FAMILY LAW

Magal practices family law at Pietrow Law Group in Vancouver.

BY MAGAL HUBERMAN
PIETROW LAW GROUP

CASE LAW ON PARENTING COORDINATION: A WORK IN PROGRESS

Parenting coordination has been available as a dispute resolution mechanism for over six years, and the case law on this topic continues to develop, though somewhat slowly. The following is a review of recent case law on parenting coordination, mostly from the past two years, grouped into three categories: whether a parenting coordinator ("PC") should be appointed, delineating the mandate of the PC, and disputes. As summarized at the conclusion of this review, there is a wide field for further developments in the law on parenting coordination in BC as well as for general research about this topic.

TO APPOINT OR NOT TO APPOINT

The court will appoint a PC when the evidence demonstrates ongoing conflict between the parties, despite the view of one party that the difficulties are temporary and that the parties can resolve disagreements between themselves. For example, in *Robertson v Vega Soto*, 2019 BCSC 1140, the court accepted that the parties' relationship has deteriorated to the point that a PC is needed, and rejected the submission that the parties can resume a previously "friendly relationship", noting that the evidence did not demonstrate a previously "friendly" relationship, that counsel had to be involved repeatedly, and that the communications between the parties were clearly poor and they were unable to resolve even minor issues. The court further rejected the submission about the unaffordability of a PC, noting that engaging counsel repeatedly is costly as well and that the costs of the PC would depend on the parties' use of the PC. In a similar vein, a PC was appointed in *Hart v Hart*, 2019 BCSC 885, with the court commenting that "[a]lthough a parenting coordinator costs money, they will be less expensive, and involve less anxiety, than further court applications. A parenting coordinator can also make decisions quickly as issues arise" (para 92).

In *N.M.A. v K.D.L*, 2018 BCSC 1879, the court appointed a PC by consent, despite the findings of family violence which led the court to make a protection order against the respondent.

Case law appears to diverge about appointing a PC when one of the parties is also granted decision-making authority in the event of a disagreement. As noted in *M.C.J. v R.J.G.*, 2018 BCSC 929 and *S.E.V. v T.M.V.*, 2018 BCSC 30, appointing a PC seems inconsistent with granting decision-making authority to one party, or at least unnecessary. In *T.E.A. v R.L.H.C*, 2019 BCSC 1042, however, the court granted the respondent final decision-making authority (with the requirement of prior consultation with the claimant) and also appointed a PC, noting that the PC "can assist the parties with communication and assist with making modifications to the parenting plan as-needed" (para 213). These parenting arrangements were based on the recommendations of a section 211 report.

Similarly, in *M.F.W. v M.A.H*, 2019 BCSC 588, the Court ordered that the claimant would have "primary parenting responsibility" with respect to most of section 41 parental responsibilities as well as decision making authority in the event of a disagreement, but also ordered the appointment of a PC, specifying that the parenting coordinator will:

> … provide guidance, advice and recommendations as to how to encourage the parties to engage in cooperative parenting including:
>
> a) facilitating the manner and place of drop offs and pickups to exchange the children;
> b) reducing the potential for conflict between the claimant and the respondent's spouse;
> c) facilitating the children's telephone call to the non-custodial parent;
> d) facilitating positive communication between the parties; and
> e) scheduling parenting time during holidays.

In other cases, however, the Court declined to appoint a PC when decision-making authority was granted to one party, on the basis that a PC was unnecessary in that situation. This was the result, for example, in *V.R. v R.Z*, 2019 BCSC 658, *T.L.M. v J.K.B*, 2018 BCSC 2237, and *R.S.D. v K.D.*, 2018 BCSC 2416.

In *T.L.M. v J.K.B*, there was ongoing post-trial litigation, following a 2012 trial decision that granted the respondent

decision-making authority in the event of a disagreement. Three years later, the court ordered that a PC would be appointed, but with the respondent maintaining decision-making authority. By the time of the present decision, the two-year term of the PC's appointment had expired, and the claimant applied to vary the trial order by removing the respondent's decision-making authority and appointing a PC. The respondent was not altogether opposed to appointing a PC, but disagreed with removing her decision-making authority. In the result, the court determined that there had not been a material change of circumstances that would support the removal of the respondent's decision-making authority, and that a PC was unnecessary given that term and given the variation made to the parenting schedule.

