

RESPONSES TO THE STEPHENS CASE: AVOID ILLEGAL DELEGATION OF JUDICIAL AUTHORITY TO COUNSELORS OR PARENTING COORDINATORS

It is well established that the district court is the only entity that can modify a custody or visitation order, subject to the review of the appellate courts. In re Marriage of Brown, 778 N.W.2d 47,54 (Iowa Ct. App. 2009); see also Iowa Code § 598.41 (providing the factors the court should considering in awarding custody and visitation rights). This obligation to modify a decree cannot be delegated to any person or entity because that person or entity has no jurisdiction to render such a decision. ³ The legislature has granted to the court the responsibility to make an impartial and independent determination as to what is in the best interests of the child, and this decision cannot be controlled by the agreement or stipulation of the parties. See Walters v. Walters, 673 N.w.2d 585, 592 (Neb. Ct. App. 2004). While the district court could seek and consider the therapist's recommendations only the district court could modify the decree after the parties had the the right to be heard.

In Re the Marriage of Stephens, Iowa Court of Appeals, No. 1-812/11-0054 Filed February 15, 2012.

Hospitalization referees were created by statute, not by our constitution. While the chief judge has the authority to appoint a hospitalization referee, the statute granting such authority limits the duties of the referee to the duties imposed on the court in sections 229.7 to 229.22. See Iowa Code § 229.21 (2). Section 229.6A is not among those listed sections. There are no other provisions in the code that grant to a hospitalization referee any authority over a minor. Thus, the hospitalization referee has no jurisdiction over the class of cases involving the involuntary hospitalization of minors. The order for involuntary hospitalization in this case was entered by a person who had no jurisdiction to do so. Accordingly, the "Order for Hospitalization" and the "Findings of Fact," both entered on December 6, 2011, are void and are hereby vacated.

In Re the Matter of T.E., Alleged to be Seriously Mentally Impaired, Iowa Court of Appeals, No. No. 2-684 112-0034 Filed October 3, 2012.

REASONS FOR DELEGATION

1. Obtain a decision based on decision-maker's specialized knowledge
2. Obtain solution that is more detailed and personal to meet particular needs
3. Avoid cost of litigation by using alternative method of decision-making or dispute resolution
4. Preserve court resources by keeping minutiae out of the court
5. Other?

ISSUES TO DELEGATE

1. Valuation
2. Carry out sale of property
3. Micromanagement of custody/visitation/parenting details
4. Custody/visitation/parenting decision
5. Other?

TO WHOM IS THE DELEGATION BEING MADE? WHAT ARE THE QUALIFICATIONS? BY WHAT STANDARDS IS THE DECISION MADE?

1. Guardian ad Litem
2. Therapist
3. Parenting coordinator
4. Special master
5. Forensic custody evaluator
6. Other?

HOW IS THE DELEGATION MADE?

1. Agreement of both parties
2. Court Order
 - a. Jurisdictional basis for decision-making
 - b. Specify the exact authority delegated
 - i. Subject matter
 - ii. Range of decisions that can be made
 - iii. Procedure of decision-making
 - iv. Confidentiality or non-confidentiality
 - v. "Special Master"
 - vi. "Mediation" and "Mediator"

ENFORCEABILITY OF DELEGATED DECISIONS

IOWA RULES OF CIVIL PROCEDURE

Rule 1.935 Reference to master, A "master" includes a referee, auditor or examiner. On a showing of exceptional conditions requiring it, the court may appoint a master as to any issues not to be tried to a jury. The clerk shall furnish the master with a copy of the order of appointment.

Rule 1.937 Powers. The order may specify or limit the master's powers or duties, the issue on which a report is to be made, or the time within which a hearing shall be held or a report filed, or specify that the master merely take and report evidence. Except as so limited the master shall have and exercise power to regulate all proceedings before the master; to administer oaths and to do all acts and take all measures appropriate for the efficient performance of the master's duties; to compel production before the master of any witness or party whom the master may examine, or of any evidence on any matters embraced in the reference, and to rule on admissibility of evidence. The master shall, on request, make a record of evidence offered and excluded. The master may appoint a shorthand reporter whose fees shall be advanced by the requesting party.

Rule 1.938 Speedy hearing. Upon appointment the master shall notify the parties of the time and place of their first meeting, which shall be within 20 days or such other time as the court's order may fix. If a party so notified fails to appear, the master may proceed ex parte, or, in the master's discretion, adjourn to a future day, giving notice thereof to the absent party. It is the duty of the master to proceed with all reasonable diligence; and the court, after notice to the master and the parties, may order the master to expedite proceedings or make a report.

Rule 1.939 Witnesses. Any party may subpoena witnesses before a master as for trial in open court; and a witness failing to appear or testify without good cause shall be subject to the same punishment and consequences.

Rule 1.941 Filing report. The master shall file with the clerk the original exhibits, and any transcript of the proceedings and evidence, otherwise a summary thereof, with a report on the matters submitted in the order of reference, including separate findings and conclusions if so ordered. The master may submit a draft of the report to counsel for their suggestions.

