

WHAT ARE AFCC AND AFCC-NJ?

The Association of Family and Conciliation Courts (AFCC) is a non-profit, international, interdisciplinary association of professionals dedicated to improving the lives of children and their families through resolution of family conflict. AFCC promotes a collaborative approach among professionals who work in the family court system, promoting education, research, and innovation and identifying “best practices” to resolve family conflict.

AFCC’s vision is a justice system in which judges, lawyers, and mental health practitioners work collaboratively, through education, support, and access to services, to attain outstanding outcomes for children and families.

AFCC members are drawn from twelve (12) disciplines: judges, mediators, lawyers, psychologists, researchers, counselors, custody evaluators, court administrators, parent educators, academics, Parenting Coordinators, and social workers -- all dedicated to the resolution of family conflict.

For 50 years, AFCC has been a catalyst for major legal reforms. AFCC members originated important alternative dispute resolution processes, including child custody mediation, Parenting Coordination, and divorce education for parents. AFCC has developed model standards of practice for family and divorce mediators, child custody evaluators, and Parenting Coordinators.

In the late 1970's, California formed the first AFCC chapter. In the years following, chapters were formed in Arizona, Colorado, Florida, Kansas, Massachusetts, Minnesota, Missouri, New Jersey, New York, Ontario, and Texas.

By the end of the 1990's, mediation had established itself as a professional field of practice. AFCC provided training, certification, and regulations regarding model standards of practice for family and divorce mediation. The Model Standards were subsequently adopted by AFCC, the American Bar Association, and the Association for Conflict Resolution.

The last decade has seen tremendous growth for AFCC. In 2003, the president of AFCC appointed a Parenting Coordination Task Force to take the lead in the development of the emerging new field of Parenting Coordination. The task force produced its first national set of

guidelines for Parenting Coordinators, adopted by the AFCC Board of Directors in May 2005, www.afccnet.org/index.asp.

AFCC has coordinated, facilitated, and encouraged the growth of the Parenting Coordination model. AFCC has contributed to this growth by providing a centralized, unifying, international presence in the arena of domestic relations law and family courts. It has become a clearing house for Parenting Coordination information. Its peer-reviewed journal serves as a forum for Parenting Coordination research and writing. AFCC conducts an online Parenting Coordination discussion group.

AFCC now has 3,521 members in the United States and 676 international members from 19 other countries. Based upon a survey of the membership composition, 43.5% are from the mental health field, 32% are attorneys, 16.6% are mediators, and 7.9% are from other fields.

AFCC-NJ has 77 members; 38 are from the mental health field, 38 are from the legal field and 1 is from an unidentified field.

AFCC-NJ members have been at the forefront of Parenting Coordination in New Jersey. They have served on the Supreme Court

Family Practice Committee, testified before the Supreme Court regarding a Parenting Coordination Rule of Court, assisted in developing the Parenting Coordinator Pilot Program, and worked on the Implementing Guidelines for that pilot. AFCC-NJ's members serve routinely as Parenting Coordinators and understand first-hand the challenges facing these professionals.

AFCC and AFCC-NJ are uniquely positioned to assist this Honorable Court in reaching a proper result in this matter of great public importance.

PARENTING COORDINATION: AN OVERVIEW

Parenting Coordinators ("PC" or "PC's") reduce Family Court caseloads and inhibit re-litigation of custody cases. They help parties monitor existing parenting plans, reduce misunderstandings, clarify priorities, promote compromises, and develop collaborative parenting models. (Judiciary website: www.judiciary.state.nj.us/family/parenting).

Parenting Coordination is a non-adversarial and child-focused dispute resolution process designed to assist high conflict parents settle disputes about children in a timely manner. It is almost always a post-judgment intervention, reserved for parents who have demonstrated an ongoing

inability to reach agreements through other means, including private negotiations, mediation, specialized parent education, settlement conferences, or trial.

The PC process combines diverse functions including dispute and case management, parental education, mediation, and non-binding recommended outcomes in child-related disputes. PC's are most often licensed mental health professionals or family lawyers with extensive experience in divorce and custody matters, particularly with high conflict parents and cases. Kelly, "Preparing for the Parenting Coordinator Role: Training Needs for Mental Health and Legal Professionals," 5 Journal of Child Custody 140 at 141 (2008).

Sixteen states have adopted rules or enacted legislation addressing the appointment, qualification, and conduct of Parenting Coordinators. Among those states is California, which had a high number of re-litigated custody cases. In addressing the issue, California enacted legislation in support of Parenting Coordinators, or "special masters", to meet the needs of high-conflict families. Additional states with the same concept include North Carolina, Vermont, New Hampshire, Massachusetts, and Florida. (www.afccnet.org). See Kirkland, "Parenting Coordination Laws, Rules, and

Regulations: A Jurisdictional Comparison”, 5 Journal of Child Custody 25 (2008).

