

# Towards a More Uniform Approach to Parenting Coordination in South Africa

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## Abstract

Because of the need to mitigate the damage done to children by chronic conflict between co-parents after divorce or family breakdown, the process of parenting coordination has been embraced by South African courts. In terms of the process, a parenting coordinator will first attempt to facilitate resolution of the parenting disputes by agreement of the parties, but if this attempt fails, the parenting coordinator has the power to make directives regarding the disputes which are binding on the parties until a competent court directs otherwise or the parties jointly agree otherwise. Although parenting coordination has flourished over the past decade, there still seems to be uncertainty and a lack of uniformity about various aspects regarding the process and the role and functions of a parenting coordinator. First of all, South Africa has the Guidelines on the Practice of Parenting Coordination (SA Guidelines), drafted by a task team of the National Accreditation Board for Family Mediators (NABFAM) to provide guidance for parenting coordinators concerning minimum qualifications, ethical obligations and conduct, practice and procedure, and children's participation in the process. In addition, the South African Law Reform Commission published the draft *Family Dispute Resolution Bill, 2020*, which deals with the process of parenting coordination in Chapter 7. Very importantly, there are also various court decisions dealing with parenting coordination in South Africa, which provide some guidance. However, the SA Guidelines, the provisions of Chapter 7 of the Bill and the court decisions are not always aligned and provide different answers to important underlying theoretical questions about various issues, such as the circumstances under which a parenting coordinator should be appointed; the issues that could be dealt with by a parenting coordinator; whom to appoint as a parenting coordinator; the approach to be followed in the parenting coordination process; the inclusion of children in the parenting coordination process; the nature of the parenting coordination process; confidentiality in the process; and a parenting coordinator's relationship with the court and the parties' legal representatives. A lack of consensus regarding these issues has given rise to diverse practices among professionals and confusion for all involved in the parenting coordination process. This article therefore endeavours to provide more clarity and certainty on these issues, taking international best practice into account.

## Keywords

Co-parenting conflict; high-conflict relationship; family dispute resolution processes; family mediation; parenting coordination; parenting coordinator; decision-making powers; best interests of the child; parental responsibilities and rights; parenting disputes; divorce; relationship breakdown; parenting plans; settlement agreements; interdisciplinary collaboration; child-centred team-building approach; co-parental solidarity; parallel co-parenting; unlawful delegation of judicial authority; *Family Dispute Resolution Bill, 2020*; *Children's Act 38 of 2005*; Guidelines on the Practice of Parenting Coordination in South Africa

## 1 Introduction

After divorce or relationship breakdown most parents can put aside their disappointment and anger over their failed marriage or relationship and establish an effective co-parenting relationship. However, for a small percentage of parents a high degree of conflict persists long after the separation and these parents are unable to reach agreement about parenting issues or to shield their children from their discord. They spend vast personal resources on protracted litigation, which is a heavy drain on the time and financial resources of the courts.<sup>1</sup> Where parents are in this situation, exposure to chronic conflict can have devastating consequences for their children's short- and long-term adjustment and can negatively influence the children's mental, emotional, physical, and social needs.<sup>2</sup> Because of the need to mitigate the damage done by chronic conflict, the process of parenting coordination has been embraced by our courts.<sup>3</sup> It is believed that parenting coordinators with appropriate training can make a significant contribution to reducing the hostility between the parents by helping them to resolve conflicts relating to day-to-day decisions and a limited number of other child-related issues.<sup>4</sup> Other potential benefits of the parenting coordination process are a decrease in the number of court applications with a consequent reduction in the burden on our court system; an increased focus on the importance of co-parenting; the saving of huge amounts of time and money; and timely interventions for children impacted by co-parenting conflict.<sup>5</sup>

Parenting coordination has been described in South African legal journals and textbooks as a child-centred process in which a mental

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<sup>1</sup> Deutsch, Coates and Fieldstone "Parenting Coordination" 218.

<sup>2</sup> Saini, Belcher-Timme and Nau 2020 *FCR* 658; De Jong "Child-informed Mediation and Parenting Coordination" 158.

<sup>3</sup> The new process was not initially labelled parenting coordination but became known as facilitation in the Western Cape (see eg *Schneider v Aspeling* 2010 3 All SA 332 (WCC); *M v V (Born N)* 2011 JOL 27045 (WCC); *CM v NG* 2012 4 SA 452 (WCC)) and case management in Gauteng (see eg *Hummel v Hummel* (SGJ) (unreported) case number 06274/2012 of 10 September 2012; *Central Authority v TK* 2015 5 SA 408 (GPJ); *LM v Goldstein* 2016 1 SA 465 (GPJ)) and the Eastern Cape (see eg *SW v SW* 2015 6 SA 300 (ECP)).

<sup>4</sup> Deutsch, Coates and Fieldstone "Parenting Coordination" 218.

<sup>5</sup> Carter and Frankel 2020 *FCR* 79; Saini, Belcher-Timme and Nau 2020 *FCR* 660, 661; De Jong 2015 *PELJ* 154-156.

health or legal professional with mediation training and experience assists high-conflict co-parents to develop and implement parenting plans, comply with court orders and resolve pre- and post-divorce parenting disputes without delay in a non-adversarial, court-sanctioned, private forum.<sup>6</sup> In terms of the process, a parenting coordinator will first attempt to facilitate resolution of the parenting disputes by agreement of the parties, but if this attempt fails, the parenting coordinator has the power to make directives regarding the disputes which are binding on the parties until a competent court directs otherwise or the parties jointly agree otherwise.<sup>7</sup> Parenting coordination requires the parenting coordinator to assume different roles and perform different functions, including assessment, parent education, coaching, facilitation, intensive case management, mediation and decision-making.<sup>8</sup> It therefore falls to parenting coordinators to

- assess parents' compliance with parenting plans, settlement agreements and court orders and assist them to correctly implement such plans, agreements and orders;
- educate the parents regarding child development, family dynamics and the harm their ongoing conflict is doing to their children and teach them to treat their relationship as if they were co-workers;
- facilitate communication between the parties and with other persons involved with their children;
- monitor and oversee the case *inter alia* by referring the parties to other professionals;
- mediate the disputes; and
- as a last resort, issue directives if the parties are unable to reach an agreement.<sup>9</sup>

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<sup>6</sup> See eg De Jong 2018 *THRHR* 189; De Jong "Child-informed Mediation and Parenting Coordination" 159; De Jong "Mediation and Other Appropriate Forms of ADR upon Divorce" 615.

<sup>7</sup> SALRC *Issue Paper 31, Project 100D* para 3.13.1 and sources referred to there.

<sup>8</sup> Hayes 2010 *FCR* 698-699; Henry, Fieldstone and Bohac 2009 *FCR* 683; Coates *et al* "Parenting Coordination for High Conflict Families" 286.

<sup>9</sup> Fidler and McHale 2020 *FCR* 748; Saini, Belcher-Timme and Nau 2020 *FCR* 660; De Jong 2018 *THRHR* 189-190; Martalas "Child-Participation in Post-Divorce or -Separation Dispute Resolution" 898.

It has been said that parenting coordination is perhaps the most significant area of interdisciplinary collaboration between the courts, mental health practitioners, attorneys and family mediators, who cooperate for the benefit of the children of parents who remain unable to make joint decisions about parenting issues or see eye-to-eye about parenting arrangements.<sup>10</sup>

Although parenting coordination has flourished over the past decade,<sup>11</sup> and professional and parental views of the process have generally been positive, there still seems to be uncertainty and a lack of uniformity about various aspects regarding the parenting coordination process and the role and functions of a parenting coordinator. First of all, South Africa has the Guidelines on the Practice of Parenting Coordination (SA Guidelines), drafted by a task team of the National Accreditation Board for Family Mediators (NABFAM) to provide guidance for parenting coordinators concerning minimum qualifications, ethical obligations and conduct, practice and procedure, and children's participation in the process.<sup>12</sup> In addition, the South African Law Reform Commission published the draft *Family Dispute Resolution Bill, 2020*,<sup>13</sup> which deals with the process of parenting coordination in Chapter 7. Very importantly, there are also various court decisions dealing with parenting coordination in South Africa, which provide some guidance. However, the SA Guidelines, the provisions of Chapter 7 of the Bill and the court decisions are not always aligned and provide different answers to important underlying theoretical questions, such as:

- a) When or under what circumstances should a parenting coordinator be appointed?
- b) Can the court appoint a parenting coordinator for parents in the absence of consent by both parents?
- c) Which issues could be dealt with by a parenting coordinator?
- d) Can a parenting coordinator oversee both the development and the

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<sup>10</sup> Sullivan and Burns 2020 *FCR* 744.

