between the parties that has been made an order of court.

The court order or relevant clause of the agreement or plan must clearly stipulate the scope of the coordinator's authority. In other words, it must set out whether the coordinator has decision-making authority or merely the ability to assist with the implementation and monitoring of the parenting plan between the parties. If it includes decision-making powers, the order or relevant clause must further indicate on which issues the coordinator may make decisions; for example, do these matters include only minor issues such as one-time changes in timeshare schedules, school activities, health care, child care and child-rearing practices, or do they include major issues, such as relocation and substantial changes to the parenting plan or court order regarding care and contact?

Parties, legal practitioners and the courts should be cautious about giving too much power to a coordinator, especially one who is not suitably qualified. The order or relevant clause should further set out the multiple functions of the coordinator, the manner in which a coordinator is to be selected, how disputes will be referred to the coordinator, whether the coordinator will have access to any persons involved with the family, whether the coordinator can make decisions or directives in the absence of a reluctant or uncooperative party, how decisions or directives will be communicated to the parties, the procedure to have a coordinator's decision or directive reviewed or set aside by the court, how the costs of retaining the services of a coordinator are to be paid, and how and when the parenting coordination process can be terminated by either of the parties or the coordinator.

Lastly, as some parties will attempt to have coordinators removed from their case simply because they disagree with a coordinator's decision or directive, it is suggested that the court order or relevant clause should grant quasi-judicial immunity to the appointed coordinator. Nevertheless, provision should be made for a grievance procedure that a disgruntled party may follow.

The parenting coordination process

At the commencement of the parenting coordination process, it is advisable for a coordinator to have both parties sign a written statement of understanding containing the parameters of the coordinator's authority and the other aspects of the parenting coordination work as set out in the court order or the parenting plan or settlement agreement in terms of which the coordinator is appointed.

In addition, the statement of understanding must set out clear rules for contact and engagement outside of scheduled parenting coordination sessions, such as the kind of communication that will be used; boundaries for the number, length and tone of messages allowed; absence of on-call services by the coordinator; and the response time for interactions between the parties and between the parties and the coordinator.

It is also important to state that there is limited confidentiality in the parenting coordination process and parenting coordination does not constitute therapy, psychotherapy, child-custody evaluation or legal advice.

It is advisable for a coordinator to meet with the parents individually at the outset to obtain a history of the relationship, screen for domestic violence or other reasons why the process might be inappropriate, and get information about the children involved and an idea of the relevant issues.

Thereafter, joint weekly meetings could be held with both parents and the coordinator until the initial issues have been resolved by the parties or decided on by the coordinator. The parties need to be notified in writing of all decisions made by the coordinator.

Although a coordinator is not neutral regarding the outcome of particular decisions, he or she must maintain impartiality in the process and take heed that the process does not become an adversarial battle between him- or herself and one of the parties.

Over time, as co-parenting communication and skills develop, the need for joint meetings usually decreases until they are needed once a month, once a year or on an as-needed basis.

The coordinator will also meet with the parties' children on an as-needed basis to explain the coordinator's role and to get to know them and to ascertain their feelings about the relevant issues.

Further, although the parenting coordination process is designed to operate outside the court house, it is advisable that there should be contact between a coordinator and the judge who is responsible for the coordinator's appointment in circumstances where a coordinator is having difficulty with any of the parties.

The parenting coordination process will be terminated when it is no longer effective or needed by the family, when the parties agree to remove the coordinator or when the court removes the coordinator from that role. Some of the most frequent reasons for removing a coordinator are allegations of bias, creation of conflict with the coordinator by refusing to pay his or her fees and dissatisfaction with a coordinator's directives.

Parenting coordination in South Africa

The first reported case dealing with parenting coordination is *Schneider NO and Others v AA and Another* 2010 (5) SA 203 (WCC). This case concerned disputes about the schooling, maintenance and other matters affecting the best interests of two children born of unmarried parents.

In the judgment, Davis J placed the judicial stamp of approval on facilitation by ordering that any dispute with regard to the payment of any medical expenses for the children or with regard to contact between them and their deceased father's family should be referred to a FAMAC-appointed facilitator, who would be entitled to facilitate these disputes and make rulings that were binding on the parties, unless the rulings were varied by a competent court or by the facilitator following a separate review. The court further ordered that the facilitator's costs should be shared equally between the parties unless the contrary was directed by the facilitator.

Through this order, a great deal of authority was assigned to the facilitator – not only was the facilitator authorised to make directives on the children's issues, but he or she was also given the authority to vary his or her rulings and to make decisions on how the facilitator's costs were to be apportioned between the parties.

It is therefore of the utmost importance that the facilitator be suitably qualified by training, experience and education to effectively handle this responsibility.

In another judgment of the Western Cape High Court, Gange AJ, in *CM v NG* 2012 (4) SA 452 (WCC), ordered that a facilitator be appointed after the separation of same-sex partners, to assist them with joint decision-making, as well as the drafting of a parenting plan in respect of their child.

The court provided for a FAMAC-appointed facilitator when the parties could not agree on one, and ordered that the facilitator's costs should be shared equally between the parties unless directed otherwise by the facilitator. All disputes between the parties concerning the child's best interests were to be referred to the facilitator in writing and the facilitator's decisions were to be binding on the parties in the absence of a court order to the contrary.

However, in the recent case of *H v H* (GSJ) (unreported case no 2012/06274, 12-9-2012) (Sutherland J) the South Gauteng High Court was not prepared to grant a father's application for the appointment of a case manager to deal with and make decisions about certain post-divorce parenting conflicts between him and his former wife in respect of their child.

The case manager was previously appointed by the divorce court, with the consent of both parties, to assist in concluding a parenting plan. Despite the case manager's intervention, the parties did not conclude a parenting plan and a clash of opinion on an appropriate nursery school for the child gave rise to the father's application.

Sutherland J held that no court had the jurisdictional competence to appoint a third party to make decisions about parenting for a pair of parents who are holders of parental responsibilities and rights in terms of ss 30 and 31 of the Children's Act 38 of 2005.

At para 7 of the judgment, he held: 'The notion of a "case manager" is one that derives from the practice of the courts and is not a label used in the Act.'

From the court's discussion of other cases in which case managers were appointed in the South Gauteng High Court, it appears that Sutherland J was of the opinion that a case manager can be appointed by agreement between the parties only and not on application by one parent.

The judge did not distinguish between the different roles of a mediator and a case manager and was of the view that the appointment of a decision-maker to break deadlocks was a delegation of the court's power that constituted an impermissible act and amounted to 'an arbitration of sorts'.

The judge did not accept the arguments on behalf of the applicant in support of the appointment, namely that s 7(1)(n) of the Children's Act, which provides that a court must weigh which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child, should be considered; that the power of the court as the upper guardian of minor children should be invoked; and that s 38 of the Constitution, which addresses the need for a court to craft a remedy for every right the Constitution confers, should be used.

The application was accordingly dismissed. The judgment has, however, been taken on appeal to the Supreme Court of Appeal.

The future of parenting coordination in South Africa

Until such time as the Supreme Court of Appeal delivers judgment in the *H* case, the position of parenting coordination in South Africa remains uncertain. Only time will tell whether FAMAC's argument, that parenting coordination does not amount to arbitration, or the opinion of Sutherland J, that parenting coordination does indeed amount to arbitration, will prevail.

Madelene (Leentjie) de Jong *BLC LLB (UP) LLD (Unisa)* is a professor in the department of private law at Unisa.