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SUGGESTED SAFEGUARDS AND LIMITATIONS FOR EFFECTIVE AND PERMISSIBLE PARENTING COORDINATION (FACILITATION OR CASE MANAGEMENT) IN SOUTH AFRICA

M de Jong*

1 Introduction

For very good reasons parenting coordination, although not labelled as such, has rapidly developed abroad and in South Africa as an alternative dispute resolution process for resolving parenting issues of chronically conflicted or high-conflict divorced or separated parties. If practiced effectively, parenting coordination has the potential to provide substantial benefits for divorcing or separating parties, their children and the court system. The reasons for the development of parenting coordination and the benefits it offers will be elucidated in the following pages.¹

As parenting coordination has been implemented in haste and in an unsystematic and uncoordinated fashion, it has given rise to considerable confusion and both ethical and practice dilemmas. The current problems with parenting coordination in South Africa are therefore examined in the second part of this article.²

To ensure that its benefits are maximised, it is imperative to give immediate and incisive attention to the foundation, parameters and standardisation of this new and innovative dispute resolution process. In this regard this article will address issues such as the incorrect and inconsistent use of terminology, the lack of training, standardised qualification requirements and practice standards for parenting coordinators, the question of whether parenting coordination is an unlawful delegation of judicial power, the question of whether parenting coordination amounts to arbitration, and the funding of the parenting coordination services for low-income families.

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¹ Paras 2.1 and 2.2.

² Para 3 below.

In conclusion, an appeal is sounded for a national education campaign on parenting coordination and the possibility is raised that new legislation may be required to properly regulate this new intervention.

2 Background

2.1 *The development of parenting coordination*

With the advent of the *Children's Act* 38 of 2005 greater emphasis was placed on the importance of both parents' involvement in their children's day-to-day lives.³ Section 30(2) read with section 31(2)(a) of the Act, for example, imposes a duty on the co-holders of parental responsibilities and rights to consult each other before making major decisions involving their children. In terms of section 33(1) and (2) these co-parents are further expected to agree on and enter into a parenting plan which is to regulate their respective responsibilities and rights in respect of their children, including where and with whom the child is to live, the maintenance of the child, contact between the child and either of the parties or third persons, and the schooling and religious upbringing of the child.⁴ However, even before the coming into operation of the *Children's Act* it was foreseen that section 30(2) would probably lead to many disputes between co-parents when one parent considers a decision in respect of a child to be relatively unimportant, which can be made without consulting the other co-parent, and the other sees it as a major decision on which he or she should have been consulted.⁵ Furthermore, although parenting plans are supposed to specify in detail the terms governing the post-divorce parenting arrangements, these plans are often not sufficiently specific, thus resulting in frequent disputes between co-parents.⁶ It is also a fact that no parenting plan, no matter how detailed it may be, can anticipate every situation that will arise. For example, a parenting plan that appeared to contemplate and address every opportunity for conflict when the children were three

³ See *PD v MD* 2013 1 SA 366 (ECP) para 12 where Goosen J states that "[a] reading of the Act indicates that it seeks to accord to parents equal responsibility for the care and wellbeing of their children, and that it seeks to ensure that, as far as may be reasonably possible, parental responsibilities and rights are exercised jointly, in the best interests of children".

⁴ In terms of s 33(3) of the *Children's Act* 38 of 2005.

⁵ Davel and Skelton *Commentary* 3-30.

⁶ Montiel 2011 *TJLP* 395.

and five years old will not necessarily contemplate and resolve every opportunity for conflict when those children are 13 and 15.⁷ An unintended negative consequence of an otherwise laudable shift in social policy which supported shared parental involvement has therefore been that the courts became the forum for these co-parents to dispute a lot of day-to-day issues in respect of their children.⁸ As the adversarial system of litigation⁹ tends to escalate conflict, diminish the possibility of civility between parents and exacerbate the win-lose atmosphere that encourages bitterness and parental irresponsibility,¹⁰ many of these co-parents became repeated litigants who consume a disproportionate amount of the court's time and resources.¹¹ Besides creating heavy workloads for our courts, high-conflict separated and divorced parents also annoy attorneys with their recurrent and untimely disputes about issues such as weekend pick-up times, holiday schedules and telephone access to children at the other parent's home.¹² But worst of all, the ongoing co-parenting conflict has had a very negative impact on children.¹³ It is said that the most dominant factor in a child's psychological and social adjustment after a divorce is not necessarily the divorce itself but rather the frequency and intensity of the parental conflict prior to, during and after the divorce.¹⁴ Children's exposure to inter-parental conflict can result in problems such as perpetual emotional turmoil, depression, substance abuse, and educational failure.¹⁵ They also suffer when their parents cannot make timely, child-focused decisions on issues that affect them.¹⁶ It has therefore become essential to alleviate the negative effects of high-conflict co-parenting cases on our court system and the children of divorce.

⁷ Montiel 2011 *Alabama Lawyer* 302.

⁸ Sullivan 2013 *Family Court Review* 56.

⁹ Which is still largely followed in the High Court in family matters: Schäfer 1988 *THRHR* 297.

¹⁰ See eg Kelly 2002 *Va J Soc Pol'y & L* 131; De Jong 2005 *TSAR* 33.

¹¹ Fieldstone *et al* 2012 *Family Court Review* 441; Montiel 2011 *TJLP* 396. Also see Fieldstone *et al* 2011 *Family Court Review* 801, who state that in the US family court judges have been frustrated by high-conflict cases, which comprise approximately 10% of their cases but consume 90% of their time.

¹² Hayes 2010 *Family Court Review* 699.

¹³ Belcher-Timme *et al* 2013 *Family Court Review* 651; Fieldstone *et al* 2011 *Family Court Review* 801; Fieldstone *et al* 2012 *Family Court Review* 442; Hayes 2010 *Family Court Review* 698-699; Montiel 2011 *TJLP* 397.

¹⁴ See eg Montiel 2011 *Alabama Lawyer* 301.

¹⁵ Montiel 2011 *TJLP* 397; Montiel 2011 *Alabama Lawyer* 301.

¹⁶ Sullivan 2013 *Family Court Review* 59.

