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The Family Law Special Master

An Innovative Conflict Resolution Program for High-Conflict Families

by Daniel J. Rybicki and Frances W. Kevetter

Our family law courts face new challenges in serving the best interests of children, given the draconian budget cuts in the judicial system. Family law courts are increasingly bogged down by high-conflict parents, those who bring mundane issues before the bench with the urgency of impending crises. Such parents, embroiled in battle, fail to address their problems effectively, in part because they lack the skills and in part because they are psychologically motivated to remain connected in conflict.

Some jurisdictions in other states have found a way to deal with such cases. They have adopted the concept of the Family Law Special Master (FLSM) to break these conflict cycles and move the divorced family system toward more effective problem-solving and crisis management. We feel it is time for Washington to consider instituting an FLSM program to help protect children in high-conflict families.

What is an FLSM program? It is a mode of alternative dispute resolution (ADR). The Family Law Special Master, sometimes called a Parenting Plan Coordinator or Special Master, is a hybrid of the disciplines of law and psychology. The FLSM is a useful partner to courts in addressing the needs of high-conflict custody cases. Such cases are estimated to account for about 8 to 12 percent of contested custody cases. Despite their relatively small numbers, they commonly demand much greater attention of the court and frequently consume precious legal resources to try to address issues that can be managed more reasonably and effectively through alternate means.

The FLSM serves to arbitrate, mediate, educate, and motivate parents who are locked in conflict to work toward a joint resolution. Where such resolution is not immediately possible, the FLSM can be empowered with court authority to resolve certain kinds of disputes between the parties. The range of issues that can be directly resolved, subject to court review, is determined in the formative stages of implementation as an agreed order or stipulation. The stipulation sets forth three levels of possible intervention and outlines which domains of concerns are covered by each level of authority. The FLSM works with the parties and their counsel to define these parameters before moving into their more routine role of meeting and mediating conflict.

Most importantly, the FLSM works to teach the parties how to resolve their own conflicts. This is achieved by modeling conflict-resolution skills and by actively teaching the parents

the communication and problem-solving tools used in resolution. Parents learn to get past their emotion-laden communication styles to focus on a more objective, business-like style of communication. They consider a cost/benefit analysis of issues before taking them to dispute. They are encouraged to examine the impact of their choices on their own stability and that of their children. The parents learn the advantages of joint problem-solving and focusing on the children rather than continuing to engage in conflict purely for conflict's sake.[1]

High-conflict parents engage in behaviors that are costly to the children, the court, and themselves. Our courts no longer have the resources to address parents who remain conflicted over negligible issues. The FLSM helps address this need while recognizing that the courts are still the forum of choice for resolving high-stakes issues, issues over which reasonable adults can differ, and issues with great direct impact on children.

The Association of Family and Conciliation Courts (AFCC) Task Force and other scholars studied the application of the FLSM to cases where alienation is a concern,[2] where monitoring and modifying parenting plans needs to take place in accordance with changing needs of very young children,[3] and where intensive case management may be required, such as in cases involving alcohol and substance abuse or other limiting factors that may undergo change.[4] Research may be somewhat sparse. However, one study found indications from states where the FLSM program has been implemented that substantial savings can occur.[5] In the year before the appointment of an FLSM in that jurisdiction, 166 cases generated 993 court appearances. The following year, with an FLSM in place, the same 166 cases required only 37 court appearances. Two other researchers conducted a study in which a high degree of satisfaction was reported amongst parents enrolled in an FLSM program.[6] A distinguished panel writing for the Family Court Review found:

> From a conceptual standpoint, the FLSM reinforces a parallel parenting model (low engagement, low conflict) by increasing the structure and detail in parenting plans and becoming the linkage between the parents for any interactions that become conflictual.[7]

Given the experience of other states with the benefit of an FLSM program, one must ask if Washington statutes and decisions in case law provide the foundation for developing an FLSM system in our courts. Do our courts have the legislated power to appoint a FLSM? The most relevant statutes include RCW 2.28.010, -.060, and -.150. RCW 2.28.010 states:

> Every court of justice has power . . . (4) To compel obedience to its judgments, decrees, orders and process, and to the orders of a judge out of court, in an action, suit, or proceeding therein.

RCW 2.28.060(2) extends this power of court to every judicial officer. RCW 2.28.150 addresses implied powers:

> When jurisdiction is, by the Constitution of this state, or by statute, conferred on a court or judicial officer all the means to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding is not specifically pointed out by statute, *any suitable* process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws (emphasis added).

