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Parenting Consultants: Lessons from the Case Law

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Decisions involving parenting consultants ("PCs") have been few and far between following the Court of Appeals' 2007 decision in *Szarzynski v. Szarzynski*, 732 N.W.2d 285 (Minn. Ct. App. 2007), which described PCs as "creature[s] of contract." However, during the last twelve months, the Court of Appeals has made a series of decisions on issues surrounding the appointment and use of PCs. Only one of the decisions is published though, leaving the family law community with helpful guidance but not definitive answers regarding some of the thorny issues raised by the use of PCs. The challenge in many of these decisions is reconciling the two often competing legal principles which always exist in cases involving a PC: the need to enforce parties' contracts and the need to safeguard children's best interests. The following lessons (and questions) emerge from these recent decisions.

1. It is error for the district court to decide an issue which the PC was required to decide.

In *Grodnick v. Velick*, No. A12-0382, 2012 WL 4856202 (Minn. Ct. App. Oct. 15, 2012), the PC's appointment order empowered the PC to resolve parenting disputes. After father relocated to California, mother filed a motion to modify his parenting time. Father argued that mother's motion was improper because that issue was required to be submitted to the PC. The district court rejected father's argument and suspended his parenting time. Father appealed and the Court of Appeals reversed, holding that the district court erred in adjudicating mother's motion before that issue had been submitted to the PC. The parties' stipulation to use the PC to resolve such disputes was a binding contract entitled to enforcement.

2. As creatures of contract, PCs have only as much authority as the parties agree to give them. The district court may not confer authority upon a PC or appoint a PC in the absence of an agreement.

In *Grodnick*, the appointment order specifically authorized the PC to make decisions concerning the parties' respective contributions to the children's "religious schooling." The district court ordered that any future disputes concerning contributions to private school costs be submitted to the PC. The Court of Appeals reversed because the PC's authority as stipulated by the parties was limited to contributions to "religious schooling" and did not include disputes over financial contributions to non-religious private schooling.

In *Custody of W.N.M.*, No. A12-1817, 2013 WL 4404575 (Minn. Ct. App. Aug. 19, 2013), in the process of litigating post-trial motions the parties agreed upon the identity of the PC and informed the court that they would be working together to craft language addressing the scope of the PC's authority. The district court asked the parties to submit proposed orders. Mother's proposed order granted the PC authority over school attendance issues. Father objected to this but the district court issued an order granting the PC authority over school attendance issues as requested by mother. Father appealed, arguing that the district court erred by granting the PC power to decide school attendance issues. The Court of Appeals agreed with father because there had not been a meeting of the minds that the PC would have authority to decide

school attendance issues. Therefore, the Court of Appeals modified the order to remove this provision.

This same failure of contract rationale arose in *Hagelstrom v. Ulan*, No. A12-1837, 2013 WL 3968656 (Minn. Ct. App. Aug. 5, 2013), although in relation to the appointment of the PC itself and not just the scope of the PC's authority. The parties settled all issues arising from the dissolution of their marriage other than child support and spousal maintenance. Before trial on those issues, the parties stated on the record that they had agreed to use a PC to resolve future parenting time issues, and that the PC would first attempt to mediate disputed issues and would have authority to make a binding decision in the event of an impasse. No further details regarding the terms of the agreement or scope of the PC's authority were placed on the record, except that the parties agreed they would provide their written agreement to the court and father's attorney stated that he would prepare the appointment order.

For reasons unclear from the opinion, that never happened. As part of a post-trial motion, father asked the district court to implement the appointment of the PC and presented a proposed appointment order to be included within the district court's order. The district court denied father's motion, reasoning that the parties had attempted to reach an agreement regarding the PC but had not actually done so.

Father challenged this on appeal, arguing that the agreement placed on the record was sufficient to support entry of his proposed PC appointment order. The Court of Appeals disagreed and affirmed the district court. The record contained none of the details regarding the agreement to use the PC, including the identity of the PC, and the parties never followed through on submitting a written agreement to the district court.

3. The party challenging the PC decision in district court does not necessarily bear the burden of proof.

In *Kerr v. Kerr*, No. A12-1663, 2013 WL 1859116 (Minn. Ct. App. May 6, 2013), mother brought a motion challenging a PC decision increasing father's parenting time. The district court held that father had not met his burden of proving that the modification was in the child's best interests and granted mother's motion. Father appealed, arguing that the district court erred by treating the PC decision as merely a recommendation and allocating the burden of proof to him since mother was the party seeking to undo the PC decision. The Court of Appeals reasoned that the district court's duty in reviewing matters implicating children is to ensure that their best interests are protected and that the district court was not required to defer to the PC. Although the stipulated PC appointment order created an affirmative obligation on the party challenging the decision to schedule a court hearing within 14 days of receiving the decision, this contractual obligation to schedule a court date was not synonymous with the burden of proof. Since the district court was correct in reviewing the PC decision *de novo*, father continued to bear the underlying burden of proving the change to the schedule made by the PC was in the children's best interests even though mother was the moving party in district court.

4. "Binding" PC decisions are always subject to challenge in district court.