<sup>11</sup> Martalas *ADR Post-Divorce or -Family Separation* 277 indicated that parenting coordination as an ADR mechanism has grown in the Western Cape from just more than 30 percent of all divorces involving minor children issued in the Western Cape High Court in 2008 to almost 70 percent in 2012 and 2013.

<sup>12</sup> These guidelines are available at FAMAC 2016 <http://www.famac.co.za/parenting-coordination> (hereafter the SA Guidelines).

<sup>13</sup> The Bill is contained at the end of the SALRC *Discussion Paper 148, Project 100D*.

implementation of a parenting plan?

- e) Who should be appointed as a parenting coordinator?
- f) What approach should be followed in the parenting coordination process?
- g) Should children be included in the parenting coordination process?
- h) Does a parenting coordinator need to afford the parties a formal hearing?
- i) Is parenting coordination really a nonconfidential process?
- j) What is a parenting coordinator's relationship with the court and the parties' legal representatives?

A lack of consensus regarding these questions has given rise to diverse practices among professionals and confusion for all involved in the parenting coordination process. This article therefore endeavours to provide more clarity and certainty on the above questions, taking international best practice into account.

Internationally, parenting coordination is being practised in the United States of America (USA), Canada, Sweden, Italy, Singapore and Hong Kong.<sup>14</sup> Thanks to the dedication of some ardent South African parenting coordinators, Australia and the Netherlands have now also taken cognisance of this new alternative dispute resolution option.<sup>15</sup> In the USA and Canada specifically, parenting coordination has been in operation for the longest period and is well researched.<sup>16</sup> These two jurisdictions could provide guidance where uncertainty exists in South Africa on some of the above questions.

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<sup>14</sup> Deutsch, Misca and Ajoku 2018 *FCR* 120.

<sup>15</sup> Martalas *ADR Post-Divorce or -Family Separation* 26.

<sup>16</sup> Martalas *ADR Post-Divorce or -Family Separation* 27, 242.

## 2 Circumstances under which a parenting coordinator can be appointed

The discussion under this heading will deal with the first two questions listed above.<sup>17</sup>

### 2.1 *Relevant provisions*

In terms of the SA Guidelines, it appears that a parenting coordinator is generally appointed by the court for those high-conflict parents who have demonstrated an inability or unwillingness to make parenting decisions on their own, comply with parenting agreements and orders, reduce child-related conflicts, and protect their children from the impact of that conflict.<sup>18</sup> The guidelines also indicate that parenting coordination has been introduced in practice to alleviate the negative effects of on-going high-conflict, litigious, co-parenting issues on children, our court system, and parents and families that form the subject matter of such litigation.<sup>19</sup> A high-conflict relationship is therefore an indication of the need to appoint a parenting coordinator in terms of the guidelines. A high-conflict relationship is described as one where the parties demonstrate a pattern of ongoing disagreement, litigation, anger and distrust, (which may be accompanied by verbal abuse, physical aggression or threats of physical aggression) and experience difficulties in communicating and cooperating with one another in caring for their children.<sup>20</sup> In addition, the SA Guidelines support the notion that a parenting coordinator may be appointed by the court in the absence of consent by both parents if such appointment is in the best interests of the children concerned.<sup>21</sup> Lastly, the SA Guidelines provide that parenting coordination services should be accessible to all parents, irrespective of their financial resources and parenting coordinators are encouraged to provide their services *pro bono* or at reduced rates to deserving parents.<sup>22</sup>

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<sup>17</sup> When or under what circumstances should a parenting coordinator be appointed? Can the court appoint a parenting coordinator for parents in the absence of consent by both parents? See para 1 above.

<sup>18</sup> Paragraph L.f of the Foreword to the SA Guidelines.

<sup>19</sup> Paragraph B of the Foreword to the SA Guidelines.

<sup>20</sup> Paragraph K.f of the Foreword to the SA Guidelines.

<sup>21</sup> Paragraphs E and I of the Foreword to the SA Guidelines.

<sup>22</sup> Guideline 11.2.

In contrast to the SA Guidelines, the *Family Dispute Resolution Bill* sets out a specific list of circumstances in which a parenting coordinator can be appointed. These circumstances are limited to the following:

- There must be a parenting plan or court order in place with respect to parenting arrangements.<sup>23</sup>
- A parenting coordinator may only be appointed for the purpose of implementing the parenting plan or the court order.<sup>24</sup>
- A short-term, emerging and time-sensitive situation or dispute about a parenting matter must be present or anticipated.<sup>25</sup>
- The parties must agree on the appointment of a parenting coordinator in terms of a parenting coordination agreement and the consent on which the parenting coordination agreement is based must constitute informed consent.<sup>26</sup>
- The parties must be able to afford the fees of the parenting coordinator.<sup>27</sup>

Case law has also set several conditions for the appointment of a parenting coordinator. It appears that parenting coordinators are predominantly appointed in matters where the parties are regarded as high-conflict parties. In *TC v SC*<sup>28</sup> the father brought an application for *inter alia* the appointment of a parenting coordinator team to assist him and his wife with decision-making in respect of their two boys<sup>29</sup> pending their divorce. Davis AJ described parenting coordination as a non-adversarial dispute resolution service provided by mental health professionals or family law practitioners who assist high-conflict parents in divorce situations to resolve child-related disputes in an expeditious and child-focused manner, in order to minimise parental conflict with its associated risks for children.<sup>30</sup> In this case, the mother opposed the father's application and particularly objected to the appointment of a team

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<sup>23</sup> Clause 44(1)(a) of the draft *Family Dispute Resolution Bill*, 2020 (hereafter the *Family Dispute Resolution Bill*).

<sup>24</sup> Clause 44(1)(b) of the *Family Dispute Resolution Bill*.

<sup>25</sup> Clauses 44(1)(c) and 44(2) of the *Family Dispute Resolution Bill*.

<sup>26</sup> Clauses 44(1)(d) and 44(2) of the *Family Dispute Resolution Bill*.

<sup>27</sup> Clause 53(1) of the *Family Dispute Resolution Bill*.

<sup>28</sup> *TC v SC* 2018 4 SA 530 (WCC) (hereafter *TC v SC*).

<sup>29</sup> One of whom was a "high needs child" and whose issues presented a particular challenge for co-parenting: *TC v SC* para 3.

<sup>30</sup> *TC v SC* para 35.

of two parenting coordinators without her consent.<sup>31</sup> She argued that because the parenting coordinators would be able to make binding directives on co-parenting matters, their appointment, without her consent, would constitute an improper delegation of judicial authority.<sup>32</sup> On behalf of the husband, it was, however, averred that where it would be in the best interests of the children involved<sup>33</sup> the court, as upper guardian of all minor children, and in terms of section 28(2) of the *Constitution of the Republic of South Africa, 1996* (the Constitution) and sections 6(4) and 7(1)(n) of the *Children's Act 38 of 2005*, has the power to appoint a parenting coordinator notwithstanding the opposition of a parent.<sup>34</sup> As a point *in limine* the court had to decide whether it has the power to impose the appointment of a parenting coordinator on parents in the absence of consent by both parents.<sup>35</sup> Davis AJ ruled that the court does indeed have such power<sup>36</sup> provided that the conditions listed below are met and certain limitations are imposed on the appointment of and the powers conferred on a parenting coordinator.<sup>37</sup> The conditions set by the court are that:

- the welfare of the child or children involved is at risk due to high levels of parental conflict;<sup>38</sup>
- mediation has been attempted and has been unsuccessful;<sup>39</sup>
- the person appointed as parenting coordinator is suitably qualified

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<sup>31</sup> *TC v SC* para 21.

<sup>32</sup> *TC v SC* paras 23.2, 40 and 41.

<sup>33</sup> *TC v SC* para 24.

<sup>34</sup> *TC v SC* para 43.

<sup>35</sup> *TC v SC* para 22.