In *R.S.D. v K.D.*, following a lengthy trial, the court allocated most parental responsibilities to the claimant (as well as decision-making authority in the event of a disagreement), but specifically stated that this was not to be seen as a permanent arrangement and that in the absence of an agreement otherwise, the parties should appear in court a year later, with leave to the respondent to seek a reallocation of parental responsibilities at that time. Given the allocation of parental responsibilities and decision-making, the court declined to appoint a PC for the time being but stated that this could be revisited when the matter returned to court.

Other cases in which the court declined to appoint a PC were *Davenport v Forliti*, 2019 BCSC 676, *A.K. v J.R.J*, 2019 BCSC 868, and *D.M.B. v D.W.A.L*, 2018 BCSC 1254. In *Davenport*, the parties' adult son had been severely disabled since birth and the parties had been in ongoing conflict about his care and parenting arrangements for many years. The parties had worked with PCs in the past, pursuant to earlier orders, but the process had been described as a failure (due to the claimant not fully participating in the process), and the requirement of having a PC was therefore set aside in 2016. In the present application, the respondent sought again to have a PC appointed, but the court determined that there had been no material change of circumstances since 2016 (para 108):

> The crux of the disputes is the parties' failure at communication, their differing views of what is best for Blue, and the enmity they feel toward each other. This is nothing new; it has been ongoing for 20 years. This is not a material change in circumstances.

In *A.K. v J.R.J.*, the court declined to appoint a PC, because "the parties have largely been able to cooperate and agree on all material decisions relating to D. and that the cost of a parenting coordinator is unjustified" (para 39). The court also determined that it would be premature to appoint a PC because the child had only recently begun counseling, and the court was "reluctant to impose a court order on the parties that may hamstring that counselling process" (para 40). The court also granted decision-making authority to the claimant in the event of a disagreement (with prior consultation with the respondent and, if applicable, professionals treating the child). In *D.M.B. v D.W.A.L*, the court rejected the respondent's submission that a PC should be appointed, and instead allocated some parental responsibilities to the claimant and granted her decision-making authority in respect of other parental responsibilities if the parties disagreed. The court's reasons for declining to appoint a PC included the respondent's controlling behaviour and history of reneging on payments, which the court considered would lead to further conflict if a PC was appointed.

There is not much case law on the selection of the PC. In *I.J.G.P.G. v K.M*, 2018 BCSC 2468 (followed by *I.J.G.P.G. v K.M*, 2019 BCSC 508), the court addressed a disagreement on this matter by requiring each party to provide the names of two PCs who were available to take the matter, together with their qualifications and hourly rates.

Further on the issue of selecting a PC, the case authorities contain little discussion about the preferred professional discipline and background of the PC for each case, that is, whether the PC appointed in the matter should be a lawyer, a psychologist, a social worker, or a clinical counselor; presumably this is a matter that is left for counsel to address or the subject of subsequent applications if the parties disagree. One reported decision in which the PC's professional background arose is *K.M.H. v P.S.W.*, 2017 BCSC 1284, where the parties were working with a PC (a lawyer) and with a team of mental health professionals who provided reunification therapy. As therapy was not successful, the team recommended other reunification and family therapy programs and the appointment of a PC with mental health expertise. The current PC endorsed these recommendations, and the court accepted them and made orders accordingly.

DELINEATING THE MANDATE OF THE PC

While some orders for the appointment of a PC only refer to the applicable sections of the *FLA* (and regulation thereto) and to the PC agreement endorsed by the BC Parenting Coordinators Roster Society, other decisions are more detailed or contain additional terms for the role of the PC.