In *Champlin v. Champlin*, No. A12-0501, 2012 WL 6734460 (Minn. Ct. App. Dec. 31, 2012), the PC issued a decision which increased father's parenting time. Father brought a motion in district court to adopt the decision and to reduce his child support obligation. On appeal after father's motions were denied, father argued that the district court had no authority to reject the PC's decision because the appointment order empowered the PC to make binding decisions and did not specifically provide for judicial review. The Court of Appeals affirmed the district court for two reasons. First, the court disagreed with father's reading of the appointment order as being non-reviewable since the order stated that the PC decision was binding until "modified or vacated by district court." Second, and more importantly, the Court reasoned that "a district court's judgment as to the best interests of the children takes precedence over a stipulation between parties as to how parenting-time issues should be resolved."

Hanson v. Wetherby, No. A12-1445, 2013 WL 1788546 (Minn. Ct. App. Apr. 29, 2013), involved a challenge to a PC decision regarding school attendance brought long after the stipulated 14 day deadline for doing so. In March 2010, the PC decided that the children would remain in father's school district for two years and then transfer to mother's school district in fall 2012. Neither party challenged the decision. In a November 2011 meeting, father expressed concern about the coming change in school districts and his ability to transport the children to school based upon the fact that he no longer was able to work primarily from home. The PC told the parties her decision regarding the school district would remain in effect. Father never challenged that decision, but in May 2012 he brought a motion in district court requiring the children to continue to attend school in his district. The district court granted father's motion after concluding that the PC's decision was speculative and overreaching since the PC could not have known about the children's best interests two years into the future. Additionally, the district court found that the decision was implicitly based

on the assumption that father would relocate to mother's school district and his inability to do so was a significant and unanticipated change in circumstances.

Mother appealed on a number of grounds, none of which were successful. Although the Court expressed concern about father's failure to timely challenge the PC decisions, it was not error for the district court to entertain father's motion based upon its duty to independently review such issues in view of children's best interests.

5. PCs are entitled to quasi-judicial immunity provided their appointment is pursuant to a court order and they are acting within the scope of their appointment.

In *VanGelder v. Johnson*, 827 N.W.2d 430 (Minn. Ct. App. 2012), the parties' dissolution decree included a provision requiring them to use a PC to resolve parenting disputes. The decree defined the scope of the PC's authority and the process to be followed but it did not name any person as the PC. The parties then signed a PC contract with June Johnson which contained language identical to the decree. During her tenure, Johnson issued decisions in May, September, and November of 2010. After the November decision, father brought a motion challenging all three decisions and seeking the removal of Johnson. The district court denied father's motions. The district court determined that Johnson's May decision was within the scope of her authority and that neither party had challenged it within the 20-day timeframe required by the dissolution decree. The district court rejected father's challenge to the September decision because he failed to provide a copy of it to the district court and because the challenge was untimely. The district court rejected father's challenge to the November decision because he failed to provide a copy of it to the district court.

In March 2011, father sued Johnson for negligence and breach of contract. Johnson brought a motion for summary judgment which was granted by the district court because Johnson had acted within the scope of her authority and was entitled to quasi-judicial immunity.

The Court of Appeals affirmed and held that Johnson was entitled to quasi-judicial immunity even though she was not appointed by name in the dissolution decree because her role was fulfilling a quasi-judicial function. However, the Court of Appeals did not decide whether decisions outside the scope of Johnson's authority were entitled to quasi-judicial immunity because it did not reach the issue of whether Johnson's decisions were outside the scope of her authority; father's argument to that effect was barred by collateral estoppel since it was based on the same exceeding authority theory which had resulted in a final adjudication by the district court in the dissolution proceeding.

Questions

While we now have a body of case law addressing many of the common issues regarding PCs, *VanGelder* stands alone as the sole published opinion since *Szarzynski*. The unpublished cases provide some useful direction regarding these issues, but their value is limited because each case involves its own PC stipulation and its own facts. Moreover, despite the relative plethora of PC decisions in the last twelve months, key questions remain unanswered. For example, what amount of deference, if any, must the district court accord a PC decision? *Kerr's* holding that the district court appropriately applied a *de novo* standard was based on the fact that the decision was challenged within the stipulated time-frame. Does the amount of deference change if a party is seeking district court review beyond the expiration of the stipulated time-frame? And are stipulated time-frames for challenging PC decisions enforceable? Although *Hanson* affirmed the district court, it was an intensely fact-specific decision involving unique circumstances and provides little guidance for future cases. Many PC appointment orders include an "abuse of discretion" standard for district court review, but are such provisions enforceable? The emphasis in *Hanson*, *Kerr*, and *Champlin* on the district court's ongoing duty to independently consider children's best interests is an indication that PC decisions are always subject to *de novo* review but none of those cases involved a stipulation purporting to use an abuse of discretion standard. Under what circumstances may a party bypass the PC and seek relief directly from the district court? In an emergency? When a party failed to pay the PC? Future appellate decisions answering these questions will undoubtedly involve the difficult task of striking the balance between enforcing contracts and protecting children's best interests.

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