In re Parentage of Schroeder[8] held that a trial court may

delegate interpretation of a parenting plan or accept an expert's reconditions for modification but may not give authority for modifications of the parenting plan. The court must retain review of the guardian *ad litem*'s actions.

In re Parentage of Smith-Bartlett[9] also addressed delegation of authority by courts:

> Interpretation of a parenting plan is not a modification of the plan itself. So the court can delegate this responsibility. However, any modification, no matter how slight, requires an independent inquiry by the court. RCW 26.09.260(I), (4) (cite omitted). The ultimate responsibility for overseeing the performance of the parenting plan remains with the court (cite omitted). Even the court's power to delegate its interpretive function is conditioned on the parties' retaining the right of review by the court (cite omitted).

Kirshenbaum v. Kirshenbaum[10] provides clear legal analysis and foundation for the concept of the Family Law Special Master. In *Kirshenbaum*, the dissolution decree and the parenting plan vested an arbitrator with the authority to make additions or alterations to the parenting plan. The arbitrator conditionally suspended the mother's visitation rights. This happened on several occasions as the mother would lose visitation, meet the arbitrator's conditions for visitation, and have the rights reinstated for a period. On the occasion giving rise to the action, the father sought to reduce the decision suspending rights to a court order. The arbitrator's authority was challenged by the mother. The superior court ruled that the arbitrator's authority included the power to suspend visitation rights as the parenting plan specifically provided for such power. The arbitrator's decision was subject to immediate court review. The court's delegation of this authority was valid under the marriage dissolution act.

The court had initially appointed a specialist as "joint counselor for the parties concerning all aspects of the parenting plan" and "binding arbitrator" providing: "If there are any disagreements between the parties concerning the implementation of the parenting plan, [the court-appointed counselor] shall make the final binding decision." The court vested the counselor with the power to make alterations and additions to the parenting plan as deemed appropriate. The parenting plan provided the right to have all dispute resolution decisions reviewed by the superior court.[11] At page 805, the court states:

> . . . the court anticipated future conflicts between 'the parents.' By vesting a binding arbitrator with power to alter the plan, the court intended to avoid the need for the parties to go to court every time a dispute arose.

The appellate court then provided guidance as to the delegation of authority:

. . . the court may not abdicate its ultimate authority to modify parenting plans. However, we hold the court in this case acted within its discretion by authorizing an arbitrator to suspend visitation rights because the suspended parent has the right of court review.[12]

Parenting plans normally provide a method for resolving future disputes about the children and establish a residential schedule. The court's power to delegate visitation suspension authority to an expert was a matter of first impression for the *Kirshenbaum* court. The court noted the validity of such a delegation depended upon the marriage dissolution act. One

objective of the plan was to:

> . . . provide for the child's changing needs as the child grows and matures, in a way that minimized the need for future modifications. RCW 26.09.184(1)(c). In addition, the marriage dissolution act encourages dispute resolution to avoid the need for judicial intervention. RCW 26.09.184(3). The parties have a statutory right of review from any dispute resolution process to a superior court. RCW 26.09.184(3)(e).[13]
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> Nowhere does the act specifically prohibit the appointment of private practitioners to oversee the performance of a parenting plan or make alterations. To modify the terms of the parenting plan, the court must find a "substantial change in circumstances" even if the modification is minor." RCW 26.09.260(1) (4). Because the suspended parent can request immediate review of the arbitrator's decision, the court has, in effect, delegated the power to act in a temporary fashion. The Legislature intended to afford a measure of flexibility in fashioning parenting plans, and no statue forbids the approach taken here.[14]
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> Allowing an appointed counselor's chosen course of action to be effective immediately, rather than awaiting a decision by the court, provides an efficient and flexible solution to disputes and threats to the children's welfare as they arise. Because the court retained the ultimate authority to review [the appointed counselor's] decision, it did not abuse its discretion by giving [him] authority to suspend visitation. While we agree the court may not delegate the final and binding authority to terminate a parent's visitation rights, we find no improper delegation here. We hold that the court may vest an arbitrator with authority to suspend visitation so long as the parties have the right of court review.[15]

In *Holms v. Holms*,[16] the Court of Appeals cited to *Kirshenbaum* with approval in holding that a court's order that the guardian *ad litem*'s recommendations be followed until resolution by the court was a proper delegation of authority.

