

## Workshop 33, June 1, 2007, 1:45 PM – 3:15 PM “Defining Parenting Coordination to Meet Local Needs and National Uniformity”

Presented by

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### Learning Objectives:

1. Identify core elements of parenting coordination as defined by various states
2. Recognize the variations in state laws which create unique practice parameters
3. Understand how the components fit together to respond to historical needs and political interests in the local districts by using the Texas model as an example

### Comparison of Key Characteristics for Statutory Parenting Coordination [PC]

The goal of the AFCC Taskforce had originally been to establish standards of practice everyone could agree on. However, the taskforce recommended the Guidelines for Parenting Coordination approved by the Board on May 21, 2005 be presented as Guidelines vs Standards because of the newness of the field and variation in practices at this time. Local jurisdictions and states were encouraged to define guidelines that work for that area. The Texas statute was drafted using the Oklahoma statute as the model in many aspects, but not all. Colorado and Texas had their statutes finalized within weeks of each other, with North Carolina not far behind. The following variables have been charted to more clearly compare similarities and differences. [See comparison chart and copy of the Texas Family Code statute on PC.]

**Title.**--At the time of this writing, 7 states were identified as having enacted statutes which appear to be consistent with the AFCC definition of parenting coordination, though Oregon did not use the term “Parenting Coordinator” as an identifier. In the November 2003 Texas AFCC conference, a workshop explored whether or not we needed additional family services outlined in the Texas Family Code [TFC] such as parenting coordination. We concluded that statutory guidelines for PC would result in greater use of the mental health service to

help high conflict families, even though we already had a statute for family counseling for high conflict families which was not well defined or frequently used. The value of using the term was primarily its national growing use, thus making an intriguing new service which had some identity.

**Statutory definitions.**—Five of the 7 statutes define the PC as an impartial/neutral party who will help separated/divorced parents resolve parenting disputes. The Texas statute clearly defines PC as a conciliatory form of dispute resolution, like mediation, which promotes the public policy of the state (1) to assure children have frequent and continuing contact with parents who can act in their best interest; (2) to provide a safe, stable, and nonviolent environment; and (3) to encourage shared parenting after separation/divorce. Judge Debra Lehrmann distinguishes conciliatory from adversarial by whether or not the professional intervener testifies in court. Conciliatory processes encourage parents to work together, while adversarial processes encourage each parent to prove that they are the better parent.

**Goals.**—Six of the statutes focus heavily on facilitating communication, problem solving, and co-parenting skills which promote empowerment of the parents. Four of the 7 states specifically include compliance with the court order, thus reducing litigation for enforcement or modification. Texas has a unique goal of educating and facilitating agreements about a parenting plan. PC can be used at any stage of the divorcing process in Texas unlike Louisiana which restricts parenting

coordination to post decree timing. Early intervention is likely to minimize the intensity of litigation if not eliminate it altogether. The development goal can also describe when a parenting plan that is not working has to be almost completely rewritten to become workable.

**Requirements for ordering.**—Where addressed, all statutes encourage agreement of the parents to include an order for PC. Agreement generally results in more effective results of the service. However, PC services can be imposed on parents in most of the states. When the service is imposed, constitutional rights become a more sensitive issue to consider in determining authority of the PC. Four of the 7 states specify that the parties must be able to pay for the service themselves if it is ordered. Only 3 of the states identify a possible exclusion for family violence.

**Provider qualifications.**—Oklahoma and Texas establish minimum qualifications and encourage local courts to set higher qualifications based on availability of PCs who can provide a good service. Two of the states include state-required mediation training, while 2 others make reference to some mediation skills/training. Only 2 states include continuing education as a requirement. Again, 3 states include specific training in family/domestic violence. Texas and Louisiana include specialized PC training. Louisiana and North Carolina have the most extensive lists of provider qualifications: an advanced degree in a mental health or medical or legal [NC] field, licensure, 5 years [NC] / 3 years [LA] of professional experience, 24 hours [NC] / 40

hours [LA] of specialized training, and continuing education. Texas requires a minimum of a bachelor's degree in a mental health related field. Perhaps the most important qualification cannot be documented by training: personal maturity which allows the PC to remain impartial and non-reactive in very challenging situations. A major concern in ordering services is the question of who will pay. We must find ways to provide quality service to low income families without paying the cost of highly qualified providers.

