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February 2011

Family Law Special Master: Training and Professional Duties for Conflict Resolution with High-Conflict Families

by Daniel J. Rybicki and Frances W. Kevetter

A previous companion article (*Bar News*, June 2010) described an innovative program for using a family law special master (FLSM) as a provider of alternative dispute resolution. As set forth in our earlier discussion, the FLSM is sometimes called a parenting plan coordinator or special master. This professional serves at the crossroads of law and psychology. As defined by noted authorities in the field, a parenting coordinator or FLSM is an impartial third party who helps the parents implement their parenting plan by facilitating the resolution of disputes between parents or legal guardians by providing education, making recommendations to the parties, and, with prior approval of the parties and the court, making decisions within the scope of their court appointment.

The origins of this conflict resolution process date back to the mid-1990s, when more detailed and formal professional guidelines were first established for the family law field. In this article we will present some useful recommendations for the training and professional services of the FLSM. We will also discuss the FLSM selection process, the issues involved in maintaining appropriate structure and boundaries, and the indications and contraindications for use of an FLSM. We further offer other practical considerations and a vision for the future.

The Association of Family and Conciliation Courts (AFCC) has been highly active in developing practice guidelines and training procedures for FLSM and related services. The AFCC has chosen to refer to these service providers as parenting coordinators, while we have chosen to distinguish our Washington state model as family law special master. In 2001, the AFCC appointed a Task Force on Parenting Coordination and Special Masters, which collected information about how various states and jurisdictions developed and implemented their FLSM services.[1] The AFCC task force reported that the FLSM has been a valued component in case management for several jurisdictions (Arizona, California, Colorado, Georgia, Massachusetts, Oklahoma, Oregon, Vermont, Hawaii, Idaho, New Mexico, North Carolina, and Ohio). Service providers go by different names across these jurisdictions even as methods vary for implementing FLSM services (such as appointment by stipulated agreement or motion made *sua sponte* or upon a finding that the case involves "complex family dynamics problems" that require speedy resolution). These states also vary in terms of jurisdictional issues and the timing of FLSM intervention (post-decree matters versus use during development of the initial parenting plan). Terms of appointment typically run for about two years, unless otherwise ordered by the court. Most states provide for methods of removing the FLSM or allowing him or her to resign.

The FLSM is typically given a degree of authority over selected elements of parenting plan issues. Most states do not allow the FLSM to make modifications to child support orders and awards or to determine such issues as which religion is to be observed by the child. Instead, most FLSMs are typically authorized to address issues such as the following: time-sharing arrangements, including holiday and summer planning; daily routine; daycare and babysitting; transportation and exchange for drop-off or pick-up; medical, dental, and vision care; psychological counseling or testing; educational issues such as choice of school or tutoring; and

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extracurricular activities.

A common practice is to develop a case-specific stipulation that specifies issues that are within the scope of the FLSM program and sets forth three major levels of FLSM authority. Level 1 decisions involve short-term and practical matters that are time-sensitive (e.g., changes to holiday schedules). These decisions are more urgent than others, and the stipulation allows the FLSM to implement immediate decisions for such concerns. Those decisions may still be reviewed by the court, but only if a parent files for a hearing within 30 days after the entry of the notice of decision. Any party challenging the decision needs to show that the decision exceeded the authority of the FLSM or the court, was erroneous as a matter of law, or was clearly not in the best interests of the child. Most jurisdictions provide for implementation of the Level 1 decision without delay, even when there is a request made for subsequent review by the court.

Level 2 decisions also are effective forthwith, but differ from Level 1 in that they are subject to review by the court upon formal objection. Level 2 decisions typically are seen as having a long-term effect on the family system, but do not make major changes to the roles of the parents as decision-makers. They do not significantly change the percentage of time that the child is with each parent.

Level 3 decisions are seen as more major in their scope and involve changes to the parenting plan. They are generally written and presented as recommendations made to the family and to the court that may become orders by stipulation or further action of the court. Most stipulations for FLSM appointments specify that those Level 3 decisions and recommendations will be admitted into evidence as expert opinion, subject to cross-examination, with hearsay objections waived as part of the original stipulation. An excellent sample Stipulation and Order of Appointment has been developed by the Family Law Section of the Los Angeles County Bar Association[2] and may offer some useful suggestions to consider in developing Washington state versions of FLSM stipulation documents.

Beyond the documents and procedural parameters is the most crucial component: who serves as an FLSM and how that person is selected and trained to serve. The nature of the FLSM decision-making power and the range of specialty skills required of this person suggest that a seasoned family law professional must be the optimal choice. However, not all jurisdictions have taken this approach. It becomes clear that whoever the FLSM may be, there is a need for that person to demonstrate sufficient experience in drafting clear orders; developing effective and developmentally sensitive parenting plans; and being effective at resolving problems, mediating conflict, and attending to the needs of families and children.