For example, in *S.E.V. v T.M.V.*, 2018 BCSC 30, the court ordered that in the event of a disagreement about whether an expense qualified as a section 7 expense, the matter first had to be brought to the PC to attempt to resolve it before either party brought a court application. In a similar vein, the court ordered in *Hart v Hart*, 2019 BCSC 885 that the PC's mandate would include "assisting the parties to determine child support and special expense requirements for children over the age of 19 where applicable" (para 93). In *T.E.A. v R.L.H.C*, 2019 BCSC 1042 (referred to above), the PC's mandate included modifications to the parenting time schedule as needed (subject to statutory restrictions) and that all communications between the parties regarding the children had to go through the PC.

DISPUTES: AUTHORITY, JURISDICTION, SETTING ASIDE DETERMINATIONS, AND REPLACING THE PC

The relatively early decision of *D.E.E. v. W.L.E.*, 2015 BCSC 612 dealt with whether the PC had authority to make a determination that altered the claimant's parenting time. The respondent sought a stay on the use of the PC pending the pronouncement of a final order about parenting time, or that the determination be set aside. The background to the application was an interim consent order that all matters of custody and access would be dealt with by the PC, and counsel assured the PC of the PC's authority to act pursuant to this order. The PC made a determination regarding the claimant's parenting time. However, there was no order or agreement at that time regarding the overall parenting arrangements, including the parenting schedule.

The court confirmed that there are two pre-conditions for the PC's authority under the *FLA*: the existence of an agreement or order about the parenting arrangements and a PC agreement. As the first precondition was not met, the PC in this case acted without authority, and the determination was therefore set aside. Importantly, the court stated that "[c]ounsel, despite their best intentions, were not in the position to grant her statutory authority she did not have under the *Act*" (para 60). The court did determine that the PC could resume work once there was an order or agreement about the parenting arrangements (if the PC agreement was still in effect).

In *Law v Cheng*, 2017 BCSC 328, the court determined that standard of review of a PC's determination is reasonableness (as for an arbitration award), which includes "consideration of whether a decision 'falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law'" (para 45).

In *H.C.F. v D.T.F*, 2018 BCSC 2411, the issue was whether the PC had authority to make a determination about the appropriate counseling regime for the parties' child. The court determined that the PC did not have this authority, and that it would not be appropriate to refer this question to the PC in this case in any event.

> Regarding the PC's authority, the determination of a counseling regime for the child did not fall within the provisions of the *FLA*, as the PC's role is limited to implementing the court-ordered or agreed-upon parenting arrangements rather than establishing these arrangements. Further, determining a counseling regime does not fall within the prescribed matters under the regulations; specifically, it does not constitute "routine" health care for a child (para 54).

On a side note, the court also rejected the submission that the child's wishes regarding his counseling should be given significant weight, stating that "[w]hen a child's health is, or potentially is, involved, the importance of the views of the child can take on different significance … These are not decisions that can or should be left to a 12-year-old. The views of a child of 12 or 13 years of age, in relation to the treatment they require for their physical or mental health, have diminished importance (paras 56 and 58).

H.C.F. v D.T.F (and other earlier decisions) were distinguished in the recent decision of *F.J.V. v. W.K.S.*, 2019 BCCA 67, which is one of a relatively small number of appellate decisions on parenting coordination. The case involved lengthy litigation, and the parties were scheduled to commence a ten-week trial (which would have been the second trial in the proceedings). However, they had reached a settlement on the parenting issues and sought to speak to a consent order. The appeal arose from the refusal of a Supreme Court judge to approve the consent order. Specifically, the consent order provided that the parties' children would attend counseling, and if the parties could not agree on the counselor, then their PC would have the authority to make the selection after receiving submissions from each party. The PC had already been working with the parties and had confirmed that she was prepared to select the counselor if the parties could not agree on the selection.

The judge declined to sign the order on the basis that it was not in the best interests of the children, and stated a preference that the parties reach an agreement on the selection of the counselor in order to minimize ongoing litigation (if the parties did not

agree with the determination of the PC), which the judge was concerned about given the lengthy litigation history. The judge also questioned whether the PC had the authority to select a counselor (although this was not the basis for the refusal to sign the consent order).