**Report to court.**—Colorado and Texas specify that records and testimony are privileged unless parties agree otherwise. Texas clearly prohibits disclosure of confidential information other than the PC's recommendation on whether the order for PC should continue and agreements. Idaho requires a regular status report; Oregon does not address this issue. North Carolina requires that records & testimony can be subpoenaed only by the presiding judge and released into court only following an in camera review [consistent with HIPAA]. Louisiana has similar HIPAA restrictions on allowing a PC to testify. Oklahoma requires a report with recommendations. Most states include some form of reporting to the court, but contents of the report are not always specified.

**Decision-making authority.**—Two states do not address this issue. Three states seem to allow minor decision making which does not change the court order or the ability to make recommendations to the court. Texas prohibits the PC making any decisions for the parents outside of facilitating their own agreements. Colorado has a unique statute in this regard. The role of PC cannot make decisions for parents. But the PC can also be the same person ordered to be a decision-maker if the parties agree. When an order is imposed on parents, the constitutional right to raise one's child must be a top consideration when setting authority of the PC.

### Why Texas Made the Choices We Did

The most important variables when trying to define a plan for parenting coordination services seem to be the following:

1. Whether the PC's records and testimony of private sessions with parents/children could be used in the litigation process,
2. Whether the PC could be given judicial authority to impose decisions on parents which might violate their constitutional right to raise their children as long as the children were not being abused, and
3. What training requirements are necessary for competent and ethical practice of PC

**Confidentiality.**--The Texas statute was composed after careful thought on the above options. Judges said clearly that they did not need additional litigation tools to help the judge in decision making. They have social/home studies, psychological evaluations, mental health guardian ad litem, amicus

attorneys, etc. The confidentiality requirement was included to be consistent with our Texas exemplary ADR statute which clearly and strongly protects confidentiality of conciliatory forms of private intervention to resolve parenting conflicts. Confidentiality was also included in order to be compliant with professional mental health codes of ethics [APA and AAMFT very clearly and possibly NASW and ACA] which prohibit a licensed professional from combining treatment roles with forensic roles in services to a single client family. A mental health professional must either (a) be there to help the family communicate and problem solve stressful conflicted parenting issues [which likely generate individual symptoms of depression/anxiety/behavioral problems in at least one family member, as well as prolonged litigation] in a self-determined environment or (b) be there as an investigative arm of the court. To do both at the same time is a double-bind message to the clients which is likely to be harmful to the parents' ability to think clearly and rationally. This is a very basic principle in the work of early family therapy psychiatrists in the 1950s.

Case law has also provided confidentiality guidance from the following quotes:

- ❑ "...as to the competing interest of full disclosure and the need for confidentiality in mental health treatment, the Texas Legislature has reconciled the conflict in favor of the confidential relationship. *Wade v. Abdnor*, 635 S.W. 2d 937 (Tex. Civ. App.-Dallas 1982, writ dismissed)"
- ❑ *Gaynier v. Johnson*, 673 S.W. 2d 899, 904 (Tex. App.-Dallas-1984, no writ) "In 1985, the Texas Supreme Court examined the privilege and its purpose:  
'...The justification of this privilege lies in the policy of encouraging the full communication necessary for effective treatment of a patient by a psychotherapist ...The protection against disclosure of confidence is primarily erected to protect the patient against an invasion of his privacy.'" *Ginsberg v. Fifth Court of Appeals*. 686 S.W. 2d 105 (Tex 1985)

**Self-determination.**--Since the AFCC Guidelines and the proposed Texas revisions in HB 555 and SB 1367 identify PC as an ADR process consistent with mediation ethical practice guidelines regarding self determination, the PC process must also be based on self determination. An arbitration model cannot be combined with a mediation model by one interventionist under Texas practice. Texas law and practice also do not choose to delegate judicial authority to make decisions about a parent's right to parent their child to a minimally trained mental health professional or a trained volunteer. This infringement on constitutional right is a very dangerous policy which should be avoided. The following court decision excerpts emphasize the importance of self-determination in parenting:

- ❑ "The natural right existing between parents and their children is of constitutional dimensions" *Holick v Smith S>W>2d 18* (Tex. 1985). This natural parental right has been characterized as "essential," a "basic civil right of man," and "far more precious than property rights." See *Stanley v Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1388, 1391 (1980).
- ❑ Parents right to "the companionship, care, custody, and management" of their children are constitutional interests "far more precious than

any property right." *Santosky v Kramer*, 455 U.S. 745, 758-59 (1982)

- ❑ "...a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. If not the first, perhaps the most significant statements of the Court in this area are found in *Pierce v. Society of Sisters*, in which the Court observed: "Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L.Ed. 1042, 29 A.L.R. 1146, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. 268 U.S., at 534-35, 45 S.Ct., at 573."
- ❑ "...and guardians' includes the right 'to direct the upbringing and education of children under their control.'" *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35, 45 S. Ct. 571, 69 L.Ed. 1070 (1925)
- ❑ "In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972)
- ❑ "\*\*\*The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." 442 U.S., at 602, 99 S.Ct. 2493 (alteration in original)
- ❑ "Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children. See, e.g., *Flores*, 507 U.S., at 304, 113 S.Ct. 1439."

**Training requirements.**--The training requirements were also carefully considered in defining the Texas statute. The statute was written with minimal training requirements which were directed toward a mental health training background combined with specialized training in parenting coordination and specific training in family violence. The focus was to encourage local jurisdictions to set their own higher criteria based on the availability of qualified service providers.

### Historical Development of the Texas Family Systems PC Model

From a systemic perspective, structural rules for a system are heavily influenced by interactive relationships over time. Family therapists pay attention to family-of-origin [FOO] dynamics which influence current patterns of behavior [family

violence is the clear example]. In looking at the legislative defining of the practice of parenting coordination in Texas, several FOO factors have left their footprint:

- ❑ The 1987 ADR statute which provided clear rules for confidentiality and self-determination for all ADR processes
- ❑ The 1991 licensure act for Marriage and Family Therapists which focuses on the use of family systems theory and techniques; a family systems model of mediation is included under the scope of practice and parenting coordination is being processed through a rules change to also be included
- ❑ The 1995 enactment and 1997 enhancement of the Family Counseling order for high conflict families in dispute over parenting issues
- ❑ The 1995 passage of the Domestic Violence statute protections for a child by restricting rights of a parent who has an historical pattern of family violence
- ❑ The exemplary 2001 Collaborative Law statute which set out clear statutory guidelines for this form of ADR which is founded on a paradigm shift to systemic thinking
- ❑ The 2005 passage of the Parenting Plan and Parenting Coordinator statute [See attachment]

The above legislative changes, which are perhaps unique to Texas, have opened the path for defining parenting coordination as a self-determined confidential ADR resource based on family systems mental health thinking in the context of family law. The following influences have under girded the family systems model of parenting coordination:

- ❑ The **therapeutic jurisprudence** philosophy united judges, attorneys, and therapists in creating the AFCC chapter with the goal of providing an interdisciplinary forum for exchange of ideas & development of procedures to assist families in conflict.
- ❑ TFC 153.001 **policy of the state** is to assure children have frequent & continuing contact with each caring parent, to provide a safe stable nonviolent environment for children, and to encourage shared parenting.

### Moving toward Uniformity and Diversity

The practice of parenting coordination is evolving and will hopefully continue to change as we professionals learn more effective methods to use in helping parents learn to coparent. The difficulty in building consensus on the practice standards for parenting coordination lies in the unique development of state legislation patterns and the unique training and skills of mental health and legal professionals in their interpretations of how to best serve families. The systemic thinking shift with collaborative law has opened the door in Texas for parenting coordination as a family systems

- ❑ **The paradigm shift** in the legal community occurred with the development of Collaborative Family Law.
- ❑ **Family systems thinking** in the mental health community believes that when the family system is working effectively [open and clear interactional processes with a healthy balanced organizational structure in which family members feel safe and humanly connected], individual symptoms of anxiety and depression will dissipate and allow rational decision making and problem solving, thus eliminating unnecessary litigation.

Since the statute went into effect on September 1, 2005, several positive changes have occurred for conflicted families impacted by the legal system.