New Jersey’s Parenting Coordinator Pilot Program began in 2004. This Court issued Guidelines in 2007, to give operational details. (Judiciary website: www.judiciary.state.nj.us/family/parenting). The Guidelines state that a PC may be a social worker, psychologist, psychiatrist, lawyer, mediator, or a marriage and family therapist, any of whom shall be licensed to practice in the State of New Jersey by the appropriate State Board and agency. They may be court-appointed or selected by the parties, but PC’s must always serve via court order.

Custody and parenting time cases are among the most fiercely litigated, and the litigants among the most contentious. Historically, high conflict cases made up approximately 10% of all divorce cases, but they now take up almost 90% of the family courts’ resources. Beck, et al., “Parenting Coordinator Roles, Program Goals and Services Provided: Insights from the Pima County, Arizona Program”, 5 Journal of Child Custody 122-23 (2008).

Many New Jersey professionals are reluctant to take on court-appointed roles. Disgruntled litigants challenge the Parenting Coordinators’ performance and file grievances, requiring PC’s to defend themselves to

licensing boards or the trial courts that appoint them. AFCC-NJ members who serve as PC's reasonably consider their very livelihoods jeopardized by such grievances, which often are filed in bad faith and frequently cause the Parenting Coordinator to quit the case. This is a source of continuing complaints by AFCC-NJ members to the Association, and it has been so for a number of years.

Certainly, no profession should be shielded from appropriate oversight and monitoring. There are Parenting Coordinators who do not perform their roles appropriately or who exercise poor judgment.

This Court must strike a balance between competing public policy interests: to protect PC's from abusive and harassing litigant complaints; and to provide appropriate oversight of court-appointed PC's.

GOALS OF AFCC-NJ AS AMICUS

Parenting Coordination is still a young concept, having begun in Colorado and California in the early 1990's. The PC role was established by professionals who realized that some high conflict families remained chronically mired in conflict and required something different. For these families, traditional approaches (litigation, mediation, forensics, and therapy) did not work. Parenting Coordination was conceived as a different and needed dispute resolution intervention. Greenberg, "Fine Tuning the

Branding of Parenting Coordination ‘...You May Get What You Need’”, 48 Fam. Ct. Rev. 206-07 (2010).

Although the Family Part handles litigation matters every day, the court system is neither designed nor equipped to handle each and every parent’s day-in and day-out conflicts. Parenting plans are often crafted in broad terms, without addressing the persistent daily issues facing some families. Because counseling is not enough for certain high conflict families, parents often benefit from introduction of a neutral PC.

Parenting Coordinators provide valuable assistance in the following case types:

1. Parents of young children who have never lived together and have no idea how to co-parent. These parents may have limited collaboration and cooperation skills, and for them, PC’s can teach co-parenting skills, reduce tensions, correct misconceptions, and alleviate anxieties.

2. One parent’s ability to care for the children is compromised by mental illness or substance abuse. The 10-20% of parents entrenched in high conflict situations years after separation/divorce are significantly more likely to have severe personality disorders and/or mental illness. Kelly, supra p. 5, 5 Journal of Child Custody 140. With help from a PC, the family can grow to understand the characteristics of the disorder or illness. As

time passes, the challenged parent may learn more tools and be better able to care for the children. PC's can help implement modifications to the plan as a party's parenting ability improves.

3. Families with special needs children. It is unrealistic to think that one parenting plan will serve a child's best interests until the child is no longer a minor. Most parenting plans require modification from time to time. The PC can help parties resolve ongoing disputes over child services, education, and health care as children grow and change.

Parents who need PC intervention are typically a special group for whom the passage of time and the finality of the divorce have not reduced the rage and inappropriate behaviors of at least one of the parents.

Parenting Coordination is a difficult and often thankless job. For some couples who remain embroiled in conflict, the PC "becomes the container of almost all of the hostility in the family." Beilin, "Why I am No Longer a Special Master," AFCC California Chapter Newsletter 6 (2002).

When a PC's decision favors one party's point of view more than the other, it is not a function of bias, although some litigants allege impropriety on the part of the PC. Per Kelly, supra p. 5, 5 Journal of Child Custody at 145:

[In some cases], one enraged, vindictive and uncooperative parent initiat[es] most of the conflict and disputes, and one parent, now emotionally disengaged, . . . is forced to deal with the disputed issues [internal citations omitted]. Decisions consistently “favoring” the better-adjusted parent may be entirely appropriate in such cases. However, PC’s more often work with two parents with continuing high anger and severe personality disorders, and the decisions of PC’s are more likely to “favor” both parents at different times during their term of service.

The nature of PC work and the pathology of some litigants results in the greatest risk to the professionals who perform the PC role. Parents with psychiatric issues (borderline personalities and other disorders) are most likely to launch attacks and file grievances when they receive “unfavorable” opinions, reports, and recommendations issued by the PC.