Although mediation has gone some way towards alleviating the negative effects of high-conflict co-parenting issues, it seems to be ineffective for the most chronically conflicted co-parents, who are unwilling to compromise and inclined to triangulate their children into their conflict.¹⁷ Consequently, a new alternative dispute resolution process, namely parenting coordination, was introduced as a solution for these chronically high-conflict cases. The new process was not initially labelled as such, but became known as facilitation in the Western Cape¹⁸ and case management in Gauteng.¹⁹ For simplicity, the use of the term "parenting coordination" in this article is meant to apply to both facilitation and case management.²⁰

Parenting coordination is an intervention that is derived from the practice of the courts.²¹ Although it has its roots in the fields of parent education and coaching, mediation, arbitration, co-parent counselling and case management,²² it should not be seen as any of these more familiar alternative dispute resolution processes, but rather as a legal-psychological hybrid.²³ Parenting coordination can be defined as a child-centred process in which a mental health or legal professional with mediation training and experience assists high-conflict co-parents in creating or implementing parenting plans, complying with court orders and resolving pre- and post-divorce parenting disputes in an immediate, non-adversarial, court-sanctioned, private forum.²⁴ A parenting coordinator (PC) will first attempt to facilitate resolution of the parenting disputes by agreement of the parties, and if this attempt fails, the PC will have the power to make decisions or directives regarding the disputes, which will be binding on

¹⁷ Belcher-Timme *et al* 2013 *Family Court Review* 651; Fieldstone *et al* 2012 *Family Court Review* 441; Fieldstone *et al* 2011 *Family Court Review* 808.

¹⁸ See *Schneider v Aspeling* 2010 3 All SA 332 (WCC); *CM v NG* 2012 4 SA 452 (WCC).

¹⁹ See *Hummel v Hummel* (SGJ) unreported case no 06274/2012 of 10 September 2012.

²⁰ See further para 3 below regarding problems with the difference in nomenclature.

²¹ *Hummel v Hummel* (SGJ) unreported case no 06274/2012 of 10 September 2012 para 7.

²² Belcher-Timme *et al* 2013 *Family Court Review* 651; Montiel 2011 *Alabama Lawyer* 301.

²³ Montiel 2011 *TJLP* 364, 367, 377; Montiel 2011 *Alabama Lawyer* 301; Fidler and Epstein 2008 *Journal of Child Custody* 54; Sullivan 2013 *Family Court Review* 59. See also O'Leary 2009 formerly available at http://www.famac.co.za/resources/documents/doc_download/1-a-critical-reflection-on-mediation-and-facilitation-practice-7-8, who argues that facilitation in the Western Cape does not amount to arbitration.

²⁴ Coates *et al* "Parenting Coordination" 277; Jessani and James 2006 *Am J Fam L* 180; Henry, Fieldstone and Bohac 2009 *Family Court Review* 683; Fieldstone *et al* 2012 *Family Court Review* 442; Hayes 2010 *Family Court Review* 699; Sullivan 2013 *Family Court Review* 57.

the parties until a competent court directs otherwise or the parties jointly agree otherwise.²⁵ It is apparent that a PC's role includes the multiple functions of assessment, parent education, coaching, facilitation, intensive case management, mediation and decision-making.²⁶ PCs must therefore be able to use interdisciplinary interventions rather than focusing solely on techniques from their own area of professional practice.²⁷ They have to assess the situation; educate the parents regarding child development, family dynamics and the harm their ongoing conflict is doing to their children; facilitate communication between the parties and with others involved with their children; monitor and oversee the case *inter alia* by referring the parties to other professionals;²⁸ mediate the disputes; and issue decisions or directives where the parties cannot reach an agreement.²⁹ Nevertheless, it is a core principle of the parenting coordination process that PCs remain as impartial as possible in the eyes of the parties.³⁰

The primary purpose of parenting coordination is to reduce the negative impact of high-conflict parenting disputes on children and to protect and sustain safe, healthy and meaningful parent-child relationships.³¹ It appears that the best way to achieve this objective is to move conflicted co-parents into parallel co-parenting, which is characterised by low engagement between co-parents.³² As conflict is dependent on engagement, lowering co-parents' engagement with each other also lowers the opportunity for conflict.³³ For this reason PCs are more likely to interact with clients by telephone and e-mail, which do not require the face-to-face sessions used in

²⁵ Kronby "Alternate Dispute Resolution" 567; AFCC Task Force on Parenting Coordination 2006 *Family Court Review* 171.

²⁶ Coates *et al* "Parenting Coordination" 286; Hastings 2005 *NHBJ* 57; Jessani and James 2006 *Am J Fam L* 180; Henry, Fieldstone and Bohac 2009 *Family Court Review* 683; Fidler and Epstein 2008 *Journal of Child Custody* 54; Hayes 2010 *Family Court Review* 698, 699; Hayes, Grady and Brantley 2012 *Family Court Review* 429.

²⁷ Hayes 2010 *Family Court Review* 699, 702.

²⁸ Such as therapists, divorce coaches, custody evaluators or attorneys.

²⁹ Coates *et al* "Parenting Coordination" 289; Kirkland and Sullivan 2008 *Family Court Review* 628; Fieldstone *et al* 2011 *Family Court Review* 809; Hayes 2010 *Family Court Review* 699, 702.

³⁰ Hayes 2010 *Family Court Review* 704.

³¹ Hastings 2005 *NHBJ* 57; Kirkland and Sullivan 2008 *Family Court Review* 628; Henry, Fieldstone and Bohac 2009 *Family Court Review* 683, 684; Hayes, Grady and Brantley 2012 *Family Court Review* 429; Fidler and Epstein 2008 *Journal of Child Psychology* 54.

³² Sullivan 2013 *Family Court Review* 59.

³³ Sullivan 2013 *Family Court Review* 59.

dispute resolution interventions such as mediation.³⁴ In this way, PCs work on building and initially being the functional link between the co-parents.³⁵ The realistic goals of the parenting coordination process are therefore not the resolution of the underlying parental psychopathology, but the management of high conflict.³⁶

Since its inception a few years ago, parenting coordination has steadily grown in popularity as an alternative dispute resolution tool in South Africa. In some divisions of the High Court a PC is appointed as a matter of course during the finalisation of all divorce matters where children are involved, while in other divisions a PC is appointed only in matters that are chronically litigious and difficult to manage.³⁷

Parenting coordination is currently also practised in Israel, Spain, more than thirty states in the USA, and several provinces in Canada.³⁸

2.2 *The benefits of parenting coordination*

Parenting coordination has the potential to provide substantial benefits for divorcing or separating parties, their children and the court system.

For the high-conflict parents, who are often faced with the impossibility of obtaining a timeous court decision on day-to-day parenting issues, parenting coordination provides a timely means of dispute resolution.³⁹ In litigation the parties may not have an opportunity to appear before a judge before it is too late to resolve a matter in dispute, such as a one-time change to the visitation schedule for an imminent holiday. By the time the court reaches a decision it may be meaningless.⁴⁰ A PC, however, can give these parents prompter attention and help them to make decisions expeditiously

³⁴ Hayes 2010 *Family Court Review* 705; Hayes, Grady and Brantley 2012 *Family Court Review* 431; 438.

³⁵ Sullivan 2013 *Family Court Review* 59.

³⁶ Sullivan 2013 *Family Court Review* 59.

³⁷ De Jong 2013 *De Rebus* 39.