<sup>36</sup> This decision is in direct contrast with the case *H v H* (SGJ) (unreported) case number 06274/2012 of 10 September 2012, where the court was not prepared to grant a father's application for the appointment of a case manager to deal with and make decisions about certain post-divorce parenting conflicts between him and his former wife in respect of their four-year-old boy in the absence of consent thereto by the wife. However, due to the judge's incorrect conflation of the role of a mediator and the role of a parenting coordinator, this decision cannot be supported or serve as authority for the view that courts do not have the jurisdiction to appoint a parenting coordinator for parents in the absence of consent by both parents. As pointed out in para 3.2 below, a parenting coordinator may never make decisions for parents about their parental responsibilities and rights. With or without both parents' consent a parenting coordinator should never be appointed to do so.

<sup>37</sup> *TC v SC* para 50. The limitations that the court imposed on the appointment and powers of parenting coordinators will be addressed in para 3.1 below.

<sup>38</sup> *TC v SC* para 68.1.

<sup>39</sup> *TC v SC* para 68.2.

and experienced;<sup>40</sup> and

- the fees charged by the parenting coordinator are fair and reasonable.<sup>41</sup>

Davis AJ concluded by saying that she was of the firm view that where there is a court-ordered parenting plan in place and there is evidence which shows that the child is at risk due to a demonstrated inability or unwillingness of the parents to co-parent amicably in the best interests of the child, then the circumstances are sufficiently exceptional to warrant the invocation of the court's inherent power in terms of sections 38 and 173 of the Constitution, both to enforce compliance with its own orders and to ensure protection of fundamental rights.<sup>42</sup> *In casu*, where the parties had not yet agreed upon a parenting plan and the parties did not appear to fall into the category of "high conflict parents", the court denied the father's application for the appointment of a parenting coordinator team of two.<sup>43</sup>

Furthermore, in other cases an interim court order to the effect that one parent's contact needs to be phased in, as opposed to a court-ordered parenting plan, was sufficient grounds for the appointment of a parenting coordinator. In *S v S*<sup>44</sup> the father brought an urgent application pending a rule 43 interim application for primary residency of the parties' three-year-old daughter as the mother was a high-class prostitute and a cocaine addict. The court appointed a parenting coordinator with as wide a discretion as possible to phase in the mother's contact with the girl up to the point where the parties would have equal residency,<sup>45</sup> to require both parties to undergo regular drug testing<sup>46</sup> and to draft, and make directives about, the parties' contact schedule for the December holidays.<sup>47</sup>

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<sup>40</sup> *TC v SC* para 68.3.

<sup>41</sup> *TC v SC* para 68.4.

<sup>42</sup> *TC v SC* paras 56 and 70.

<sup>43</sup> *TC v SC* para 72.

<sup>44</sup> *S v S* (GSJ) (unreported) case number 2019/13892 of 12 February 2020.

<sup>45</sup> *TC v SC* paras 36-38.

<sup>46</sup> *TC v SC* para 43.

<sup>47</sup> *TC v SC* para 52 (5.2 to 5.3 of the order).

## 2.2 Discussion and proposal

It appears that the conditions precedent set for the appointment of a parenting coordination by the SA Guidelines, the *Family Dispute Resolution Bill* and case law are not in sync.

Although high conflict is not mentioned as a condition precedent for the appointment of a parenting coordinator in the *Family Dispute Resolution Bill*, it is clear from the SA Guidelines and case law that parenting coordination should be reserved for high-conflict co-parents. This is also the position in the USA where it has been rightly noted that parenting coordination is the most intensive intervention available to assist parents who share parenting time and decision-making to do so more functionally.<sup>48</sup> Where other less intensive options, such as parent education programmes, co-parent counselling and mediation, are available, such options should be considered before a parenting coordinator is appointed for parties.<sup>49</sup> Parenting coordination is specifically described as a child-centred dispute resolution process designed to assist the minority of separating or divorcing parents, estimated to be about 10 to 20 percent, who remain unable to successfully disengage, and instead are immersed in chronic co-parenting conflict.<sup>50</sup>

It further appears that some of the prerequisites for, or the conditions imposed on, the appointment of a parenting coordinator in South Africa as set by the *Family Dispute Resolution Bill* and/or case law are out touch with reality, too strict and/or unnecessary.

In the first place it appears that the existence or anticipation of a short-term, emerging and time-sensitive situation or dispute about a parenting matter, as is required for the appointment of a parenting coordinator by the *Family Dispute Resolution Bill*,<sup>51</sup> might be too restrictive a requirement. It appears from *S v S*<sup>52</sup> (the case where the prostitute and addict mother's contact with the child had to be phased in or stepped up until equal parenting was reached) that the appointment of a parenting coordinator is particularly useful in circumstances where there is no emerging and time-sensitive situation, but where there is an expectation

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<sup>48</sup> Sullivan and Burns 2020 *FCR* 730.

<sup>49</sup> Sullivan and Burns 2020 *FCR* 730-731.

<sup>50</sup> Fidler and McHale 2020 *FCR* 748.

<sup>51</sup> See the discussion of clause 44(1)(c) and (2) in para 2.1 above.

<sup>52</sup> See the discussion of *S v S* in para 2.1 above.

that a parent's involvement will increase once issues that are restricting his or her parenting involvement have been addressed. This may also be the case where a co-parent's parenting involvement has been temporarily restricted for reasons related to the child's development, such as where a child is still very young or has special needs that have restricted a co-parent's involvement.<sup>53</sup> In the USA, it is also generally accepted that oversight and support for such "step up" parenting plans or time schedules can best be provided if a parenting coordinator is appointed to assist the parties.<sup>54</sup>

Furthermore, the *Family Dispute Resolution Bill's* prerequisite of informed consent by both parties to the appointment of a parenting coordinator<sup>55</sup> seems to be out of touch with practice and reality. In *TC v SC*<sup>56</sup> the court expressly stated that if the required conditions are met and the required limitations are imposed on the appointment of and the powers conferred on a parenting coordinator, the court does have the power to impose the appointment of a parenting coordinator on parents in the absence of consent by both parents.<sup>57</sup> This sentiment is shared by the SA Guidelines.<sup>58</sup> If consent of the parties were to be a requirement for the appointment of a parenting coordinator, many high-conflict parties, who have great difficulty in reaching agreement about many issues, let alone a process that could cost them time, energy and money, would be denied the benefits of the parenting coordination process.

Lastly, the condition that mediation should have been attempted unsuccessfully before a parenting coordinator may be appointed<sup>59</sup> seems to be superfluous as mediation is part of the parenting coordination process. In the parenting coordination process a parenting coordinator would always first attempt to facilitate resolution of the parenting dispute by agreement of the parties and only if they were unable to resolve the matter in the mediation phase would the parenting coordinator resort to making a directive on the issue in dispute.<sup>60</sup>

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<sup>53</sup> Sullivan and Burns 2020 *FCR* 734.

<sup>54</sup> Sullivan and Burns 2020 *FCR* 735-736.

<sup>55</sup> See the discussion of clause 44(1)(d) of the draft *Dispute Resolution Bill* in para 2.1 above.

<sup>56</sup> *TC v SC* 2018 4 SA 530 (WCC).

<sup>57</sup> See the discussion of this case in para 2.1 above.

<sup>58</sup> See the discussion of the SA Guidelines in para 2.1 above.

<sup>59</sup> See the discussion of *TC v SC* in para 2.1 above.

<sup>60</sup> It is interesting to note that parenting coordinators who participated in a research study in the USA view their education function as their most important function, which transects all other functions, while they consider their decision-making

The remainder of the conditions, as set out in the SA Guidelines, the *Family Dispute Resolution Bill* and case law, do not raise any difficulties. It is indisputable that the existence of a parenting plan or a court order dealing with parenting arrangements is a prerequisite for the appointment of a parenting coordinator. It also goes without saying that the appointment of a parenting coordinator should always be in the best interests of any children involved.<sup>61</sup> As regards the affordability of the process, there is further unanimity that the parties must be able to afford the services of a parenting coordinator, or that the parenting coordinators must be obliged to render their services to deserving clients for free or at a reduced rate.

It is therefore proposed that the conditions precedent for the parenting coordination process should be the following:

- the presence of intractable co-parenting conflict;
- the existence of a parenting plan or a court order with respect to parenting arrangements or contact with a child;
- an indication that the appointment of a parenting coordinator is in the best interests of the children involved; and
- an indication that the process is affordable.

### **3 Issues that could be dealt with by a parenting coordinator**

The discussion under this heading will deal with questions (c) and (d) listed above.<sup>62</sup>

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function to be a last resort before referral to court and, in many cases, referral to court is viewed as preferable to decision-making: Hayes 2010 *FCR* 701-702 and 705-706.

