Parenting Coordinators in Custody Cases

***NOTE: After the publication of this blog, the statute dealing with parenting coordinators was extensively amended. See S.L. 2019-172, effective October 1, 2019.

Unfortunately, the entry of a custody order does not always stop conflict between parents. Anyone working in family law knows that there are cases where, no matter how much effort and skill goes into creating the parenting plan, the parties will continue to come back to court because of the inability of one parent or both to stop fighting.

Recognizing that on-going litigation is bad for families, the General Assembly in 2005 enacted Article 5 of Chapter 50, GS 50-90 through 50-100, to authorize the appointment of a Parenting Coordinator ("PC") in custody cases determined to be 'high-conflict'. The hope is that the PC can help parents reduce their need to return to court.

What is a Parenting Coordinator?

The statute defines a PC as "an impartial person who meets the qualifications of GS 50-93." GS 50-90(3). The qualifications required by GS 50-93 include an advanced degree in psychology, law, social work, counseling, medicine or "some related subject area" and at least 24 hours of training related to "the developmental stages of children, the dynamics of high-conflict families, the stages and effects of divorce, problem solving techniques, mediation, and legal issues." That impartial qualified person is granted any or all of the authority authorized by GS 50-92 that the court deems necessary to allow the PC to work with the parties outside of court to help them reduce conflict and abide by the terms of the custody order.

When can a PC be appointed?

The court can appoint a PC in a custody proceeding brought pursuant to Chapter 50. GS 50-90(1); GS 50-91. The appointment can be made at any time with the consent of the parties. GS 50-91(a). If the parties do not consent, the court can appoint the PC "upon entry of a custody order other than an ex parte order" when the court makes the required findings of fact. GS 50-91(b). *But see Jackson v. Jackson*, 192 NC App 455 (2008)(court had discretion to appoint PC as part of a civil contempt order enforcing a custody order).

When the parties do not consent, the court may appoint a PC upon finding:

- The case is a high-conflict case;
- Appointment of the PC is in the best interest of the child; and

- The parties have the ability to pay the PC.

GS 50-91. It is error for a court to appoint the PC without making these findings. *Hall v. Hall,* 188 NC App 527 (2008). *Cf. Thomas v. Thomas*, 757 SE2d 375 (NC App 2014)(when court is not appointing a PC, the court has no obligation to require the parties to present evidence of ability to pay a PC).

The appointment may be made *sua sponte. Jackson.*

A high-conflict case is one "where the parties demonstrate an on-going pattern of any of the following:

1. Excessive litigation
2. Anger and distrust
3. Verbal abuse
4. Physical aggression or threats of physical aggression
5. Difficulty communicating about or cooperating in the care of the minor children
6. Conditions that in the discretion of the court warrant the appointment of a PC"

GS 50-90(1).

What is the authority of a PC?

The PC has authority as specified by the court at the time of appointment. GS 50-92. The court is required to have an "appointment conference" and the parties, their attorneys and the proposed PC all must attend the conference. GS 50-94. During the conference, the court is required to inform them all about the "role, authority and responsibilities" of the PC, determine the information each side must provide to the PC, and determine how the PC fee will be paid. GS 50-94.

The court has discretion to determine the specific authority to be granted to a PC in an individual case, but the authority granted "shall be limited to matters that will aid the parties:

(1) Identify disputed issues

(2) Reduce misunderstandings

(3) Clarify priorities

(4) Explore possibilities for compromise

(5) Develop methods of collaboration in parenting

(6) Comply with the court's order of custody, visitation, or guardianship"

GS 50-92.

A PC cannot provide "any professional services or counseling" to the parties or the children and cannot address financial issues. GS 50-92(c).

The court also can "authorize a PC to decide issues regarding the implementation of the parenting plan that are not specifically governed by the court order and which the parties are unable to resolve" and the parties are required to abide by that decision until the court reviews the decision. GS 50-92(b). However, the statute is clear that the PC is authorized to make decisions necessary to *implement* the existing plan but not to change it. The statute does not authorize a delegation of judicial authority; instead, the statute specifically states:

"Notwithstanding the appointment of a PC, the court shall retain exclusive jurisdiction to determine fundamental issues of custody, visitation and support, and the authority to exercise management and control of the case."

GS 50-91(c).

However, in a case decided on Tuesday of this week, the court of appeals stated that the trial court was properly exercising discretion pursuant to GS 50-92(b) when it authorized the PC to "make minor changes to the custody/visitation order." In Nguyen v. Heller-Nguyen, NC App (July 5, 2016), the court of appeals rejected defendant's argument that the trial court impermissibly modified the custody order when it authorized the PC to change the pick-up times for visitation provided in the custody order when the PC determined such changes were necessary to "resolve disputes surrounding transition time, pickup, delivery, and transportation to and from visitation."

Hearings After a PC Decision

If a PC makes a decision regarding the implementation of a custody order, the PC or a party can "request an expedited hearing to review a parenting coordinator's decision." At that hearing, the PC can be required to appear and testify only if the presiding judge subpoenas the PC to appear. GS 50-92(b).

The statute provides no additional guidance about what can happen as a result of that hearing. The court can enforce the underlying order through contempt if necessary. Chapter 5A authorizes the court to initiate contempt proceedings *sua sponte* even if neither party requests contempt. But what if the PC has determined that the underlying order needs to be clarified or changed? Of course, either party can file a motion requesting modification of the custody order. In Nguyen the court of appeals acknowledged the "unanswered questions" raised by the statute as to whether the PC is an interested party who can move to modify the custody order pursuant to GS 50-13.7.

But what if no one has filed a motion to modify? Case law is clear that the court cannot modify custody *sua sponte*. *Jackson v. Jackson*, 192 NC App 455 (2008). The court cannot even "tweek' an existing order unless a motion to modify is filed and the court concludes there has been a substantial change in circumstances. *See* "Tweeking" of Custody Orders is Not Allowed (blog post, On the Civil Side, June 12, 2005).

Perhaps the appellate court will interpret GS 50-92 as an expansion of the court's authority to revisit provisions in the custody order. After all, what purpose does it serve to allow a hearing if the court has no authority to do anything to address the issues raised? On the other hand, it may be that the legislature assumed one of the parties would file a motion of some kind based on the dissatisfaction with the PC's decision.

The court in Nguyen did not need to reach this issue so we must wait until another day for more guidance.