- ❑ The Texas Office of the Attorney General Child Support Enforcement Division is currently conducting a pilot project using parenting coordinators which is showing evidence of increase in child support agreements.
- ❑ The TSBEMFT has agreed that parenting coordination does fall under the scope of practice for Licensed Marriage and Family Therapists and therefore ethical practice by LMFTs can be regulated by the Board to protect the public. Other mental health licensing boards are likely to make similar determinations.
- ❑ The TAMFT Parenting Coordination Taskforce has developed “Recommended Practice Guidelines for a Family Systems Model of Parenting Coordination in the Context of Texas Family Law” to help provide assistance to the LMFT Board and to offer guidance for family therapists who provide parenting coordination services. [See full report.]
- ❑ Many more parents are now receiving parenting coordination services through court mandates, mediated settlement agreements, collaborative law agreements, and attorney referrals. Parents are reporting favorable responses in unique ways the traditional legal system did not provide. Parents and their children are now saying they are learning to communicate and practice the special skills of co-parenting. These improved skills help them minimize the stress of family reorganization on their children. This new pattern of behavior will certainly reduce if not eliminate ongoing litigation about parenting issues.

intervention. Even with the success of collaborative law, there are still many litigation oriented attorneys practicing in Texas who resist the change from linear to systemic thinking. The 2007 legislative session has seen a strong challenge to the parenting plan and parenting coordination statute in attempt to protect litigation practices threatened by ADR advancements.

In order for parenting coordination to become a uniform act some day, the options seem to be

1. consensus developed on the key variables of confidentiality, self-determination, and qualifications based on practice experience, research, and theory development;

2. agreement to define a variety of models based on skill sets from various professions with each setting their own standards of practice; or
3. creative thinking for other options.

The **National Conference of Commissioners on Uniform State Laws (NCCUSL)**, established in 1892, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

Conference members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

- NCCUSL strengthens the federal system by providing rules and procedures that are consistent from state to state but that also reflect the diverse experience of the states.
- NCCUSL statutes are representative of state experience, because the organization is made up of representatives from each state, appointed by state government.
- NCCUSL keeps state law up-to-date by addressing important and timely legal issues.
- NCCUSL's efforts reduce the need for individuals and businesses to deal with different laws as they move and do business in different states.
- NCCUSL's work facilitates economic development and provides a legal platform for foreign entities to deal with U.S. citizens and businesses.
- NCCUSL Commissioners donate thousands of hours of their time and legal and drafting expertise every year as a public service, and receive no salary or compensation for their work.
- NCCUSL's deliberative and uniquely open drafting process draws on the expertise of commissioners, but also utilizes input from legal experts, and advisors and observers representing the views of other legal organizations or interests that will be subject to the proposed laws.
- NCCUSL is a state-supported organization that represents true value for the states, providing

services that most states could not otherwise afford or duplicate.

Each uniform act is years in the making. The process starts with the Scope and Program Committee, which initiates the agenda of the Conference. It investigates each proposed act, and then reports to the Executive Committee whether a subject is one in which it is desirable and feasible to draft a uniform law. If the Executive Committee approves a recommendation, a drafting committee of commissioners is appointed. Drafting committees meet throughout the year. Tentative drafts are not submitted to the entire Conference until they have received extensive committee consideration.

Draft acts are then submitted for initial debate of the entire Conference at an annual meeting. Each act must be considered section by section, at no less than two annual meetings by all commissioners sitting as a Committee of the Whole. With hundreds of trained eyes probing every concept and word, it is a rare draft that leaves an annual meeting in the same form it was initially presented.

Once the Committee of the Whole approves an act, its final test is a vote by states—one vote per state. A majority of the states present, and no less than 20 states, must approve an act before it can be officially adopted as a Uniform or Model Act.

At that point, a Uniform or Model Act is officially promulgated for consideration by the states. Legislatures are urged to adopt Uniform Acts exactly as written, to “promote uniformity in the law among the states.” Model Acts are designed to serve as guideline legislation, which states can borrow from or adapt to suit their individual needs and conditions.

When drafting is completed on an act, a commissioner's work has only begun. They advocate the adoption of uniform and model acts in their home jurisdictions. Normal resistance to anything “new” makes this the hardest part of a commissioner's job. But the result can be workable modern state law that helps keep the federal system alive.

The work of the Conference simplifies the legal life of businesses and individuals by providing rules and procedures that are consistent from state to state. Representing both state government and the legal profession, it has sought to bring uniformity to the divergent legal traditions of more than 50 sovereign jurisdictions, and has done so with significant success.