<sup>61</sup> Section 28(2) of the *Constitution of the Republic of South Africa*, 1996 (the Constitution); s 9 of the *Children's Act* 38 of 2005.

<sup>62</sup> Which issues could be dealt with by a parenting coordinator? Can a parenting coordinator oversee both the development and the implementation of a parenting plan? See para 1 above.

### 3.1 *Relevant provisions*

Apart from providing that a parenting coordinator may only be appointed for the purpose of implementing a parenting plan or court order,<sup>63</sup> the *Family Dispute Resolution Bill* provides that the appointment of a parenting coordinator may not divest the court of its exclusive jurisdiction to determine the fundamental issues of guardianship, care, contact, and maintenance.<sup>64</sup> To give practitioners more clarity on what the latter entails, the Bill provides that a parenting coordinator will only be able to make directives in respect of a child's daily routine, including the child's schedule in relation to parenting time or contact with the child; the education of a child and his or her participation in extracurricular activities and special events; the temporary care of a child by a person other than the child's parents; the provision of routine medical, dental or other health care to a child; the discipline of a child; the transport and exchange of a child for purposes of exercising parenting time or contact with the child; parenting time or contact with a child during holidays and special occasions; and any other matters agreed upon by the parties and the parenting coordinator.<sup>65</sup> However, a parenting coordinator may not make directives in respect of a change to the guardianship of a child; a change to the allocation of parental responsibilities and rights; a substantial change to contact with a child; the relocation of a child; the need for supervised contact by either parent; or the need for psychological or psychiatric treatment for either parent.<sup>66</sup>

The SA Guidelines contain a more extensive list of issues that may be dealt with by a parenting coordinator.<sup>67</sup> Over and above the issues set out in the *Family Dispute Resolution Bill*, the list includes child-rearing issues; religious observance and education; communication between the parents and the children; alteration of the appearance of the children including hair-cuts, tattoos, ear and body piercings; psychological testing or other forms of assessment of the children and parents; substance abuse assessment or testing for either or both parents or a child,

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<sup>63</sup> See the discussion of clause 44(1)(b) of the *Family Dispute Resolution Bill* in para 2.1 above.

<sup>64</sup> Clause 46 of the *Family Dispute Resolution Bill*.

<sup>65</sup> Clause 47(2)(a) of the *Family Dispute Resolution Bill*.

<sup>66</sup> Clauses 47(2)(b)(i)-(vii) of the *Family Dispute Resolution Bill*. In terms of clause 48(1)(b), a parenting coordinator may also not make directives that would affect the division or possession of property or the apportionment of family debt.

<sup>67</sup> Guideline 9.4.4 of the SA Guidelines.

including access to results; and parenting education for either or both parents.

Case law has also dealt with the specific issues a parenting coordinator is or is not permitted to deal with. Besides the conditions for the appointment of a parenting coordinator, Davis AJ in *TC v SC*<sup>68</sup> stipulated that the following three limitations need to be imposed on the functions and powers of the parenting coordinator, even in circumstances where the parties agree on the appointment of a parenting coordinator, to avoid an impermissible delegation of judicial authority.

- (a) The first limitation is that the parenting coordinator should be appointed after the parents have reached agreement on the contents of their parenting plan, whether interim or final, and the parenting plan has been made an order of court so that the parenting coordinator's role would be limited to the implementation of an agreed-upon parenting plan and/or compliance with an existing court order.<sup>69</sup>
- (b) The second limitation concerns confining the decision-making power of the parenting coordinator to ancillary rulings which are necessary to implement the court order, but which do not alter the substance of the court order or involve a permanent change to any of the rights and obligations defined in the court order.<sup>70</sup> Davis AJ concluded that a parenting coordinator's decision-making powers should be confined to minor day-to-day conflicts which do not trespass on the exclusive jurisdiction of the court to determine, amend and terminate parental responsibilities and rights.<sup>71</sup>
- (c) The third limitation on a parenting coordinator's powers is that all the directives made by a parenting coordinator must be subject to comprehensive judicial oversight in the form of a full reconsideration of the decision.<sup>72</sup>

However, in direct contrast to *TC v SC*, parenting coordinators are not always appointed exclusively to implement parenting plans, but also to develop them. For example, in *CM v NG*<sup>73</sup> the Cape Town High Court

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<sup>68</sup> *TC v SC* 2018 4 SA 530 (WCC).

<sup>69</sup> *TC v SC* paras 53-56 and 71.1 (a) and (b).

<sup>70</sup> *TC v SC* paras 57 and 71.1(c).

<sup>71</sup> *TC v SC* paras 63-66.

<sup>72</sup> *TC v SC* paras 67 and 71.1(d).

<sup>73</sup> *CM v NG* 2012 4 SA 452 (WCC).

ordered that a facilitator, as a parenting coordinator was known at the time in the Western Cape, be appointed after the separation of same-sex partners to assist them with joint decision-making as well as the drafting of a parenting plan in respect of the child conceived by artificial insemination during the relationship.<sup>74</sup> Similarly, in *Centre for Child Law v NN and NS*<sup>75</sup> the Pretoria High Court appointed a parenting coordinator to assist two sets of parents, whose babies had been swapped at birth, to develop an appropriate parenting plan and resolve any possible conflicts that might arise, in circumstances where the court ordered that the children should remain in the care of their "psychological" parents.<sup>76</sup>

A last case that concerns the issues that may be dealt with by a parenting coordinator is *Van der Merwe v Bruwer and Van der Merwe*.<sup>77</sup> In this case the mother of three children brought an application to have a facilitator's directive reviewed and set aside by the court. The directive purported to vary a maintenance order of the High Court by reducing the maintenance amount that the father had to pay to the mother when the oldest child left for university and the middle child for boarding school.<sup>78</sup> The mother claimed that the facilitator had *inter alia* exceeded her powers as facilitator and had not followed a fair process,<sup>79</sup> while the father contended that the directive issued by the facilitator was binding and that the process that had been followed was fair.<sup>80</sup> It transpired that the facilitator had been appointed in terms of a parenting plan between the parties which had been incorporated in the court order upon divorce.<sup>81</sup> In terms thereof, the facilitator was authorised *inter alia* to regulate, facilitate and review issues relating to the children's maintenance and to issue binding directives.<sup>82</sup> The court found that the words "regulate, facilitate and review issues relating to the children's maintenance" were indeed wide enough to afford the facilitator the power to vary the original maintenance order and that she had therefore not exceeded the powers of a facilitator as set out in the order upon divorce.<sup>83</sup> However, Vos AJ found that the initial order upon divorce constituted an impermissible

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<sup>74</sup> Clause 5 of the order at *CM v NG* 2012 4 SA 452 (WCC) para 76.

<sup>75</sup> *Centre for Child Law v NN and NS* (GNP) (unreported) case number 32053/2014 of 16 November 2015.

<sup>76</sup> See also Manyathi-Jele 2016 *De Rebus* 8.

<sup>77</sup> *Van der Merwe v Bruwer and Van der Merwe* (WCC) (unreported) case number 12624/18 of 21 December 2018 (hereafter *Van der Merwe v Bruwer*).

<sup>78</sup> *Van der Merwe v Bruwer* paras 2, 36 and 83.

<sup>79</sup> *Van der Merwe v Bruwer* para 9.

<sup>80</sup> *Van der Merwe v Bruwer* para 11.

<sup>81</sup> *Van der Merwe v Bruwer* paras 13 and 18.

<sup>82</sup> *Van der Merwe v Bruwer* para 20.

