

Parenting Coordinator in the Province of Ontario

Think of the Parenting Coordinator as a referee for separated or divorced parents in conflict. Particularly of value in high conflict situations, the Parenting Coordinator provides an alternate dispute resolution mechanism to the constant return to lawyers or the Court.

The process of resolution involves two components; a non-decision making phase and in view of an impasse, a decision making phase. Due to these two components, Parenting Coordination is also referred to as “med-arb” as in the combination of “mediation” and “arbitration”. Typically parents will attempt to mediate their dispute with the help of the Parenting Coordinator before implementing the arbitration phase wherein the Parenting Coordinator is empowered to make binding decisions.

In response to issues raised with concern to religious tribunals, the Arbitration Act of 1991, was amended in 2006 with an implementation date of May 1, 2007. Effectively, for a family arbitration to be enforceable now, it must be conducted in accordance with the law of Ontario or of another Canadian jurisdiction. Further family arbitrations, agreements and awards must also be consistent with the Family Law Act, which shall prevail in case of conflict.

Of particular importance to family arbitration in the Province of Ontario is the distinction between primary and secondary arbitrations.

Primary arbitrations occur where there is no prior agreement to arbitrate. Further, primary arbitrations are otherwise “unenforceable unless the arbitration agreement is entered into after the dispute to be arbitrated has arisen” (Family Statute Law Amendment Act 2006, S. 59.4). A party cannot be held to arbitrate if the agreement to arbitrate predates the issue to be arbitrated even if the parties had agreed to do so. Thus setting out arbitration as a mandatory alternate dispute resolution mechanism in a marriage contract or cohabitation agreement in view of separation is no longer enforceable under the new legislation. Further, parties subject to primary arbitrations are required to obtain Independent Legal Advice (ILA); someone other than the arbitrator must screen them separately for power imbalances and domestic violence; and they must make full financial disclosure.

However, arbitration agreements entered as a result of a separation agreement will be treated as secondary arbitrations and are subject to different conditions. Here the matters to be arbitrated are identifiable and can be set

out in the separation agreement, if only in broadly stated terms. Given the secondary arbitration flows from the separation agreement and ILA was obtained then, this is no longer required at the outset of a secondary arbitration. Further, while the parties still must be screened for power imbalances and domestic violence, the arbitrator may carry this out.

The role of the Parenting Coordinator likewise flows from separation agreements where there is a mutual agreement to arbitrate disputes as they arise thereafter. Still, it seems, that in the Province of Ontario, Judges cannot order Parenting Coordination without consent of the parties.

With regard to the screening for power imbalances and domestic violence, the Act is silent on the course of the arbitration in the event there are positive findings. However, the arbitrator is to consider the results of the screening throughout the arbitration process.

In addition to the above, changes in legislation exclude the parties subject to family arbitration from opting out of certain clauses, and in particular, equity and fairness (s.19) and application of law and equity (s. 31) to name but a few. However, to enable Parenting Coordination to exist, the parties must opt out of s.35, Mediation and Conciliation where opting out thus permits both the mediation, the non-decision making component, to pre-exist the arbitration, the decision-making component.

While secondary arbitrations can proceed on the basis of ILA obtained when signing the separation agreement, good practice suggests parties should still obtain ILA regarding the actual Parenting Coordinator’s agreement. There will likely be significant variations between the terms of reference of Parenting Coordinator agreements.

All in all, the changes to the Arbitration Act usher in a new era of Parenting Coordination where parties, lawyers and service providers must clearly specify the terms of the Parent Coordinator Agreement.

To view my Parent Coordinator Agreement, go to:
http://www.yoursocialworker.com/parenting_coordinator.htm

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Gary Direnfeld is a social worker. Courts in Ontario, Canada, consider him an expert on child development, parent-child relations, marital and family therapy, custody and access recommendations, social work and an expert for the purpose of giving a critique on a Section 112 (social work) report. Call him for your next conference and for expert opinion on family matters. Services include counselling, mediation, assessment, assessment critiques and workshops.