The AFCC Task Force has found that jurisdictions differ widely in setting forth their expectations for the training and experience of the parenting coordinator. Some states require that such persons hold a license as a mental health professional (master's level or greater) or be an experienced family law attorney. Many states encourage a background in mediation training, sometimes setting those as requirements to function as an FLSM. Still other jurisdictions have expanded the pool of possible special masters by allowing for certain paraprofessionals such as court staff to fulfill the function, provided that adequate training has been acquired. The definition of adequate training has varied across the states, varying from 20 hours of training to as much as 160 hours of specialized training, additional shadowing of an experienced FLSM, and ongoing continuing education requirements.

In most jurisdictions, attorneys and mental health professionals serve as FLSM providers. Given the novelty of this concept to the Washington legal landscape, there have not yet been any specific qualification requirements developed or any training programs implemented. Since we are at the seminal stages of this program of assistance, it would seem prudent to consider developing appropriate statutory guidelines for professionals whose work directly affects children, such as judges, mediators, parenting evaluators, and family law guardians *ad litem* (e.g., Title 26 Training for Family Law GALs). Such statewide requirements for training and experience would help ensure that the delivery of services would adhere to basic common professional standards regardless of the setting — from Yelm to

Yakima, Spokane to Seattle.

Drawing upon current statutory guidelines in Title 26 (c.f., RCW 26.12.177), there are specific training requirements that call upon the Administrative Office of the Courts to develop a statewide curriculum in conjunction with the chief justice. RCW 2.56.030(15) identifies those areas of training required for Title 13 and Title 26 GALs. Included are requirements of training in the areas of family reconciliation and mediation services. It should not be a stretch to use these statutes in addressing the training needed for the FLSM.

The U.S. District Court for the Western District of Washington has promulgated CR 39.1, which addresses alternative dispute resolution. This rule provides the purpose of the ADR program, qualifications necessary to serve as mediator or arbitrator, how mediation is to be conducted, how arbitration is to be conducted, and other alternative dispute resolution procedures.

Clearly, Washington has a good structure in place in creating a training program for the FLSM. Statutes and court rules can be modified and adapted to provide for a statewide curriculum. Using the Federal CR 39.1 as a blueprint would allow for defining the FLSM and the qualifications necessary to serve as FLSM. This would provide the appropriate forum for defining whether and how mediation and arbitration would be conducted.

A useful starting point for developing the standard curriculum would be with examination of the various training approaches used by other states. For instance, California provides local court rules that require "special masters" to meet the same qualifications as those required of a supervising or associate counselor of family court services. Specific training regarding domestic violence, the family code, and local court protocols are part of those requirements. Other states such as Colorado identify attorneys with guardian ad litem experience, mental health professionals with experience in conducting parenting evaluations, or mediators with similar backgrounds as suitable FLSM service providers. Closer to home are the qualification guidelines set forth by the Oregon courts. Their local rules for "parenting coordinators" are fairly broad and call for "mental health training" (with a master's or doctoral degree in psychology, counseling, or social work, or equivalent training and experience, or an M.D. with psychiatric specialization) along with provision for attorneys, court-qualified mediators, or court staff personnel with specialized training to serve in this role. Perhaps the most detailed and comprehensive qualification and training requirements are those of Vermont. There, FLSM providers need to have 160 hours of training that includes 60 hours of mediation training, 24 hours of domestic-violence and substance-abuse training, 20 hours of family law and court procedures training, 36 hours of family-dynamics and child-development training, and 12 hours of FLSM training, including shadowing a minimum of two cases, as well as eight hours of document-writing and giving of testimony in court. The specific topics of that training are available through the Vermont judiciary (www.vermontjudiciary.org/).

Training centers have emerged in other states that provide 20 to 24 hours of classroom education to meet the initial standards for becoming a special master or parenting coordinator. Curriculum topics include:

- understanding and managing the high-conflict family system
- coping styles of children
- divorce recovery process
- alienation, estrangement, and alignment concerns
- family systems models for conceptualization and intervention
- personality disorders in parents
- special complications of addictions
- attachment issues and developmental risk factors in time-share plans
- communication skills and problem-solving skills for conflicted parents
- parallel parenting or cooperative coparenting
- mediation methods for "getting to yes" outcomes
- managing angry parents
- noncompliance and resistance
- boundaries and ethical practice guidelines

- interview methods; interfacing with the court
- practical considerations (fees, billing, records, reports)

Notable sources such as Joan Kelly³ have described some customary components for such training. She suggests that the initial training be at least two days' duration or perhaps three days or longer. The components she offers include study of the parenting coordinator role and process, examination of role distinctions and boundaries, and comparisons of varying models of parenting coordination that exist in the field. She includes a large component on research literature pertaining to parental conflict, the divorce adjustment process, domestic violence, and parenting dynamics after separation and divorce. Ethical issues and professional practice recommendations are also part of her suggested series of topics for parenting coordinator training.