<sup>83</sup> *Van der Merwe v Bruwer* para 47.

delegation of judicial authority by allowing the facilitator to determine the maintenance of the children, an aspect of parental responsibilities and rights which only the parents may determine in terms of section 33 of the *Children's Act* and which they may not, in terms of section 30(3) of the Act, delegate to a third party.<sup>84</sup> By changing an aspect of parental responsibilities and rights, the facilitator had therefore acted as a judicial officer and exercised a judicial power that falls within the preserve of the courts.<sup>85</sup> The court also pointed out that, in terms of section 165 of the Constitution, the judicial authority of the Republic is vested in the courts,<sup>86</sup> and that, in terms of section 2 of the Constitution, conduct which is inconsistent with the Constitution is invalid.<sup>87</sup> The court further found that the right of either party to approach the court in order to review the judicial authority exercised by the facilitator did not cure the unconstitutional and fundamental defect of delegating judicial authority to a third party in contravention of section 165 of the Constitution. The court therefore concluded that insofar as the initial order upon divorce purported to delegate judicial authority to the facilitator, it was invalid and unenforceable.<sup>88</sup> The facilitator's directive was accordingly set aside.<sup>89</sup>

### **3.2 Discussion and proposal**

From the *Family Dispute Resolution Bill* and case law, particularly *Van der Merwe v Bruwer and Van der Merwe*,<sup>90</sup> it appears that a parenting coordinator should never be allowed to make determinations about or any modifications to parental responsibilities and rights; namely care, contact, guardianship and child maintenance.<sup>91</sup> Where a court order purports to give a parenting coordinator such judicial authority to engage in determining or varying care, contact, guardianship or child maintenance, such order will be in contravention of section 165 of the Constitution, in terms of which the judicial authority of the Republic is vested in the courts, and both the court order and any directive that a parenting coordinator may issue would be invalid in terms of section 2 of the Constitution. Therefore, whenever issues such as care, contact and child maintenance are referred to parenting coordinators for determination or substantial amendment, they should refer the matter

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<sup>84</sup> *Van der Merwe v Bruwer* paras 62, 74 and 75.

<sup>85</sup> *Van der Merwe v Bruwer* para 84.

<sup>86</sup> *Van der Merwe v Bruwer* para 79.

<sup>87</sup> *Van der Merwe v Bruwer* paras 82 and 92.

<sup>88</sup> *Van der Merwe v Bruwer* para 92.

<sup>89</sup> *Van der Merwe v Bruwer* paras 91 and 133.1.

<sup>90</sup> See the discussion of this case in para 3.1 above.

<sup>91</sup> Section 18(2)(a) to (d) of the *Children's Act* 38 of 2005.

back to the court to first resolve these issues or simply decline the appointment as parenting coordinator.<sup>92</sup> However, where a parenting coordinator's directive does not concern parental responsibilities and rights, but matters incidental to such responsibilities and rights – such as the matters listed in the *Family Dispute Resolution Bill* and the SA Guidelines – such directive would not constitute an improper delegation of judicial authority and would be valid and enforceable.

As parenting plans set out and determine parents' parental responsibilities and rights – issues on which a parenting coordinator cannot make directives – it follows that a parenting coordinator should never be required to develop a parenting plan. As section 33(2) read with section 33(5) of the *Children's Act* correctly indicates, parents who cannot agree on how to exercise their parental responsibilities and rights should seek the services of a mediator to assist them in agreeing on a parenting plan – not a parenting coordinator. A mediator would endeavour to facilitate agreement between the parents regarding their respective parental responsibilities and rights and is never permitted to make any decisions for the parents on these issues, or for that matter, on any other issue, as self-determination is one of the core values of the mediation process.<sup>93</sup> If the mediation is unsuccessful, the parents must approach the court to determine their parental responsibilities and rights and it is clear that no third party has the right to determine parental responsibilities and rights for parents.<sup>94</sup>

Despite some South African court cases allowing parenting coordinators to develop parenting plans for co-parents,<sup>95</sup> the express provisions of the *Family Dispute Resolution Bill*, the purport of the SA Guidelines and findings in other cases<sup>96</sup> make it clear that parenting coordinators should only be appointed for the purpose of implementing parenting plans or court orders in terms of which parents' respective parental responsibilities and rights have already been determined – and never for the purpose of developing parenting plans.

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<sup>92</sup> Sullivan and Burns 2020 *FCR* 734, 741. See also Saini, Belcher-Timme and Nau 2020 *FCR* 659.

<sup>93</sup> De Jong "Mediation and Other Appropriate Forms of ADR upon Divorce" 583.

<sup>94</sup> See also *H v H* (SGJ) (unreported) case number 06274/2012 of 10 September 2012 para 6.

<sup>95</sup> See the discussion of *CM v NG* and *Centre for Child Law v NN and NS* in para 2.1 above.

<sup>96</sup> See the discussion of *TC v SC* in para 2.1 above.

This also seems to be the position in the US and Canada, where the parenting coordination process is typically employed after a parenting plan has been established.<sup>97</sup> The latest Guidelines for Parenting Coordination of the Association of Family and Conciliation Courts (AFCC) do, however, anticipate that there may be circumstances where a parenting coordinator is expected to create a parenting plan, or parts thereof,<sup>98</sup> such as where the parents have an interim or temporary parenting plan, while processes such as care evaluations are occurring, and the parenting coordinator is tasked with establishing a more permanent parenting plan,<sup>99</sup> or where the parents arrive at the doorstep of a parenting coordinator with an inadequate and insufficiently detailed parenting plan.<sup>100</sup> Even so, in South Africa the position is clear – only the parents by agreement or the court may determine or amend their respective parental responsibilities and rights and parenting coordinators should never be expected to create or substantially revise parenting plans. All a parenting coordinator is allowed to do is to explain, interpret, monitor and enforce a parenting plan, "while making minor changes and tweaks necessary to make the already-adopted plan work".<sup>101</sup>

## **4 Whom to appoint as parenting coordinator**

The discussion under this heading will deal with question (e) listed above.<sup>102</sup>

### **4.1 Relevant provisions**

In terms of the SA Guidelines, a parenting coordinator must be qualified by education, training and experience to undertake parenting coordination with the skill and capacity required to deal appropriately and efficiently with parenting issues in the best interests of the children.<sup>103</sup> Guideline 1.2 further provides that a person seeking to serve as a parenting coordinator must at a minimum:

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<sup>97</sup> Sullivan and Burns 2020 *FCR* 734.

<sup>98</sup> Guideline VII.8 of the AFCC Guidelines published in Task Force 2020 *FCR* 651 (hereafter the AFCC Guidelines).

<sup>99</sup> Sullivan and Burns 2020 *FCR* 734.

<sup>100</sup> Fidler and McHale 2020 *FCR* 752.

<sup>101</sup> Sullivan and Burns 2020 *FCR* 734.

<sup>102</sup> Who should be appointed as a parenting coordinator? See para 1 above.

<sup>103</sup> Guideline 1.1 of the SA Guidelines.

- 1.2.1 have a mental health or legal professional qualification (NQF level 7 or higher); and
- 1.2.2 be an NABFAM-accredited family mediator;
- 1.2.3 have specific training in the parenting coordination process, which includes knowledge of family dynamics in separation and divorce, facilitating child participation and domestic violence screening; and
- 1.2.4 have seven years' professional experience in family dispute resolution; and
- 1.2.5 be a member of a designated professional organisation, such as the Health Professions Council of South Africa ("HPCSA"), the South African Council for Social Service Professions ("SACSSP"), the Law Society of South Africa ("LSSA") or the General Bar Council of South Africa;<sup>[104]</sup> or
- 1.2.6 have served for a period of seven years on the bench as a judge or magistrate; and
- 1.2.7 have a certificate of good standing with NABFAM and the designated professional body; or,
- 1.2.8 be a person deemed to be suitably qualified by the Court.

The *Family Dispute Resolution Bill* provides that the minimum requirements for appointment as a parenting coordinator include that the parenting coordinator must-

- (a) be a licensed mental health professional or licensed legal practitioner practising in a sphere associated with families;
- (b) have training and experience in family mediation and be a certified family mediator in terms of the generic *Mediation Act*;<sup>105</sup> and
- (c) have training and experience in family arbitration and meet the [prescribed] requirements ...<sup>106</sup>

As far as case law is concerned, Davis AJ in *TC v SC*<sup>107</sup> set as one of the conditions for the appointment of a parenting coordinator that the person appointed as parenting coordinator must be suitably qualified and experienced.

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<sup>104</sup> Now, of course, the Legal Practice Council, the national, statutory body established in terms of s 4 of the *Legal Practice Act* 28 of 2014.

<sup>105</sup> Which is currently being drafted by the SALRC.

<sup>106</sup> Clause 43(2) of the *Family Dispute Resolution Bill*.

<sup>107</sup> *TC v SC* para 68.3.