³⁸ Fieldstone *et al* 2012 *Family Court Review* 442; Sullivan 2013 *Family Court Review* 57; Belcher-Timme *et al* 2013 *Family Court Review* 651-652; Hayes, Grady and Brantley 2012 *Family Court Review* 429; Fidler and Epstein 2008 *Journal of Child Custody* 61; Cyr, Stefano and Desjardins 2013 *Family Court Review* 529.

³⁹ Montiel 2011 *TJLP* 372.

⁴⁰ Montiel 2011 *TJLP* 430.

or, where they are unable to do so, can quickly make a directive on the issue.⁴¹ A PC is also much more accessible than a judge and less expensive than litigation.⁴² In many instances the parenting coordination process is therefore superior to litigation. Furthermore, although the resolution of the underlying parental psychopathology *per se* is not a goal of parenting coordination, in many instances the process trains the co-parents in the long run to be more functional when addressing child-related issues.⁴³ It appears that the different phases of the parenting coordination process equip these parents with integrated tools and skills for resolving their parenting (and even other) disputes more constructively.⁴⁴ The findings of research which explored the degree to which the number of court applications changed one year after parenting coordination was implemented with high-conflict co-parenting parties indicate that these parties do in fact file significantly fewer court applications when utilising the services of a PC.⁴⁵ It can therefore be said that the parenting coordination process educates the parents in ways to avoid or resolve future conflicts on their own.⁴⁶ Lastly, parents who participated in parenting coordination reported satisfaction with the process and less conflict with the other parent.⁴⁷

The fact that parenting coordination reduces high-conflict co-parents' excessive use of litigation simultaneously has a positive effect on the court system. As parenting coordination reduces the amount of court resources and court time spent on high-conflict parenting cases, it significantly decreases the costs that these parents impose on the court system.⁴⁸ It also reduces the backlog in the courts' case loads and increases access to court time for other cases in need.⁴⁹ Very importantly, parenting

⁴¹ Coates *et al* "Parenting Coordination" 284; Montiel 2011 *TJLP* 400-401.

⁴² Montiel 2011 *TJLP* 373, 400-401.

⁴³ Sullivan 2013 *Family Court Review* 61.

⁴⁴ Fieldstone *et al* 2011 *Family Court Review* 813.

⁴⁵ Henry, Fieldstone and Bohac 2009 *Family Court Review* 689 indicate that over 60% of couples filed fewer total motions in the first year after parenting coordination was ordered by the court, including 75% fewer child-related motions and 40% non-child-related motions.

⁴⁶ Montiel 2011 *TJLP* 373, 401.

⁴⁷ Walker 2008 *J Am Acad Matrimonial Law* 642; Coates *et al* "Parenting Coordination" 279; Kirkland and Sullivan 2008 *Family Court Review* 635.

⁴⁸ Belcher-Timme *et al* 2013 *Family Court Review* 653; Fieldstone *et al* 2011 *Family Court Review* 802; Coates *et al* "Parenting Coordination" 279; Henry, Fieldstone and Bohac 2009 *Family Court Review* 689-690.

⁴⁹ Fieldstone *et al* 2011 *Family Court Review* 802.

coordination further prevents the court system from becoming a type of social service agency, which has to deal with the day-to-day issues of co-parents.⁵⁰ In addition, parenting coordination may relieve attorneys of some of their "most nightmarish cases".⁵¹

But most importantly, as parenting coordination lessens the conflict between their parents, it reduces the harmful effects of parental discord on children.⁵² It allows for a more harmonious, or at least a less hostile environment for children.⁵³ Mental health professionals have also reported better post-divorce adjustment for children where a PC is involved with their parents.⁵⁴ It is apparent that it is in the best interests of children for their divorced parents to amicably and quickly resolve parenting conflicts as they arise.⁵⁵

3 Problems with parenting coordination in South Africa

The overhasty implementation of parenting coordination without considering certain concerns, pitfalls and difficulties could damage the "brand", lead to confusion about the process and diminish the opportunity for high-conflict co-parents, their children and the judicial system to reap the many benefits of this evolving intervention.⁵⁶ It is therefore necessary to identify the problems currently experienced with parenting coordination.

In the first place the difference in nomenclature is a real problem. It makes no sense that essentially the same intervention is called facilitation in the Western Cape and case management in Gauteng. This has indeed led to discordant expectations of the process by parties, attorneys and judges, and disparate parenting coordination practices that are eroding the integrity of the intervention. Similar problems were

⁵⁰ Montiel 2011 *TJLP* 398; Montiel 2011 *Alabama Lawyer* 302.

⁵¹ Coates *et al* "Parenting Coordination" 284.

⁵² Fieldstone *et al* 2011 *Family Court Review* 801. See also para 2.1 above.

⁵³ Montiel 2011 *TJLP* 400.

⁵⁴ Fieldstone *et al* 2011 *Family Court Review* 803; Coates *et al* "Parenting Coordination" 279.

⁵⁵ Montiel 2011 *Alabama Lawyer* 302.

⁵⁶ Montiel 2011 *TJLP* 371.

experienced in the United States,⁵⁷ where initially the terminology used for parenting coordination in the various jurisdictions differed from one jurisdiction to the next.⁵⁸ There, the inconsistent terminology has been found to pose the risk of board complaints and civil lawsuits against PCs, presumably because the inconsistency caused parties to misunderstand the role.⁵⁹

Secondly, the training and qualifications of PCs are problematic and even non-existent in most provinces. It appears from the website of the Family Mediators' Association of the Cape (FAMAC) that facilitators are trained by this association.⁶⁰ However, no details of the training programme could be found on the website to ascertain which fields or components are covered by such facilitation training. Furthermore, no indication of any parenting coordination, facilitation or case management training could be found on the websites of any of the other South African mediation organisations, such as the South African Association of Mediators (SAAM) and the KwaZulu-Natal Association of Family Mediators (KAFam).⁶¹ It seems that mediators affiliated to these associations practise as PCs, facilitators or case managers from time to time without any specific training in this new and difficult hybrid role, which requires both mental health and legal skills.⁶² A related and additional problem is the fact that there are no practice standards specifically for PCs in South Africa.

Thirdly, it is argued by sceptics that parenting coordination is impermissible and constitutes an improper delegation of judicial authority in circumstances where the PC is appointed in a court order and not in terms of an Act or court rule or by agreement between the parties. This opinion was expressed by Sutherland J in the unreported South Gauteng High Court case, *Hummel v Hummel*,⁶³ where a father's application for

⁵⁷ AFCC Task Force on Parenting Coordination 2003 *Family Court Review* 534 n 3; Montiel 2011 *TJLP* 369 n 8.

⁵⁸ Ie "special master" in California, "med-arbiter" in Colorado, "wise person" in New Mexico, "custody commissioner" in Hawaii, "family court advisor" in Maricopa County, Arizona, formerly "resolution coordinator" in Oklahoma, and formerly "parenting referee" in Oregon.