AFCC-NJ supports the decisions made by the trial court and the Appellate Division below, which established appropriate guidelines for addressing meritless complaints and compensating PC’s for their time spent responding to them.

We believe that Parenting Coordination is a vital alternative dispute resolution model and that the court-appointed neutrals who perform this work are, by and large, experienced and dedicated professionals whose contributions should be protected.

AFCC-NJ's goals in these proceedings are threefold:

1. To encourage qualified professionals to accept court appointments as Parenting Coordinators, guardians ad litem, and custody/parenting time evaluators, and to protect them from vexatious and abusive complaints and grievances.

2. To maintain the trial courts as gatekeepers and "first responders" for party complaints and grievances, rather than professional licensing boards.

3. To allow PC neutrals to be compensated for time spent responding to frivolous complaints by disgruntled litigants, upon the trial court's finding of frivolousness, bad faith, and/or harassment.

LEGAL ARGUMENT

POINT I.

Court-Appointed Neutrals Must Be Protected From Vexatious Litigation and Harassment in Parenting Coordination Matters.

A. Without Protection From Abusive Complaints, Qualified Professionals Will Refuse Appointments.

In a national survey of custody evaluations, researchers found that filed grievances resulted in findings of professional fault 1% of the time.

Kirkland & Sullivan, "Parenting Coordination Practice: A Survey of

Experienced Professionals”, 46 Fam. Ct. Rev. 622 (2008). The system should expect some pathological and manipulative litigants to seek a PC’s removal or censure because they disagree with a PC’s recommendations. Clear procedures for submitting grievances, and for objectively reviewing them, are an integral aspect of any successful PC program.

The chilling effect of greatest concern involves the impact that abusive litigation or licensing board tactics have on court-appointed professionals. Mental health professionals already are reluctant to serve in a variety of roles that involve the courts and court appointments. The PC is the predictable target of parental hostility. If the system that uses them does not establish reasonable and appropriate protections against frivolous attacks, then these professionals will resign and refuse further appointments.

POINT II.

The Trial Court is the Most Appropriate Forum to Hear and Consider Complaints Against Court-Appointed Neutrals.

In the Pilot Program, this Court established procedures for hearing grievances. When parties and professionals cannot resolve a dispute themselves, the trial court is directed to decide the issue. This Court properly recognized the trial judge as the one in the best position to

determine the facts in the context of the case, including the history of the parties' behaviors and interactions. Therefore, the trial court has the first responsibility to determine whether the PC's have acted ethically. The trial judge retains the ability to refer matters to the professional board of whatever license the PC holds.

The various professionals who serve as PC's are subject to separate licensing boards and grievance processes. The role of the PC, however, does not fit into the traditional models of those professions, which include psychology, social work, marriage and family therapy, attorneys, mediation, and others. The PC's role is not psychotherapy, it is not the practice of law, and it is not mediation. Rather, the PC role is a unique hybrid, bringing to bear knowledge of child development, family dynamics, the court system, the law as it pertains to custody and parenting issues, and alternative dispute resolution methods.

Because of the multi-disciplinary nature of the role, the licensing boards for the professionals lack clear standards and guidance for evaluating Parenting Coordination. Moreover, those various professional boards all have their own standards and regulations by which they assess their members' conduct. The handling of grievances against PC's should be consistent across professional lines. Grievances submitted to governing

boards, which have the power to revoke licenses and publicly reprimand professionals, can have career-threatening impacts. Litigious parties, who abuse the system and file frivolous complaints, should not be permitted to place a stranglehold on the professionals appointed to serve as PC's.

Cases in which PC's and other neutrals are appointed often have long and tortured histories that are well-known to the judges who deal with them. The trial court, as a tribunal most familiar with the role of PC's, and with the history and knowledge of parents and cases, must continue to perform a gate-keeping function.

In most instances, grievances arise from a disputed PC recommendation. The trial court can straightforwardly decide to uphold or overturn a PC recommendation. If the trial judge concludes that there is no PC misconduct, then such a determination should end the inquiry unless the grievant files an appeal. The grievant should not, however, do an "end run" around the trial court by bringing parallel or successive proceedings to a professional licensing board. Professionals who are willing to handle these tough assignments should not be subjected to multiple or serial investigations. See Sullivan, "Ethical, Legal, and Professional Practice Issues Involved in Acting as a Psychologist Parent Coordinator in Child Custody Cases", 42 Fam. Ct. Rev. 576, 581 (2004) ("a better definition of

standards of practice and review is critical if the courts expect to retain the highly skilled professionals required to work [as PC's]"). See also, Kirkland, supra at pp. 5-6, 5 Journal of Child Custody at 43 ("The reviewing body should always first be the appointing court rather than a licensing board Many times manipulative parties have filed grievances, board complaints, or civil lawsuits just to get a given PC removed from a given case [internal citations omitted]").