Rule 1.942 Disposition. The clerk shall mail notice of filing the report to all attorneys of record. Within ten days after mailing, unless the court enlarges the time, any party may file written objections to it. Application for action on said report, or objections, shall be heard on such notice as the court prescribes. The report shall have the same effect whether or not the reference was by consent; but where parties stipulate that the master's findings shall be final, only questions of law arising upon the report shall thereafter be considered. The court shall accept the master's findings

of fact unless clearly erroneous; and may adopt, reject or modify the report wholly or in any part, or recommit it with instructions.

Iowa Code of Judicial Conduct

IV. Special Master, Referee, and Other Pro Tempore Part-Time Judge

A special master, referee, and other pro tempore part-time judge who serves or expects to serve once or only sporadically on a part-time basis under a separate appointment for each period of service or for each case heard is not required to comply:

(A) except while serving as a judge, with rules 51:1.2 (Promoting Confidence in the Judiciary), 51:2.4 (External Influences on Judicial Conduct), 51:2.10 (Judicial Statements on Pending and Impending Cases), or 51:3.2 (Appearances before Governmental Bodies and Consultation with Government Officials); or

(B) at any time with rules 51:3.4 (Appointments to Governmental Positions), 51:3.6 (Affiliation with Discriminatory Organizations), 51:3.7 (Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities), 51:3.8 (Appointments to Fiduciary Positions), 51:3.9 (Service as Arbitrator or Mediator), 51:3.10 (Practice of Law), 51:3.11 (Financial, Business, or Remunerative Activities), 51:3.13 (Acceptance of Gifts, Loans, Bequests, Benefits, or Other Things of Value), 51:3.15 (Reporting Requirements), 51:4.1 (Political and Campaign Activities of Judges and Judicial Candidates in General), and 51:4.5 (Activities of Judges Who Become Candidates for Nonjudicial Office).

Parenting Coordination: WHEN?

Parenting coordination is appropriate for high conflict cases dealing with child-related issues, such as when

- there is a high rate of litigation, especially concerning the implementation of a custody order or parenting plan;
- mediation has not been successful or has been deemed inappropriate;
- parents need assistance developing, modifying or implementing their parenting plan;
- parents have difficulty communicating information about their child's welfare;
- parents are unable to agree on substantive issues concerning their child;
- there are complex child-related or family issues that require intensive case managing; and
- parents can afford to pay for the parenting coordinator's services or the services can be provided at no expense.

Parenting coordination is *not* for cases in which it has been determined that the process may compromise the safety of parents of the minor children.

Parenting Coordination: WHAT?

Parenting coordination is an alternative dispute resolution process combining assessment, education, case management, conflict resolution and, sometimes, decision-making functions. A Parenting coordinator (PC) is typically appointed by a court order or private consent agreement to help parents implement, modify and comply with the parenting plan. PCs assist parents by providing: (1) education about co-parenting and parental communication; (2) the psychological and developmental needs of the children; (3) strategies to manage conflict and reduce the negative effects on children; and (4) effective post-separation parenting. To further assist parents and children, PCs facilitate referrals to community providers when necessary and collaborate with other professionals who may already be involved with the family.

Some jurisdictions have statutes or court rules that regulate parenting coordination. Therefore, certain aspects of the parenting coordination role may vary in different jurisdictions. For instance, in some courts the parenting coordination process is confidential; in others, the PC may report to the court. In some areas, a PC can also help parents create their parenting plan and can make recommendations and/or decisions for the parents as specified in the court order or agreement. Any decisions made by the PC are subject to the review of the court, which is an important safeguard to the process. PCs should be aware of, and explain to parents, any laws and local rules of practice.

Parenting Coordination: HOW?

The process of entering parenting coordination varies amongst jurisdictions. Sometimes, the judge will sign a court order mandating parenting coordination; in other instances, the consent of

the parties is necessary. When the judge appoints the PC, the length of time that the PC will serve is often limited, such as to a term of one or two years.

Some courts maintain a roster of PCs, who meet specific qualifications, to provide parenting coordination. In other courts the PC simply needs to be approved by the court or agreed upon by the parents. In some jurisdictions PCs may be available at low or no cost.

You may obtain more information about having a PC appointed to your case from your local court, your attorney, or other family law professional in your area.

Parenting Coordination: WHO?

Since PCs are appointed in high conflict cases, their qualifications are particularly important. The Association of Family and Conciliation Courts' *Guidelines for Parenting Coordination* recommend that PCs have specialized psychological knowledge, relevant legal knowledge and significant experience working with high-conflict divorce and parent separation cases. PCs should also have experience with mediation and specific training in parenting coordination. Depending on the jurisdiction, the PC may be required to be licensed as a mental health professional, psychologist or attorney, or certified as a family mediator. The PC may be required to have a specific number of years of experience working with high conflict families. To avoid a potential conflict of interest, it is best to choose a PC who has not worked with the family in the past and will not work with the family in the future in any role other than parenting coordinator, such as a custody evaluator, mediator, therapist, financial advisor, attorney, or guardian *ad litem*.

The Association of Family and Conciliation Courts (AFCC) is a professional membership association that offers support and guidance to parenting coordinators. More information, including the *AFCC Guidelines for Parenting Coordination*, is available on the AFCC website at www.afccnet.org.

This pamphlet draws from materials developed by Family Court Services, 11th Judicial Circuit, Miami-Dade County, Florida.

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Additional copies of this brochure may be purchased from the Association of Family and Conciliation Courts

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