## 4.2 Discussion and proposal

Because parenting coordination is one of the most challenging and complex family dispute resolution processes<sup>108</sup> and, further, because the delegation of decision-making authority is a serious issue,<sup>109</sup> extremely high standards are set for parenting coordinators in both the SA Guidelines and the *Family Dispute Resolution Bill*. Some of the standards set out in these two sources are, however, open to criticism. It appears from the AFCC Guidelines for Parenting Coordination<sup>110</sup> that it is not an "either or" situation but rather that specialised experience and training in both the legal domain and the psychological domain are required for minimum competency.<sup>111</sup> A specific parenting coordination training programme, as envisaged by the SA Guidelines, should therefore entail comprehensive training which covers both the legal and the psychological domains. It is doubtful whether experience in family arbitration, as envisaged by the *Family Dispute Resolution Bill*, would address the multidisciplinary perspective of the parenting coordination process. At present, the available family arbitration training programme offered by the Family Law Arbitration Forum of South Africa (FLAFSA) is exclusively aimed at and offered to legal practitioners and the requirement that parenting coordinators are to have training and experience in family arbitration would exclude all mental health practitioners.

In practice parenting coordination is currently undertaken by practitioners belonging to multiple disciplines, including psychologists, social workers, mental health counsellors, family mediators and attorneys or advocates. From a research study undertaken in North America, it appears that parenting coordinators from mental health backgrounds generally fare better at helping children to adjust and limiting children's involvement in their parents' conflict, while parenting coordinators from a legal background tend to focus more on assisting families to resolve legal disputes.<sup>112</sup> Depending on the specific circumstances of a case, some parents would preferably require a parenting coordinator from a mental health background while others might benefit more from a parenting

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<sup>108</sup> Sullivan and Burns 2020 *FCR* 736.

<sup>109</sup> Paragraph L.i of the Foreword to the SA Guidelines.

<sup>110</sup> Guideline 1 of the AFCC Guidelines.

<sup>111</sup> Sullivan and Burns 2020 *FCR* 736.

<sup>112</sup> Saini, Belcher-Timme and Nau 2020 *FCR* 667.

coordinator with a legal background. In this regard, Sullivan and Burns remark that

[a]relevant distinction may be that one case will fit better with a legal professional who may have more specialized skill in court-related dispute resolution procedures, while another case may be a better fit for a mental health professional who has more specialized skill in managing a team of mental health professionals dealing with an issue such as a parent-child contact problem.<sup>113</sup>

Nonetheless, the current diversity of professionals involved in parenting coordination is essential since there is such diversity in the nature and background of the high-conflict parents who are in need of the parenting coordination process.<sup>114</sup>

Legal practitioners and judges should, therefore, carefully consider the circumstances of each case before a specific parenting coordinator is appointed. The background and character of a parenting coordinator should fit the relevant circumstances in which the high-conflict co-parents and the children concerned find themselves. Legal practitioners and judges should also require proof that the specific parenting coordinator is either an experienced legal practitioner or a mental health practitioner, is an accredited mediator and has undergone specific training in the parenting coordination process before he or she is proposed or appointed.

## **5 Approach to be followed in the parenting coordination process**

The discussion under this heading will deal with question (f) listed above.<sup>115</sup>

### **5.1 Relevant provisions**

Both the SA Guidelines and the *Family Dispute Resolution Bill* stipulate what the functions of a parenting coordinator are and what it is that a parenting coordinator should do.

Guideline 9 of the SA Guidelines contains voluminous provisions on the role and functions of a parenting coordinator, which include an

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<sup>113</sup> Sullivan and Burns 2020 *FCR* 736.

<sup>114</sup> Deutsch, Coates and Fieldstone "Parenting Coordination" 214.

<sup>115</sup> What approach should be followed in the parenting coordination process? See para 1 above.

assessment function, a conflict management function, a dispute resolution function, and an educational function.

In terms of clause 47(1) of the *Family Dispute Resolution Bill*, a parenting coordinator may assist the parties in the following manner:

- (a) by building consensus between the parties by-
  - (i) giving guidelines on how a parenting plan or court order will be implemented,
  - (ii) giving guidelines for communication between the parties,
  - (iii) identifying, and creating strategies for resolving conflicts between the parties, and
  - (iv) providing information about resources available to the parties for purposes of improving communication or parenting skills;
  - (v) identifying disputed issues; and
  - (vi) developing methods of collaboration and parenting.
- (b) by issuing directives ... with respect to
  - (i) parenting arrangements;
  - (ii) contact with a child.

In settlement agreements and parenting plans the standard parenting coordination clause<sup>116</sup> makes provision for a parenting coordinator to determine the protocol of all communications, interviews and sessions, mediate disputes, and engage the services of other professionals and make directives.

However, none of the sources indicates how parenting coordinators should exercise their functions or contains any pointers on the approach to be followed in the parenting coordination process.

## **5.2 Discussion and proposal**

As there is no guidance as to the approach that a parenting coordinator should follow, it is apt to refer to two specific theoretical approaches generally utilised by parenting coordinators in the US and Canada.

The first approach entails the creation of a parallel, disengaged model of co-parenting, where engagement between the parents is minimised and

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<sup>116</sup> See Martalas *ADR Post-Divorce or -Family Separation* 456-460 (Addendum A).

the parenting coordinator acts as a functional link between them in respect to their parenting.<sup>117</sup> As conflict is dependent on engagement, reducing parents' engagement with each other simultaneously lowers the opportunity for conflict.<sup>118</sup> In this model, the parenting coordinator, functioning as the interface between co-parents, structures, monitors and enforces the way communication between the co-parents should take place,

... ensuring that coparents get child-focussed business done – information-sharing, coordination of day-to-day schedules and activities (education, health, extracurricular), and joint decision-making necessary to implement their parenting plan.<sup>119</sup>

It further appears that over time the different phases of the parenting coordination process equip high-conflict parents with integrated tools, skills and insight for resolving their parenting (and even other) disputes more constructively.<sup>120</sup> Co-parents, therefore, typically first establish a parallel model of functioning and then potentially, after establishing stability with low-conflict minimal engagement, build more cooperative engagement. The main goal of this approach is, however, to disengage the co-parents and it is accepted that a parallel model of co-parenting can support healthy child development in much the same way as a collaborative and cooperative model of co-parenting.<sup>121</sup>

The second approach rejects the main goal of the parenting coordination process as the establishment and implementation of a disengaged, parallel model of co-parenting and goes further by focusing on co-parental solidarity and bringing the parents together in "a child-centred team-building approach".<sup>122</sup> Co-parental solidarity does not simply entail the absence of conflict, disparagement and attempts to undermine the other parent. It should be:

... an active process, co-constructed by the parenting adults, in which all involved adults manage to create a functional partnership allowing them to: become and remain jointly attuned to the child's emotional needs; be consistent and predictable in how they regulate and socialize the child; foster security and safety within the child's everyday life space; and

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<sup>117</sup> Sullivan 2013 *FCR* 59; Sullivan and Burns 2020 *FCR* 733.

<sup>118</sup> Sullivan 2013 *FCR* 59.

<sup>119</sup> Sullivan and Burns 2020 *FCR* 733.

<sup>120</sup> Mandarino, Kline Pruett and Fieldstone 2016 *FCR* 570; Fieldstone *et al* 2011 *FCR* 813.

<sup>121</sup> Sullivan and Burns 2020 *FCR* 733.

<sup>122</sup> Fidler and McHale 2020 *FCR* 747.

communicate and collaborate so as to provide one another with support and solidarity of perspective and resolve.<sup>123</sup>

Parents need to recognise not only the harmful impact of hostile, competitive or disconnected parenting on children's coping and adjustment, but also the protective and buffering effects of cooperative co-parenting for children.<sup>124</sup> It is said that co-parental solidarity is a catalyst for children's healthy emotional growth.<sup>125</sup> In terms of this approach, it is important to realise that parallel parenting is not co-parenting<sup>126</sup> and that co-parenting betterment should always be the primary goal for the sake of the children.<sup>127</sup>

Parenting coordinators in South Africa should take note of these approaches and collaborate on the development of a unified theoretical model to inform the practice of parenting coordination.<sup>128</sup>

## **6 Inclusion of children in the parenting coordination process**

The discussion under this heading will deal with question (g) listed above.<sup>129</sup>

### **6.1 Relevant provisions**

In terms of various provisions of the SA Guidelines,<sup>130</sup> parenting coordinators are obliged to facilitate child participation in all disputes concerning the child in accordance with sections 10 and 31(1)(a) of the *Children's Act* and to ensure that, in accordance with section 6(5) of the Act, children are informed of any action or decision taken in a matter concerning them which significantly affects such children.