Certainly, there will be instances in which grievances are a response to true misconduct on the part of the PC. It is in these cases that the court's gate-keeping function must differentiate between disagreement with a PC's recommendations and actual misconduct. Where misconduct is found, the court can exercise its discretion and apply appropriate sanctions. These could include a refusal to award fees for some or all of the Parenting Coordinator's time spent responding to the grievance. If the PC's conduct is deemed sufficiently grievous, and the trial court has serious concerns about the performance of a particular Parenting Coordinator, then the judge may refer the matter to the appropriate licensing board for ethical inquiry.

Whether grievances are submitted to these licensing boards by litigants or judges, the boards should rely on the trial judge's findings of fact when assessing the merits of a grievance, thereby avoiding multiple

investigations and fact-finding proceedings, as well as inconsistent rulings. In this way, the system provides for appropriate review of the PC's conduct, while also protecting the PC against the potential for repetitive, harassing complaints.

POINT III.

Trial Courts Should Have Discretion to Order Litigants to Compensate Parenting Coordinators for Time Spent Responding to Frivolous Grievances.

Until the trial court and Appellate Division decisions in this case, there was no New Jersey rule regarding a PC's right to bill for time spent responding to grievances, frivolous or otherwise. On the record below, the trial court and Appellate Division determined that a PC is entitled to be compensated for reasonable time and costs in defense of a frivolous grievance. We urge this Honorable Court to affirm those rulings, and extend them to other court-appointed neutrals in custody and parenting disputes. As Judge Weisenbeck held, to decide otherwise would penalize the court-appointed neutral for a litigant's unreasonable conduct.

Trial courts should be free to exercise discretion to determine the nature of a grievance, the extent to which it has merit, and the reasonableness of the efforts undertaken by the neutral professional to respond to it. In making these assessments, the trial judge should have the

ability to assess penalties against a party who files a frivolous complaint, and to reasonably compensate the PC or other professional who is forced to deal with it. When a litigant acts in bad faith, a fee award protects the innocent party from unnecessary expenditure of time and costs and punishes the guilty actor. Yueh v. Yueh, 329 N.J. Super. 447 (App. Div. 2000).

Particularly when the PC's response to a grievance requires a discussion of the case and explanation of the Parenting Coordinator's role and reasoning, as was the case here, trial judges should also have the ability to exercise discretion to award fees for those labors.

In California, the Los Angeles County Bar Association Family Law Section has adopted a model order of appointment for Parenting Coordinators, which allows for an award of fees to a PC when responding to grievances:

The Court reserves jurisdiction to make orders for payment of the [PC] for time and expenses spent in responding to any grievance, removal proceeding, or other claim or challenge arising from this Order, including attorneys' fees and costs incurred, if any.

Los Angeles County Bar Association Family Law Section (2009),
"Parenting Plan Coordinator Appointment Stipulation".

PC's and other court-appointed professionals should also have the right to enter into contractual arrangements with parties. In 1957, this Court held that an attorney engaged by parties as a consultant, not as a counselor, could seek repayment of his fees due under a contract in the matter of Ellenstein v. Harman Body Co., 23 N.J. 348, 353 (1957). Justice Weintraub wrote,

If he in fact was engaged to render services in a non-legal area, I think it would be solicitude to the point of foolishness to deny him his rights merely because he is a member of the Bar. More important, perhaps, than the nature of the work furnished, is what the parties to the contract contemplated when the contract was made. Were they contracting for legal services or were they not?

Here, the PC's engagement letter provided that she would be compensated for her time rendering reports to the Court. Mr. Segal submitted his grievance, prompting the PC to submit a detailed and comprehensive report to the Court. Thus, it was appropriate under the terms of the parties' agreement with the PC for her to charge for her time, and to be paid.

CONCLUSIONS

AFCC-NJ believes that Judge Weisenbeck and the Appellate Division got it right when they ruled that Ms. Schofel was entitled to be paid

reasonably for her time and costs for work created by Mr. Segal's frivolous grievances.

AFCC-NJ also believes that Judge Weisenbeck and the Appellate Division correctly directed the process to the trial court in the first instance, rather than a professional licensing board.

AFCC-NJ finally believes that the trial court and Appellate Division properly decided the fees and costs issue for services unique to the PC undertaking, rather than requiring a R. 1:20A-6 pre-filing notice and a client-optional mandatory trip to Fee Arbitration. Ms. Schofel is an attorney, but she was not engaged principally in legal services in this case.

For the foregoing reasons, in the interests of substantial justice, and for good cause shown, AFCC-NJ respectfully asks this Honorable Court to affirm the rulings of Judge Weisenbeck and the Appellate Division.

Respectfully submitted,

AFCC-NJ

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