⁵⁹ Kirkland and Kirkland 2008 *Journal of Child Custody* 30-31.

⁶⁰ FAMAC date unknown <http://www.famac.co.za/facilitation>.

⁶¹ See SAAM date unknown <http://www.saam.org.za/training.php?catid=4>; KAFam.org date unknown <http://thepixelstudio.wix.com/kafam#!blank>.

⁶² Fieldstone *et al* 2011 *Family Court Review* 815. Also see para 2.1 above.

⁶³ *Hummel v Hummel* (SGJ) unreported case no 06274/2012 of 10 September 2012.

the appointment of a case manager to deal with and make decisions about certain post-divorce parenting conflicts between him and his former wife was denied. The judge observed that in his view no court has 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 as contemplated in sections 30 and 31 of the *Children's Act*.⁶⁴ He also felt that the appointment of a decision-maker to break deadlocks is a delegation of the court's power which constitutes an impermissible act⁶⁵ and amounts to an arbitration of sorts.⁶⁶ These observations are probably based on section 165(1) of the *Constitution of the Republic of South Africa*, 1996, which provides that the judicial authority of the Republic is vested in the courts, and section 2 of the *Arbitration Act* 42 of 1965, which currently prohibits the use of arbitration in respect of matrimonial and related matters.

Lastly, the cost of parenting coordination is indicated as an area of contention.⁶⁷ PCs charge professional fees for the (rather intense) services they render and the question is what is to be done where high-conflict co-parents, who clearly need parenting coordination, cannot afford this intervention.

4 Suggested safeguards for and limitations on parenting coordination

To properly address the problems identified above, various safeguards for and limitations on parenting coordination practice need to be considered.

4.1 Terminology

In the United States of America a special task force of the Association of Family and Conciliation Courts (AFCC), which was commissioned to study the new legal-psychological hybrid role, adopted the term "parenting coordination" in an effort to create a unifying term for this role.⁶⁸ This term has now become fairly standardised in

⁶⁴ Para 6.

⁶⁵ Para 13.

⁶⁶ Para 10.2.2.

⁶⁷ See Fieldstone *et al* 2012 *Family Court Review* 446.

⁶⁸ AFCC Task Force on Parenting Coordination 2003 *Family Court Review* 533; Sullivan 2013 *Family Court Review* 57.

the United States⁶⁹ as well as in Canada.⁷⁰ It is proposed that the internationally accepted term "parenting coordination" should also be used in South Africa. As parenting coordination is still an evolving field, the consistent use of the term "parenting coordination" is advisable for the sake of the continuity and comprehensiveness of professional role development and consistency of practice across South Africa.⁷¹ The current labels "facilitation" and "case management" are too narrow in any case, as each of them describes only one of the many functions of a PC.⁷² In a legal opinion obtained from senior counsel by FAMAC with regard to facilitation in the Western Cape the use of a term other than "facilitation" was recommended.⁷³ Therefore, to uphold the integrity of the intervention, judges, attorneys, psychologists and parenting coordination practitioners are all urged to start using the unifying term "parenting coordination".

4.2 Qualifications, training and experience of PCs, and practice standards

To be able to bestow the full benefits of parenting coordination on divorcing or separating parties, their children and the court system,⁷⁴ PCs must have adequate qualifications, proper training and sufficient experience.⁷⁵

As far as their qualifications are concerned, it appears that internationally PCs are required to be licenced or accredited mental health professionals, physicians, legal practitioners or family law mediators.⁷⁶ Because of the hybrid legal-psychological nature of parenting coordination and the fact that it is such an intensive and comprehensive intervention,⁷⁷ the typical psychologist or family law attorney – or even the typical family law mediator – is probably not qualified to serve as a PC. It is clear

⁶⁹ Belcher-Timme *et al* 2013 *Family Court Review* 659.

⁷⁰ See eg Div 3 of the BC *Family Law Act*, 2011.

⁷¹ De Jong 2013 *De Rebus* 39.

⁷² De Jong 2013 *De Rebus* 39.

⁷³ O'Leary 2009 formerly available at http://www.famac.co.za/resources/documents/doc_download/1-a-critical-reflection-on-mediation-and-facilitation-practice_8-9.

⁷⁴ See para 2.2 above.

⁷⁵ Montiel 2011 *TJLP* 373, 403.

⁷⁶ See eg s 14 of the BC *Family Law Act*, 2011 read with reg 6(1)(a) of the BC Regulations 347/2012 of 26 November 2012 and s 61.125(4)(a) of the *Florida Statutes*. Also see Montiel 2011 *TJLP* 403.

⁷⁷ Sullivan 2013 *Family Court Review* 58, 60; Montiel 2011 *Alabama Lawyer* 303; Hayes 2010 *Family Court Review* 699.

that PCs need additional training to practise at the interface of the fields of law and psychology.⁷⁸

As far as such additional training is concerned, PCs who are not yet accredited as family mediators should first complete a basic 40-hour mediation training programme and obtain accreditation from one of the recognised mediation organisations.⁷⁹ In addition, a PC should have specific training in parenting coordination, which should focus *inter alia* on the role and responsibilities of a PC; the cognitive and emotional shifts required to integrate new or different functions; family law; family dynamics in separation and divorce; developmental psychology; family systems theory and application; professional practice guidelines for PCs; issues that are appropriate and inappropriate for parenting coordination; the parenting coordination process; appropriate practice boundaries; the drafting, monitoring and modifying of 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.⁸⁰ It is clear that such comprehensive parenting coordination training is not something that can merely be provided at conference workshops and one- or two-day training seminars. In the province of British Columbia in Canada, for example, a PC is required by legislation to complete a minimum of 40 hours of specific parenting coordination training.⁸¹ Mediation organisations in South Africa are therefore advised to follow suit and immediately start overseeing the development of such comprehensive parenting coordination training programmes in addition to basic mediation training programmes. Furthermore, training models that equip aspiring PCs with the ability to observe and be observed by experienced PCs in a university or

⁷⁸ Montiel 2011 *Alabama Lawyer* 303.

⁷⁹ See eg reg 6(1)(b)(ii)(A) of the BC Regulations 347/2012 of 26 November 2012, which requires all non-legal PCs to meet the training requirements of, and be eligible for membership in a family mediation organisation; and s 61.125(4)(a) of the *Florida Statutes*, which requires PCs to have completed a family mediation training programme certified by the Florida Supreme Court. Also see AFCC Task Force on Parenting Coordination 2006 *Family Court Review* 166.

⁸⁰ Fidler and Epstein 2008 *Journal of Child Custody* 61-62; AFCC Task Force on Parenting Coordination 2006 *Family Court Review* 166, 173-176; Sullivan 2013 *Family Court Review* 61.