The use of Special Masters in general is not unprecedented in our state. Our federal courts have approved the use of Special Masters in a variety of different forums. The U.S. District Court for the Western District of Washington is a leader in alternative dispute resolution. Civil Rule 39.1, adopted in 1978, is a model of bench-bar cooperation and has been adopted, in principle, by several other federal courts. To serve as a Special Master under this rule, an attorney must certify that he or she (1) has been a member of the Bar of the Federal District Court for at least seven years (or has had at least seven years of judicial experience), (2) is a member of the Bar of the United States District Court for the Western District of Washington, (3) has devoted a substantial portion of his or her practice to litigation, and (4) has met the training requirement established by the court's General Order of January 17, 1997. Currently, the Federal Court ADR Training Program consists of 15 hours of mediation training or experience during the three years before certification, a portion of which may consist of observing or presiding over mediations.[17]

The role of an FLSM is to effectuate the judgments, decrees, and orders of a court by implementing the parenting plan.

Any decision made by the FLSM would be within the scope of RCW 2.28.060 (2), to compel obedience to the lawful order of a judicial officer, subject to review by the court. Courts would no longer be lavishing limited resources on an obstreperous few. Justice would be more available to all our citizens. Most importantly, we would be benefiting the children of dissolution, providing them with a better present and a realistic hope for the future.

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NOTES

1. Berke, Mara. "Planned Parenthood," *Los Angeles Lawyer*, March 2009; Foreword, "Guidelines for Parenting Coordination Developed by the AFCC Task Force on Parenting Coordination," 44(1) *Fam.Ct.Rev.* 164, 165 (2006); Kirkland, Karl, and Sullivan, Matthew, "Parenting Coordination (PC) Practice: A Survey of Experienced Professionals," 46(4) *Fam. Ct. Rev.* 622, 633 (2008); Coates, Christine, Deutsch, Robin, Starnes, Hon. Hugh, Sullivan, Matthew, and Belisa Sydlik, "Parenting Coordination for High Conflict Families," 42(4) *Fam.Ctr. Rev.* 246-262 (2004); Sullivan, Matthew, and Kelly, Joan, "Legal and Psychological Management of Cases with an Alienated Child," 39 *Fam. Ct. Rev.* 299 (2001); Stahl, Philip, "Complex Issues in Child Custody Evaluations" (1999); Sullivan, Matthew, et al., "Parenting Coordination: The Basics and Beyond," workshop presented at the Florida Association of Family and Conciliation Courts (AFCC) Parenting Coordination and Legislative Forum (2003); Johnston, Terry, "Outcome Study on Special Master Cases in Santa Clara County" (unpublished study, 1994); Vick, Mark, and Backerman, Robert, "Mediation/Arbitration: Surveys of Professionals and Clients," paper presented at the Boulder, Colorado, Interdisciplinary Committee on Child Custody (1996).
2. Sullivan, Matthew, and Kelly, Joan, "Legal and Psychological Management of Cases with an Alienated Child," 39 *Fam. Ct. Rev.* 299 (2001).
3. Stahl, Philip, "Complex Issues in Child Custody Evaluations" (1999) 4 Sullivan et al., 2003.
4. Sullivan, Matthew, et al., "Parenting Coordination: The Basics and Beyond," workshop presented at the Florida Association of Family and Conciliation Courts (AFCC) Parenting Coordination and Legislative Forum (2003).
5. Johnston, Terry, "Outcome Study on Special Master Cases in Santa Clara County" (unpublished study, 1994).
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7. Coates, Christine; Deutsch, Robin; Starnes, Hon. Hugh; Sullivan, Matthew; and Sydlik, Belisa, "Parenting Coordination for High Conflict Families," 42(4) *Fam.Ctr. Rev.* 246-262 (2004).
8. *In re Parentage of Schroeder*, 106 Wn.App. 343, 22 P.3rd 1280 (2001).
9. *In re Parentage of Smith-Bartlett*, 95 Wn.App. 633, 976 P.2d 173 (1999).
10. *Kirshenbaum v. Kirshenbaum* 84 Wn.App. 798, 929 P.2d 1204 (1997).

11. *Kirshenbaum* at p. 801.
12. *Kirshenbaum* at p. 804.
13. *Kirshenbaum* at p. 806.
14. *Kirshenbaum* at pp. 806–807.
15. *Id.*
16. *Holmes v. Holmes*, 128 Wn.App. 727, 117 P.3rd 370 (2005).
17. The Federal Bar Association of the Western District of Washington, ADR Committee, June 26, 2009.

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