On the first issue, the Court of Appeal determined that the judge erred in concluding that the proposed consent order was not in the best interests of the children. Regarding the authority of the PC, the Court of Appeal determined that the selection of a school for the parties' eldest child fell within s. 6(4)(a)(ii) of the regulations (the education of a child, including in relation to the child's special needs) and the selection of a counsellor or child psychologist fell within s. 6(4)(a)(ix) of the regulations (any other matters, other than matters referred to in paragraph (b), that are agreed on by the parties and the parenting coordinator). The parties and the PC had agreed that the PC could determine the matter, and it was not a prohibited matter pursuant to s. 6(4)(b).

The Court of Appeal distinguished *H.C.F. v. D.T.F.* on the basis that at issue was not the appropriate counseling regime (which was already addressed in the consent order), but only the selection of the counselor.

Lastly, the recent decision of *A.K.S. v A.L.E.S*, 2019 BCSC 419 dealt with setting aside a PC's determination and with terminating the PC's appointment.

The determination at issue changed the parenting schedule, based on the recommendations of a section 211 report that was prepared by consent. Of note, the consent order entered into by the parties contemplated that the PC would have the authority to make this determination. However, the respondent took the position that the PC did not have the authority to make this determination because it involved a substantial change to the parenting schedule.

Regarding the standard of review, the court noted that "[t]he question of the standard of review to be adopted in assessing the decision of an administrative decision-maker review is a vexed question … the law continues to evolve" (para 30). The standard of review for the PC's (implicit) decision that the change in the parenting schedule was not substantial, and that she therefore had the authority to make the determination, is reasonableness. The court determined that from the perspective of the child, the change to the schedule was not significant, and further, that the determination should be viewed in the context of the consent order, which contemplated the PC making this determination. Accordingly, the determination was upheld.

The respondent also sought to replace the PC. The court concluded that the respondent had lost confidence in the PC and that accordingly, without ascribing fault to the PC, the PC has lost the ability to mediate effectively between the parties and there was a risk that the respondent would challenge future determinations of the PC. Accordingly, the court ordered that a new PC would be appointed, with the respondent to nominate three qualified candidates for appointment and the claimant to choose one of them.

FINAL NOTE

In *Critical Review of Research Evidence of Parenting Coordination's Effectiveness*, published in 2018 in the Family Court Review, the authors note that research on the effectiveness of parenting coordination is "sorely lacking". The article provides a review of existing research, grouped into three themes: parenting coordinators' perceptions of their role and function; professionals' and parents' views and perceptions of parenting coordination; and outcomes of parenting coordination, including some measures of effectiveness of the PC process. The review concludes that "although promising methodological approaches are underway, the research is limited by a small number of studies of variable quality, and none use a control group or experimental design(s)". The gaps in research include formulating objective outcome measures of efficacy and identifying the efficacy of each aspect of the PC's work. Further, while current research indicates that parenting coordination is best provided by persons with legal or mental health backgrounds (or a combination of both), research that "looks at the differences in perceptions of role, application of knowledge base and training to functions, and effectiveness based on the discipline of the PC would be useful as it applies to different kinds of family characteristics and problems", as would research about different models of intervention.

In addition, the authors conclude that efforts must be made to include larger samples of PCs and parents, and from different jurisdictions, and "it would benefit the field of parenting coordination to begin to explore the characteristics of the families who make use of the parenting coordination practice as well as whether or not there are certain variables that make a family a good or poor candidate for the parenting coordination process and how to disseminate PC services so that it can reach those who could benefit from this intervention". Given that BC is one of a relatively small number of jurisdictions (outside of the US) in which parenting coordination is available, BC can provide significant contributions to research on this topic. V

1. Robin M. Deutsch, Gabriela Misca, and Chioma Ajoku, "Critical Review of Research Evidence of Parenting Coordination's Effectiveness", *Family Court Review*, Volume 56, Issue 1, January 2018; pages 119-134.