⁸¹ See s 14 of the BC *Family Law Act*, 2011 read with reg 6(1)(b)(ii)(C) of the BC Regulations 347/2012 of 26 November 2012.

institute setting are seen as essential in the development of parenting coordination practice.⁸²

As far as experience is concerned, a PC should have extensive practical experience with high-conflict families. Some foreign jurisdictions require at least 18 years' practice experience,⁸³ while locally it seems that at least three years' practical experience would be sufficient.⁸⁴ It is advisable, however, that those three years should be three years post accreditation as a family mediator.⁸⁵ (In this regard, just as an interesting aside, it appears from a study of PCs in North Carolina who have fulfilled statutory requirements for practice that their average age is 57.)⁸⁶

Minimum practice standards that need to be set for PCs are, firstly, that a PC must enter into a written agreement to provide parenting coordination services with parties before the commencement of the process;⁸⁷ secondly, that he or she must provide confirmation to the parties in the agreement⁸⁸ that he or she has the necessary qualifications, training and experience to serve as a PC;⁸⁹ and thirdly that he or she must set out the basis and parameters of his or her authority in the agreement.⁹⁰

4.3 The question of whether parenting coordination is an unlawful delegation of judicial power

To counter the argument that parenting coordination is an unlawful delegation of judicial power in circumstances where a PC's role is dependent on a court order and not on an Act, a court rule or an agreement between the parties, the necessary authority for parenting coordination first needs to be found. In addition, appropriate

⁸² Sullivan 2013 *Family Court Review* 61.

⁸³ Kirkland and Sullivan 2008 *Family Court Review* 626.

⁸⁴ O'Leary 2009 formerly available at http://www.famac.co.za/resources/documents/doc_download/1-a-critical-reflection-on-mediation-and-facilitation-practice 4.

⁸⁵ See s 61.125(4)(a) of the *Florida Statutes*, which requires PCs to have served three years of post-licensure or post-certification practice.

⁸⁶ Hayes 2010 *Family Court Review* 701.

⁸⁷ See reg 6(2)(a) of the BC Regulations 347/2012 of 26 November 2012 to the *Family Law Act*, 2011.

⁸⁸ Such agreement is often termed a Statement of Understanding: De Jong 2013 *De Rebus* 40.

⁸⁹ See reg 6(2)(b) of the BC Regulations 347/2012 of 26 November 2012 to the *Family Law Act*, 2011.

⁹⁰ See further paras 4.3.1 and 4.3.2 below.

limitations need to be imposed on the PC's role to incrementally diminish the argument that the appointment is an improper delegation of judicial authority.⁹¹

4.3.1 Finding authority for courts to refer parties for parenting coordination

As parenting coordination differs from mediation in many respects,⁹² it follows that existing laws permitting a court to send a matter to mediation, such as section 33(2) read with section 33(5) of the *Children's Act*⁹³ or the recently published court-annexed mediation rules,⁹⁴ would not suffice as the necessary authority for a court to appoint a PC for high-conflict co-parents.

Nonetheless, it is argued that where a court has some inherent authority to ensure the best interests of children, parenting coordination could be sustained.⁹⁵ Our High Court, which is the upper guardian of all children,⁹⁶ may therefore make any decision that is in the best interest of children, including appointing a PC for their high-conflict parents so as to minimise the negative impact of the conflict on the children.⁹⁷ As far as the divorce court or the children's court is concerned, section 29(1) of the *Children's Act* confers jurisdiction upon these courts in respect of matters such as parental responsibilities and rights agreements, court-assigned contact, care and guardianship and the suspension, termination, extension or circumscription of parental responsibilities and rights. Section 45(1) has further substantially broadened the jurisdiction of the children's court and section 45(3) has placed a divorce court more or less on a par with the High Court in respect of children's issues. In all these matters

⁹¹ Montiel 2011 *TJLP* 364, 367.

⁹² Mediation does not involve any decision-making by the mediator, whereas parenting coordination may involve limited decision-making by the PC; mediation is generally confidential, whereas parenting coordination is not; parenting coordination involves much more intensive case management than mediation: Fidler and Epstein 2008 *Journal of Child Custody* 58; Montiel 2011 *TJLP* 382; Hayes 2010 *Family Court Review* 698.

⁹³ Making provision for co-parents who are experiencing difficulties in exercising their parental responsibilities and rights to first seek to agree on a parenting plan by attending mediation through a social worker or other suitably qualified person.

⁹⁴ Ch 2 of the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa: GN R183 in *GG* 37448 of 18 March 2014.

⁹⁵ Montiel 2011 *TJLP* 365, 367. Also see the argument on behalf of the applicant in *Hummel v Hummel* (SGJ) unreported case no 06274/2012 of 10 September 2012 para 14.

⁹⁶ See *Calitz v Calitz* 1939 AD 56; Heaton *South African Family Law* 302; s 45(4) of the *Children's Act* 38 of 2005.

⁹⁷ See paras 2.1 and 2.2 above.

these courts are obliged in terms of section 9 of the *Children's Act* and section 28(2) of the *Constitution* to apply the standard that the child's best interest is of paramount importance. In addition, there are several provisions in the *Children's Act* that could possibly be relied upon in support of the appointment of a PC in circumstances where the children's best interests require such an appointment. For example, in terms of section 2(d), it is one of the objects of the Act to make provision for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children; in terms of section 6(2)(a), all proceedings, actions or decisions in a matter concerning a child must respect, protect, promote and fulfil the child's rights set out in the Bill of Rights and the best interests of the child standard; in terms of section 6(4)(a), in any matter concerning a child, an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided; in terms of section 7(1)(n) one of the factors that must be taken into consideration whenever a provision of the Act requires the best interests of the child standard to be applied is which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.⁹⁸ Furthermore, Retired Judge Goldstein is of the opinion that sections 23 and 28, dealing with court-assigned contact and care to interested persons and the extension and suspension of parental responsibilities and rights respectively, are wide enough to encompass the court's power to appoint a third person in *loco parentis* with decision-making powers.⁹⁹ His argument is therefore that parenting coordination is not so much a delegation of judicial authority but rather an extension of the parents' parental responsibilities and rights. In terms of these sections the PC will have to approach the court and it remains to be seen if he or she would indeed be regarded by the court as a person having a sufficient interest in the care, well-being or development of a child (before his or her appointment as a PC) as is required by these sections. Nonetheless, the message is clear – innovative measures to ensure children's best interests are encouraged. The appointment of a parenting coordinator by the

⁹⁸ The last-mentioned section was also relied upon by the applicant in *Hummel v Hummel* (SGJ) unreported case no 06274/2012 of 10 September 2012 para 12 in support of the appointment of a PC.