Similarly, in terms of the general provisions of the *Family Dispute Resolution Bill*, child participation in family disputes involving children should be actively facilitated in accordance with the provisions of the *Children's Act* during all dispute resolution processes, including parenting

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<sup>123</sup> Fidler and McHale 2020 *FCR* 749.

<sup>124</sup> Fidler and McHale 2020 *FCR* 755.

<sup>125</sup> Fidler and McHale 2020 *FCR* 749.

<sup>126</sup> McHale *et al* 2020 *FCR* 214.

<sup>127</sup> McHale *et al* 2020 *FCR* 222-223.

<sup>128</sup> Deutsch, Misca and Ajoku 2018 *FCR* 119, 132.

<sup>129</sup> Should children be included in the parenting coordination process? See para 1 above.

<sup>130</sup> See paras J.e and f of the Foreword to the SA Guidelines; guidelines 4.1.2 iv and 9.4.3.

coordination.<sup>131</sup> More specifically, clause 48 of the Bill, which deals with directives by parenting coordinators, provides that a parenting coordinator must consider the child's views if the child has reached such an age and level of maturity and development as to be able to participate.

## **6.2 Discussion and proposal**

Despite the peremptory provisions of the SA Guidelines, the *Family Dispute Resolution Bill* and the *Children's Act* referred to above,<sup>132</sup> it appears from research undertaken in South Africa that children are often not consulted in the parenting coordination process – whether directly or indirectly through a child specialist.<sup>133</sup> The study, for example, revealed that only half of parenting coordinators with a social work background consulted with children on a regular basis, while psychologist parenting coordinators consulted with children far less than social worker parenting coordinators and most parenting coordinators with a legal background hardly ever consulted children. It therefore appears that children remain largely excluded from the parenting coordination process.

Obtaining the child's voice directly is indeed the most reliable way to bring the child's needs and preferences to the parenting coordination process.<sup>134</sup> A parenting coordinator who meets with a child conveys the child's voice continuously throughout the process.<sup>135</sup> It is said that

[g]aining a sense of the child through meeting the child is the only way to know who the child is and how the child is managing and coping, without relying on others' perceptions.<sup>136</sup>

However, understanding the parameters of developmental psychology and being able to engage with children in such a way as to obtain their true voices, unencumbered by parental alienation or fear, is a skill that requires extensive training and relevant experience.<sup>137</sup> Child specialists should, therefore, be called upon to determine the voice of the child if the parenting coordinator's training and experience are not adequate to enable him or her to consult with children and ensure their safety in the process.<sup>138</sup> After obtaining the child's views and preferences either

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<sup>131</sup> Clause 7 of the *Family Dispute Resolution Bill* entitled "Voice of the child".

<sup>132</sup> See para 6.1 above.

<sup>133</sup> Martalas *ADR Post-Divorce or -Family Separation* 346-347.

<sup>134</sup> Yasenik, Graham and Fieldstone 2020 *FCR* 760.

<sup>135</sup> Yasenik, Graham and Fieldstone 2020 *FCR* 765.

<sup>136</sup> Yasenik, Graham and Fieldstone 2020 *FCR* 763.

<sup>137</sup> Martalas "Child-Participation in Post-Divorce or -Separation Dispute Resolution" 899.

<sup>138</sup> Yasenik, Graham and Fieldstone 2020 *FCR* 760.

directly or indirectly through a child specialist, such views and preferences should be made available to the parents so that they can be discussed and inform any agreements that are negotiated in the process. If no agreement can be reached, the parenting coordinator is able to make a directive on the dispute, “and the information gleaned from the child helps the facilitator [the parenting coordinator] to make a decision that is in the best interests of the child.”<sup>139</sup>

## 7 Nature of the parenting coordination process

The discussion under this heading will deal with question (h) listed above.<sup>140</sup>

### 7.1 Relevant provisions

In terms of the SA Guidelines, parenting coordinators must use a methodology that is fair and transparent to both parties and the court, and each party must be given an opportunity to be heard in the process.<sup>141</sup> The *Family Dispute Resolution Bill* goes further and provides that although the parenting coordination process is an informal process, it must be transparent, and both parties must have an opportunity to state their case in the presence of the other party and to challenge or question each other's statements/views and ask for supporting information.<sup>142</sup>

In *Van der Merwe v Bruwer and Van der Merwe*,<sup>143</sup> where the parenting coordinator's directive was set aside because it purported to amend a child maintenance order, the court required a fair hearing by the parenting coordinator in the parenting coordination process.<sup>144</sup> It seems that for each directive that a parenting coordinator makes, there should have been a statement by each party, discovery of relevant documents and information and a chance to cross-examine the other party's statement.

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<sup>139</sup> Martalas "Child-Participation in Post-Divorce or -Separation Dispute Resolution" 905.

<sup>140</sup> Does a parenting coordinator need to afford the parties a formal hearing? See para 1 above.

<sup>141</sup> Guideline 6.4 of the SA Guidelines.

<sup>142</sup> Clause 50 of the *Family Dispute Resolution Bill*.

<sup>143</sup> *Van der Merwe v Bruwer and Van der Merwe* (WCC) (unreported) case number 12624/18 of 21 December 2018. See also the discussion of this case in para 3.1 above.

<sup>144</sup> *Van der Merwe v Bruwer* paras 102-112.

## **7.2 Discussion and proposal**

Despite the decision in *Van der Merwe v Bruwer and Van der Merwe*,<sup>145</sup> it is evident from the SA Guidelines and accepted in practice that parenting coordinators are under no obligation to afford the parties a hearing. Parenting coordinators are, however, required to provide the parties with a fair process and both parties must be heard and given the opportunity to challenge or question each other's arguments. The *Family Dispute Resolution Bill's* prescription that the parties need to state their case in the presence of the other party is, however, not supported. Where the parenting coordination process has created a parallel, disengaged model of co-parenting, and engagement between the parents is avoided, it would be counter-productive to let each party state his or her case in the presence of the other party. As email correspondence is the norm in the parenting coordination process and parenting coordinators generally interact with clients via email (and on WhatsApp groups) and not in joint face-to-face meetings as in other alternative dispute resolution processes,<sup>146</sup> there is no reason why each party cannot state his or her case in an email on which the other party is copied. Each party is then given an opportunity to answer and make comments on the other's case (also by email) and the parenting coordinator then makes a directive on the specific dispute. Thanks to Covid-19 online dispute resolution or simply ODR, as it is commonly referred to these days, has now also become an option.<sup>147</sup> It provides an opportunity for the parties to be both in their own private and familiar space and at the same time in the same virtual space. The impact of the other party's physical presence is therefore not as intense.

## **8 Confidentiality in the parenting coordination process**

The discussion under this heading will deal with question (i) listed above.<sup>148</sup>

### **8.1 Relevant provisions**

In terms of the SA Guidelines, parenting coordination is not a confidential process for communications between, firstly, the parties, their children and the parenting coordinator; secondly, the parenting coordinator and

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<sup>145</sup> See the discussion of this case in para 7.1 above.

<sup>146</sup> Hayes 2010 *FCR* 705; Hayes, Grady and Brantley 2012 *FCR* 431, 438.

<sup>147</sup> First 2017 *HNL* 405-406; Baum 2020 *New York Dispute Resolution Lawyer* 34.

<sup>148</sup> Is parenting coordination really a nonconfidential process? See para 1 above.

other relevant parties to the parenting coordination process, such as the children's therapists and/or teachers; or thirdly, the parenting coordinator and the court.<sup>149</sup> In addition, whenever parenting coordinators communicate with third parties in the course of the parenting coordination process, they should notify such third parties that information obtained from them is not confidential and that it may be made available to the parties if that is in the best interests of the children, and/or may be used in the issuing of directives, the writing of reports, the making of recommendations or when testifying in court.<sup>150</sup> However, subject to the legal limitations on confidentiality, permitted professional purposes (such as where a parenting coordinator discusses the matter for consultation purposes with another professional), and the express provisions of a court order or an agreement, a parenting coordinator must maintain confidentiality and information obtained must not be shared outside the parenting coordination process.<sup>151</sup>

The *Family Dispute Resolution Bill* simply states that no communication between the parties and the parenting coordinator may be confidential.<sup>152</sup>

## **8.2 Discussion and proposal**

As parenting coordinators hail mainly from other professions, such as mental health, law, social work and mediation, where information and disclosures are strictly confidential, parenting coordinators and parties find it difficult to understand the exact extent to which information and privacy are protected in the parenting coordination process.<sup>153</sup> To make things easier to understand, it is proposed that a distinction should be made between internal confidentiality, which pertains to communications between the parents or between a parenting coordinator and one parent and/or children or others involved in the parenting coordination process; external confidentiality, which pertains to communications between a parenting coordinator and other audiences beyond the parenting coordination process; and liminal confidentiality, which pertains to communications with, by, and between other professionals and nonprofessional supports who are often integral to the parenting

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<sup>149</sup> Guideline 6.1 of the SA Guidelines.