As evident from some of these training guidelines, there is recognition that the FLSM needs to maintain appropriate professional boundaries and roles at all times. For this reason, several states have specifically addressed issues such as confidentiality and *ex parte* communication. Most frequently, the FLSM process is considered not to be confidential (i.e., communications with the FLSM are not confidential and the FLSM may be called as a witness to testify to the court or to make recommendations regarding parenting time or custody issues). Most established FLSM processes provide that parents may communicate *ex parte* with the FLSM. Some jurisdictions allow the FLSM to communicate *ex parte* with attorneys and others do not. The FLSM model typically provides for access to anyone involved with the family members, including school officials, physicians, mental health providers, guardians *ad litem*, custody evaluators, and other professionals involved with the family. Most jurisdictions also allow the FLSM access to all orders and pleadings filed in the case, as well as school and medical records of the children, and reports of psychological testing or evaluations that have been performed.

Given that some cases may require additional special services, most jurisdictions allow for and encourage the FLSM to make referrals for third-party services. Some jurisdictions, such as Santa Clara County in California, allow the FLSM authority in "determining and ordering appropriate medical, mental health and counseling treatment for the parents or children... [and allows the FLSM to] designate whether any ordered counseling is or is not confidential." As can be seen, a variety of levels of communication and authority characterize the roles and boundaries of the FLSM in various jurisdictions.

Special considerations are given to cases where there have been allegations or findings of domestic violence. Safety concerns are paramount and may affect decisions on where to meet and how to involve the parties in any such meetings. There may be occasions where the parties do not meet together in order to reduce the risk of violence and to avoid power differentials that might disrupt the process. There may also be a decision to meet in a secure setting and to set forth protective measures for having the domestic violence victim arrive first and leave first to avoid further risk. The presence of violence in the relationship of the parents should have been litigated or at least identified and addressed to some significant degree before the FLSM gets involved.

While FLSM services may vary from state to state, there is a common recognition of the importance of granting the FLSM quasi-judicial immunity. This does not prevent the filing of complaints with professional licensing boards or with the court, nor does it prevent the parents from filing objections to various decisions, requests for judicial review, or requests for removal of the FLSM from providing further services. As noted by the AFCC Task Force, in most jurisdictions there are no legal codes that accurately describe the legal functioning of the FLSM. The ethical, legal, and malpractice risks may be seen as substantial due to the variety of tasks, roles, and qualifications required to serve as an FLSM. To adequately manage such risks, the FLSM needs to understand the requirements and standards that different review processes may impose on his or her work. Multiple processes of review may arise that include formal legal review (in state or federal courts), professional review (the state bar, psychological association, ethics committees), and review by the state consumer protection agency or professional licensing agency. Each of these will hold the FLSM to the appropriate specific set of standards for conduct.

The AFCC provides Model Standards and Guidelines for the parenting coordinator's role, practice, and training. Additional useful suggestions for professional ethics and service delivery standards have been offered by Matthew Sullivan,[4] along with recommendations for how to practice in a defensive and well-documented approach with high-conflict families.[5] Additional risk management and aspirational ethics for parenting coordinators have been offered by Kirkland and Kirkland (2006).[6]

Finally, appropriate use of the FLSM service model requires careful consideration of the types of cases where such procedures are indicated and cases where there are significant contraindications. While the FLSM may be highly effective in cases where there is high conflict, impaired coparenting, or communication problems, the FLSM approach is contraindicated for cases where there is a high tolerance of conflict between the parents, the process begins to potentiate the conflict, the parties insist on violating boundaries (e.g., demanding immediate attention for non-critical issues), there is frequent need to engage in limit-setting with one of the parties, or one or more of the parties has a serious Axis II personality disorder (e.g., paranoid or borderline personality disorder).

The development of the FLSM process in Washington is still in the early stages. There will certainly be a period of discussion, exploration, and consideration of the strengths and weaknesses that have been identified by other states and other professionals who have been providing these services for several years. Research data such as that presented by Kirkland and Sullivan (2008) and training materials developed by the AFCC will likely be crucial to our process of tailoring the FLSM process to meet our unique needs. This is an exciting time for our professions and a golden opportunity for interested parties to contribute to the emergence of an important tool for reducing post-divorce inter-parent conflicts which, in turn, will enhance the development and experience of children of divorce throughout our state.

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NOTES

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2. Sample stipulation, Los Angeles County Bar Association, www.lacba.org/files/main%20folder/sections/family%20law/files/pcc-1stipulation2007.pdf. See also sample material at www.lundstrachan.com/ for parenting coordination stipulation and forms.
3. Kelly, Joan, "Preparing for the parenting coordination role: Training needs for mental health and legal professionals," *Journal of Child Custody*, 5(1/2), 140–159 (2008).
4. Sullivan, Matthew, "Ethical, legal, and professional practice issues involved in acting as a psychologist parent coordinator in child custody cases," *Family Court Review*, 42(3), 576–582 (2004); 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. Coates, Christine, Deutsch, Robin, Starnes, Hon. Hugh, Sullivan, Matthew, and Sydlik, Belisa, "Parenting Coordination for High Conflict Families," *Family Court Review* 42(4), 246–262 (2004).
6. Kirkland, K., and Kirkland, K.E., "Risk management and aspirational ethics for parenting coordinators," *Journal of Child Custody*, 3(2), 23–43 (2006).



Last Modified: Monday, January 31, 2011

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