⁹⁹ Goldstein "Facilitation" 67-68.

court where parents would otherwise be engaged in frequent conflict and re-litigation would therefore surely be justified. Further support for the appointment of a PC could possibly be found in section 38 of the *Constitution*, which addresses the need for a court to craft a remedy for every right the *Constitution* confers.¹⁰⁰ There is therefore ample authority for the appointment of a PC by our courts in lieu of an agreement between the parties to appoint a PC.

4.3.2 Appropriate limitations on a parenting coordinator's role

Even with a basis for authority for parenting coordination – either a court order or an agreement between the parties to appoint a PC – the role of the PC should further be appropriately limited so as not to usurp the court's judicial authority.¹⁰¹

A first limitation that should be imposed relates to the conditions under which a PC should be appointed. Where parties have consented to the appointment of a PC, their later grounds for objection to the appointment would probably not be well-founded.¹⁰² It has also been found that the best results occur when both parties initially agreed to enter the parenting coordination process.¹⁰³ In most Canadian provinces, for example, where it has generally also been accepted by courts that judges cannot make an order delegating their powers to a third party, PCs can be appointed by the court only if the parties consent thereto.¹⁰⁴ There are, nonetheless, a minority of judges, especially in the province of Alberta, who are prepared to appoint a PC without the parties' consent.¹⁰⁵ In addition, in British Columbia the new *Family Law Act*, 2011 expressly provides that a PC may be appointed either by agreement between the parties or by an order of court.¹⁰⁶ This also seems to be the position in the United States of America, where some states strictly require consent from the parents,¹⁰⁷ while other states allow judges to refer parties to parenting coordination either upon the agreement of

¹⁰⁰ See para 14 of *Hummel v Hummel* (SGJ) unreported case no 06274/2012 of 10 September 2012.

¹⁰¹ Montiel 2011 *TJLP* 373; Montiel 2011 *Alabama Lawyer* 303.

¹⁰² Montiel 2011 *TJLP* 411.

¹⁰³ Fieldstone *et al* 2012 *Family Court Review* 445-446, 448, 453.

¹⁰⁴ See eg Fidler and Epstein 2008 *Journal of Child Custody* 56.

¹⁰⁵ Fidler and Epstein 2008 *Journal of Child Custody* 57.

¹⁰⁶ S 15 of the *Family Law Act*, 2011.

¹⁰⁷ Eg California: Montiel 2011 *TJLP* 416. Also see Belcher-Timme *et al* 2013 *Family Court Review* 663.

the parties or upon the court's own motion.¹⁰⁸ Therefore, although it is probably better for judges to obtain the agreement of the parents involved, rather than simply ordering them to go to parenting coordination,¹⁰⁹ there are undoubtedly circumstances where a judge should have the discretion to appoint a PC without the parents' consent.¹¹⁰ Such circumstances would include a finding that the parents are "high conflict" parties and/or that the appointment of a PC would be in the best interests of the children involved.¹¹¹ Parents are said to be "high-conflict" parties where they have 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",¹¹² or "... a pattern of ongoing litigation, anger and distrust, verbal abuse, physical aggression or threats of physical aggression, difficulty in communicating about and cooperating in the care of their children ...".¹¹³ The appointment of a PC would probably be in the best interests of children involved when a court has determined that those children would otherwise be exposed to chronic post-divorce parental conflict.¹¹⁴ Relevant conditions precedent to the appointment of a PC should therefore be either consent to the appointment or court findings that the parties are high-conflict or that the appointment is in the best interest of the children.¹¹⁵ Interestingly, in this regard, parties in Texas are not allowed to agree on the appointment of a PC in the absence of a trial court finding that the parents are high-conflict parties or that the appointment of a PC would be in the best interests of the children involved. As parenting coordination should not be overused,¹¹⁶ this is perhaps the way to go.

The next limitation concerns the timing of the appointment of a PC. Here the question is whether a PC may be appointed before or only after a court has made a divorce

¹⁰⁸ See eg s 61.125(2) of the *Florida Statutes*.

¹⁰⁹ Belcher-Timme *et al* 2013 *Family Court Review* 663.

¹¹⁰ Fieldstone *et al* 2012 *Family Court Review* 453.

¹¹¹ Montiel 2011 *TJLP* 411; Montiel 2011 *Alabama Lawyer* 304.

¹¹² AFCC Task Force on Parenting Coordination 2006 *Family Court Review* 165.

¹¹³ S 43-120.2(2) of the *Oklahoma Statutes*.

¹¹⁴ Montiel 2011 *Alabama Lawyer* 304.

¹¹⁵ Also see Montiel 2011 *TJLP* 411-413.

¹¹⁶ Coates *et al* "Parenting Coordination" 285.

order and a parenting plan has been finalised. In this regard it appears from the AFCC Task Force's Guidelines on Parenting Coordination that parenting coordination is proper only when there is already a parenting plan or court-ordered custody and visitation arrangement in place.¹¹⁷ The guidelines therefore limit the PC's role to the implementation of pre-existing court orders and parenting plans. These guidelines have been followed in some Canadian provinces¹¹⁸ and quite a number of states in the USA.¹¹⁹ However, there are some American states that do allow the appointment of a PC prior to the court's making an order.¹²⁰ In these states a PC is therefore also allowed to assist parties in creating a parenting plan, which is similar to the position in South Africa.¹²¹ Nonetheless, consideration should possibly be given to restricting the appointment of a PC to only after the court has entered an order or after a parenting plan has been finalised. If that were the situation, a PC would only be allowed firstly to assist the parties in reaching an agreement and secondly, if they could not, to make a direction that is in line with an existing court order or parenting plan.¹²² If, however, a PC is allowed to take independent action and make entirely new decisions on parental responsibilities and rights, rather than just making decisions on how to implement a court order or an agreement between the parties on these matters, that might indeed be perceived as an improper delegation of judicial authority and thus cause the viability of parenting coordination to be questioned. PCs should therefore act as enforcers and implementers, encouraging parents' compliance with existing legal authority, rather than as creators of that authority,¹²³ and their directives should be ancillary to a court order.¹²⁴

¹¹⁷ Montiel 2011 *TJLP* 405-406; AFCC Task Force on Parenting Coordination 2006 *Family Court Review* 165.

¹¹⁸ See eg s 15(3) of the BC *Family Law Act*, 2011, which provides that a parenting coordination agreement or order may be made at the same time as, or after, an agreement or order respecting parenting arrangements, contact with a child or other prescribed matters is made.

¹¹⁹ Eg Oklahoma, Idaho, Louisiana and Vermont: Montiel 2011 *TJLP* 406-408. See also Sullivan 2013 *Family Court Review* 57.

¹²⁰ Eg Florida, Oregon, Arizona, North Carolina, California: Montiel 2011 *TJLP* 408-409.

¹²¹ See the definition of parenting coordination in para 2.1 above.