<sup>150</sup> Guideline 6.5 of the SA Guidelines.

<sup>151</sup> Guideline 6.2 of the SA Guidelines.

<sup>152</sup> Clause 51(2) of the *Family Dispute Resolution Bill*.

<sup>153</sup> Carter and Frankel 2020 *FCR* 71.

coordination process but who occupy a somewhat ambiguous threshold position – neither fully internal nor external to the family in question.<sup>154</sup>

In terms of the SA Guidelines, it appears that confidentiality does not apply to internal communications, but that it does indeed apply to external communications in the parenting coordination process. Liminal communications, however, appear to be a grey area where the confidentiality of communications would depend on the parenting coordinator's discretion as to whether otherwise privileged mental health and other sensitive information about parents should or should not be regarded as part of the parenting coordination process. In the light of the broad definition of personal information in the *Protection of Personal Information Act 4 of 2013* (POPIA), which includes information relating to mental health and belief, information about a person's medical or financial history, a person's opinions and preferences, private correspondence and opinions about a person,<sup>155</sup> this is something that should be clarified as soon as possible to prevent potential claims and charges against parenting coordinators for unlawful processing of data under the Act.

In the meantime, it is proposed that parenting coordinators should always get the consent of both parents before information is shared with third parties, before therapists or teachers are included in email correspondence with parents, or before other persons, such as new partners, are included on WhatsApp communication groups between the family members and the parenting coordinator. Third parties are also to be informed in writing in advance that whatever they share with parenting coordinators will not be confidential and may be shared with the parents and/or the court. Parenting coordinators should nonetheless take heed of the warning that they do not have a fundamental right to invade a parent's privacy, even though a court might find that the best interests of children would be served by the appointment of a parenting coordinator.<sup>156</sup> They need to be aware of the fact that although children's best interests are paramount,<sup>157</sup> it does not mean that the constitutional

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<sup>154</sup> Carter and Frankel 2020 *FCR* 72.

<sup>155</sup> DLP Compliance 2020 <https://www.tessian.com/blog/ultimate-guide-to-the-popia-south-africas-privacy-law/>.

<sup>156</sup> Deutsch, Coates and Fieldstone "Parenting Coordination" 211.

<sup>157</sup> Section 28(2) of the Constitution; s 9 of the *Children's Act* 38 of 2005.

rights of the parents can simply be ignored, or that limitations on children's best interests are impermissible.<sup>158</sup>

## **9 A parenting coordinator's relationship with the court and the parties' legal representatives**

The discussion under this heading will deal with the last question listed above.<sup>159</sup>

### **9.1 Relevant provisions**

Only the SA Guidelines contain provisions on parenting coordinators' relationship with the parties' legal representatives and the court. In the first place, the guidelines provide that parenting coordinators may be requested by the court to provide a written or oral report to the court.<sup>160</sup> It is further proposed in the guidelines that court orders must clearly and specifically define a parenting coordinator's scope of authority and responsibilities.<sup>161</sup> Parenting coordinators are also to follow the court's directions regarding provision of a copy of any directives, report or recommendations made by them to the court.<sup>162</sup> In addition, the guidelines provide that parenting coordinators must communicate with all parties, children, legal representatives, colleagues and the court in a manner which preserves the integrity of the parenting coordination process and considers the safety of all participants.<sup>163</sup>

### **9.2 Discussion and proposal**

To be successful, the parenting coordination process needs the support of not only the co-parents but also the court and the parents' attorneys.<sup>164</sup>

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<sup>158</sup> Heaton and Kruger *SA Family Law* 295 with reference to *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC); *Sonderup v Tondelli* 2001 1 SA 1171 (CC); *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC).

<sup>159</sup> What is a parenting coordinator's relationship with the court and the parties' legal representatives? See para 1 above.

<sup>160</sup> Paragraph L.j of the Forward to the SA Guidelines.

<sup>161</sup> Guideline 2.2 of the SA Guidelines.

<sup>162</sup> Guidelines 10.4.3 – 10.4.4 of the SA Guidelines.

<sup>163</sup> Guideline 10.1 of the SA Guidelines.

<sup>164</sup> Sullivan and Burns 2020 *FCR* 742.

In the first place, courts must be careful not to request parenting coordinators to act in roles that exceed their scope of authority.<sup>165</sup> As pointed out above, parenting coordinators should, for example, never be instructed to create or substantially revise parenting plans.<sup>166</sup> Judges further need to be trained to realise and appreciate the value that parenting coordinators can provide in difficult cases. Although the parenting coordination process is designed to operate outside the court, it is advisable that there should be contact between a parenting coordinator and the judge who is responsible for the parenting coordinator's appointment, especially in circumstances where a case management judge has been appointed to a case,<sup>167</sup> or where a parenting coordinator is having a difficult time with one or both parties.<sup>168</sup> To give the parenting coordination process the gravity it deserves, it is further advisable that all directives made by parenting coordinators should be filed on court files for cognisance by the judges dealing with these cases. In this regard, the *Family Dispute Resolution Bill*, in fact, provides that if parenting coordinators' directives are filed with the court, they would be enforceable as if they were an order of the court.<sup>169</sup>

There should also be regular contact and an exchange of information between parenting coordinators and the parties' attorneys from the outset of the parenting coordination process.<sup>170</sup> If at all possible, new facts or forthcoming directives should be discussed with the parties' attorneys to enhance trust and respect between parenting coordinators and the legal profession and to enable attorneys to prepare their clients for changes that might otherwise give rise to extreme behaviour.<sup>171</sup> Where necessary, attorneys can also be invited to attend joint parenting coordination sessions with parents to level the playing field where one parent is dominating such sessions.

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<sup>165</sup> Sullivan and Burns 2020 *FCR* 743. See also *Van der Merwe v Bruwer* as discussed in para 3.1 where the divorce court's order amounted to an impermissible delegation of judicial authority.

<sup>166</sup> Paragraph 3.2 above.

<sup>167</sup> In terms of Rule 37A of the Uniform Rules of Court.

<sup>168</sup> Coates *et al* "Parenting Coordination for High Conflict Families" 284; Kirkland and Sullivan 2008 *FCR* 624.

<sup>169</sup> Clause 48(6)(b) of the *Family Dispute Resolution Bill*.

<sup>170</sup> Sullivan and Burns 2020 *FCR* 743.

<sup>171</sup> Sullivan and Burns 2020 *FCR* 743.

## 10 Conclusion

Since parenting coordination is a relatively new alternative dispute resolution process, it is to be expected that improvements will be needed to ensure the best possible intervention for co-parents, their children and the court.<sup>172</sup> It is also imperative for parenting coordinators and professionals involved in the parenting coordination process to collaborate towards the development of a uniform approach to parenting coordination in South Africa.<sup>173</sup> It is therefore to be hoped that the discussion of the above contentious questions regarding the parenting coordination process and the proposals as to how these questions should be answered, will contribute to a consistent national approach to the parenting coordination process in South Africa, to the benefit of courts and those families who are being torn apart by chronic co-parenting conflict.

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<sup>172</sup> See also Deutsch, Coates and Fieldstone "Parenting Coordination" 214.

<sup>173</sup> See also Fidler and McHale 2020 *FCR* 756.

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## List of Abbreviations

ADR	Alternative dispute resolution
AFCC	Association of Family and Conciliation Courts
FAMAC	Family Mediators' Association of the Cape
FCR	Family Court Review
FLAFSA	Family Law Arbitration Forum of South Africa
HNLR	Harvard Negotiation Law Review
NABFAM	National Accreditation Board for Family Mediators
NQF	National Qualifications Framework
ODR	Online dispute resolution
PELJ	Potchefstroom Electronic Law Journal
POPIA	Protection of Personal Information Act
SALRC	South African Law Reform Commission
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
USA	United States of America