¹²² Montiel 2011 *TJLP* 406.

¹²³ Belcher-Timme *et al* 2013 *Family Court Review* 653

¹²⁴ Montiel 2011 *TJLP* 433, 437.

Thirdly, some limitations need to be imposed on the decision-making powers of PCs. To maximise the benefits of parenting coordination it is imperative that PCs should have some degree of decision-making authority. However, they cannot be granted so much decision-making authority that the grant constitutes an improper delegation of judicial authority.¹²⁵ For this reason PCs should be allowed to make decisions or issue directives within a defined and limited scope only.¹²⁶ In most jurisdictions in the USA and Canada PCs are allowed to make decisions on minor issues only, such as temporary changes to the parenting time schedule that do not substantially alter the basic time share allocation, the management of clothing and belongings between the two homes, the transportation and exchange of a child between the two homes, parental communication and the rules of engagement, the temporary care of a child by a person other than his or her parents, telephone contact between a child and the non-resident parent, a child's daily routine including day-to-day educational matters, a child's participation in extramural activities and special events, the provision of routine medical, dental or other health care to a child, the discipline of a child, and the approval of international travel plans.¹²⁷ In these jurisdictions PCs are ordinarily not allowed to make any substantial changes to a parent's care or contact with a child or to decide on relocation issues and the quantum of child maintenance.¹²⁸ Restricting PCs' decision-making authority to minor issues will not render parenting coordination superfluous, as it has been found that high-conflict co-parents are typically more prone to arguing about these day-to-day issues than about major child-related decisions.¹²⁹ Interestingly, in some jurisdictions PCs are allowed to make recommendations to the court on issues such as which parent may authorise counselling or treatment for a child, which parent may select a school, the supervision of contact, submission to a contact and care evaluation, the appointment of a legal representative for a child, and financial matters, including child support, liability for particular expenditures for a

¹²⁵ Montiel 2011 *TJLP* 418.

¹²⁶ Sullivan 2013 *Family Court Review* 57; Fidler and Epstein 2008 *Journal of Child Custody* 54.

¹²⁷ Montiel 2011 *TJLP* 434; Fidler and Epstein 2008 *Journal of Child Custody* 73-74; reg 6(4)(a) of the BC Regulations 347/2012 of 26 November 2012 to the *Family Law Act*, 2011.

¹²⁸ Fidler and Epstein 2008 *Journal of Child Custody* 74; reg 6(4)(b) of the BC Regulations 347/2012 of 26 November 2012 to the *Family Law Act*, 2011.

¹²⁹ Fidler and Epstein 2008 *Journal of Child Custody* 54.

child, and health insurance.¹³⁰ It is unclear whether PCs in South Africa are allowed to make recommendations to the court on these more serious/major issues. However, it seems to be a good idea to allow them to do so, provided of course that they have the required qualifications, experience and training.

A last limitation is that any decision-making by a PC should always be subject to comprehensive and meaningful judicial review.¹³¹ In my opinion the form of judicial scrutiny on review should therefore be a proper and full hearing *de novo*.¹³² It is further proposed that a PC's directive or decision should be subject to such broad judicial review even where the parties have consented to the PC's authority to make a decision that is not reviewable by the court.¹³³ Such a strict approach is necessary to ensure that it remains the court's role to ultimately safeguard the best interests of the children involved. However, this limitation does not imply that a PC's reviewable decision should not be immediately effective and binding in the meantime.¹³⁴ If PCs' directives have no binding effect and are subject to a lengthy review process, one of the primary benefits of parenting coordination, namely the expeditious resolution of conflict to the benefit of co-parents and their children, will be sacrificed.¹³⁵

It is very important that all these suggested limitations should be set out in the court order, the parenting coordination agreement in terms of which a PC is appointed or the agreement that the PC is required to enter into with the parties before the commencement of the parenting coordination process.¹³⁶ It is crucial that all parties know what the PC's powers and limitations are before they become involved in the process, as such an understanding may prevent parties from expecting more from a

¹³⁰ Montiel 2011 *TJLP* 434.

¹³¹ Montiel 2011 *TJLP* 418.

¹³² However, to reduce ill-founded applications for a hearing *de novo*, there should be some cost implications for an applicant who is not successful in bettering his or her position on review.

¹³³ See Montiel 2011 *TJLP* 422.

¹³⁴ See eg ss 18(5)(a) and (b) of the BC *Family Law Act*, 2011. In terms hereof a PC's determination (directive) is binding on the parties, effective on the date the determination is made or on a later date specified by the PC. If the determination is filed in the court, it is enforceable as if it were an order of court. However, the determination is subject to a rather broad standard of review, as set out in s 19(1) of the Act.

¹³⁵ See para 2.2 above.

¹³⁶ See para 4.2 above.

PC than he or she is ethically able to provide.¹³⁷ They need to know that while a PC may make directives to resolve parenting conflicts, the ultimate power lies with the court. Therefore, if the PC stays within the parameters suggested above, the argument that parenting coordination is an improper delegation of judicial authority would in all probability not hold water.¹³⁸

4.4 The question of whether parenting coordination amounts to arbitration

Although parenting coordination contains certain elements of arbitration in that a PC has (limited) decision-making authority, it is argued that when a PC issues a decision or directive, he or she does so based on his or her professional opinion and not as an arbitrator.¹³⁹ The reasons are that the PC is not required to afford the parties a hearing before issuing a directive and that a directive is not final and binding in the sense that an arbitration award is. In terms of section 28 of the *Arbitration Act*, as a rule an arbitration award is final and not subject to appeal on a point of law. A PC's decision or directive, on the other hand, should always be subject to a very broad judicial review, as proposed above.¹⁴⁰

In addition, in the USA and Canada, where both parenting coordination and family law arbitration have become very prevalent in recent years, a definite distinction is made between these two alternative dispute resolution interventions.¹⁴¹ In fact, it has been stated categorically that parenting coordination is not arbitration.¹⁴²

Parenting coordination should therefore not be seen as a contravention of section 2 of the *Arbitration Act*. In any event it is argued that the current prohibition on

¹³⁷ Fieldstone *et al* 2012 *Family Court Review* 448.

¹³⁸ Montiel 2011 *TJLP* 437; Montiel 2011 *Alabama Lawyer* 303.

¹³⁹ O'Leary 2009 formally available at http://www.famac.co.za/resources/documents/doc_download/1-a-critical-reflection-on-mediation-and-facilitation-practice 7.

¹⁴⁰ See para 4.3.2.

¹⁴¹ Fieldstone *et al* 2012 *Family Court Review* 442; Sullivan 2013 *Family Court Review* 57; Belcher-Timme *et al* 2013 *Family Court Review* 651-652; Hayes, Grady and Brantley 2012 *Family Court Review* 429; Walker 2008 *J Am Acad Matrimonial Law* 642-643, 649; Fidler and Epstein 2008 *Journal of Child Custody* 56; Cyr, Stefano and Desjardins 2013 *Family Court Review* 528, 529; Legal Services Society, BC 2012 <http://goo.gl/Q5ERpj> 2, 3.

¹⁴² Montiel 2011 *TJLP* 364, 367, 377. See also para 2.1 above.

arbitration in matrimonial and related matters in section 2 is clearly out of sync with the demands of modern times, and that arbitration, either on its own or in conjunction with mediation, is certainly a viable option for the resolution of family law disputes in South Africa today.¹⁴³

4.5 *Parenting coordinators' fees and funding for parenting coordination*

As regards PCs' fees, it is suggested that the court appointing a PC should determine the allocation of fees and costs for parenting coordination between the parties.¹⁴⁴ Courts should further first ascertain whether parties can afford the private services of a PC before ordering them to go for parenting coordination.

The issue of affordability also needs to be addressed to provide fair access to this new intervention. It would be optimal if the opportunity to participate in parenting coordination were more accessible at reduced rates or on a no-fee basis for low-income families, rather than having the process restricted to the wealthy.¹⁴⁵ Consequently, there is a need for parenting coordination services to be expanded from the private fee-for-service model to the public sector.¹⁴⁶ In this regard, the development of court-based parenting coordination services would be welcomed so that parenting coordination could also be offered to those who are likely to benefit but who cannot afford to obtain the service privately.¹⁴⁷ This could possibly be a project in which psychology and family law master's degree students could get involved.

5 Conclusion

Parenting coordination appears to be a highly effective intervention in resolving parenting issues between high-conflict parties, not only in the best interests of their children but also for the benefit of the parties themselves and the administration of justice. If the current problems with parenting coordination are properly addressed as

¹⁴³ See De Jong 2014 *PER* 2355-2410.

¹⁴⁴ In this regard see s 61.125(6) of the *Florida Statutes*.

¹⁴⁵ Fieldstone *et al* 2012 *Family Court Review* 452.

¹⁴⁶ Sullivan 2013 *Family Court Review* 57.

¹⁴⁷ Fidler and Epstein 2008 *Journal of Child Custody* 62; Fieldstone *et al* 2012 *Family Court Review* 452.

suggested above, parenting coordination will play an increasing part in future in the continuum of alternative dispute resolution interventions during and after separation and divorce. The solution of the current problems would also contribute to the systematic development of parenting coordination and a high level of practice by PCs in South Africa.

It seems, however, that a national education campaign is called for to ensure the uniform usage of the correct terminology, standardisation, and a full understanding among judges, attorneys, PCs and co-parents of the role and limitations of this valuable intervention. The time has possibly also come for the legislator to intervene and provide comprehensive legislation governing parenting coordination.

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LIST OF ABBREVIATIONS

AFCC	Association of Family and Conciliation Courts
Am J Fam L	American Journal of Family Law
BC	British Columbia, Canada
FAMAC	Family Mediators' Association of the Cape
J Am Acad Matrimonial Law	Journal of the American Academy of Matrimonial Lawyers
KAFam	Kwazulu-Natal Association of Family Mediators
NHBJ	New Hampshire Bar Journal
PC	Parenting coordinator
PER	Potchefstroom Elektroniese Regstrydskrif / Potchefstroom Electronic Law Journal
SAAM	South African Association of Mediators
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TJLP	Tennessee Journal of Law and Policy
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
Va J Soc Pol'y & L	Virginia Journal of Social Policy and Law

**SUGGESTED SAFEGUARDS AND LIMITATIONS FOR EFFECTIVE AND
PERMISSIBLE PARENTING COORDINATION (FACILITATION OR CASE
MANAGEMENT) IN SOUTH AFRICA**

M de Jong*

SUMMARY

With the advent of the *Children's Act* 38 of 2005 greater emphasis was placed on the importance of both parents' involvement in their children's day-to-day lives. An unintended negative consequence of an otherwise laudable shift in social policy which supported a shared parental involvement was that the courts became the forum for co-parents to dispute a lot of day-to-day issues in respect of their children. To alleviate the negative effects of high-conflict co-parenting cases on our court system and the children of divorce, a new alternative dispute resolution process, namely parenting coordination, was introduced. The new process was not labelled as such, but became known as facilitation in the Western Cape, and as case management in Gauteng. Parenting coordination is a legal-psychological hybrid intervention that derives from the practice of the courts. It has the potential to provide substantial benefits for divorcing or separating parties, their children and the court system. Since its inception a few years ago, parenting coordination has steadily grown in popularity as an alternative dispute resolution tool in South Africa. Overhasty implementation of parenting coordination without considering certain concerns could, however, damage the "brand" and lead to confusion about the process. In the first place the difference in nomenclature is a real problem. Secondly, the training and qualifications of parenting coordinators are problematic and even non-existent in most provinces. Thirdly, it is argued by sceptics that parenting coordination is impermissible and constitutes an improper delegation of judicial authority in circumstances where the parenting coordinator is appointed in a court order and not in terms of an Act or court rule or by agreement between the parties. It is further observed that parenting coordination amounts to arbitration in contravention of section 2 of the *Arbitration Act*

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42 of 1965, which currently prohibits the use of arbitration in respect of matrimonial matters. Lastly, the cost of parenting coordination is indicated as an area of contention. To properly address these problems, various safeguards for and limitations on parenting coordination practice are considered. It is proposed that the internationally accepted term "parenting coordination" is also consistently used in South Africa. It is further proposed that adequate qualifications, proper training and sufficient experience for parenting coordinators are set. To counter the argument that parenting coordination is an unlawful delegation of judicial power, the necessary authority for courts to refer parties for parenting coordination is sought, firstly in the inherent power of the High Court as upper guardian to ensure the best interests of children, and secondly in the *Children's Act* and the *Constitution of the Republic of South Africa*, 1996 as far as the children's court and divorce courts are concerned. In addition, various limitations regarding the conditions under which and the stage at which a parenting coordinator should be appointed, the scope of a parenting coordinator's decision-making powers and the finality of his or her directives are suggested. Lastly, the issue of the affordability of parenting coordination is addressed and suggestions are made on ways to provide fair access to this new intervention.

KEYWORDS: Parenting coordination, facilitation, case management, alternative dispute resolution, divorce, family breakdown, shared parenting, *Children's Act* 38 of 2005, high-conflict co-parenting cases, negative consequences of divorce on children, advantages of parenting coordination, best interests of children, parenting plan, problems with parenting coordination, training and qualifications of parenting coordinators, practice standards for parenting coordinators, unlawful delegation of judicial power, limitations on parenting coordination, decision-making powers, arbitration, directives, judicial review, affordability of parenting coordination.