LEGAL IMPLICATIONS OF DELEGATING FINAL DECISION MAKING AUTHORITY TO A CO-PARENTING THERAPIST (OR OTHER THIRD PARTIES)

by:
Marvin L. Solomiany, Esq.

KESSLER | SCHWARZ, P.C.
ATTORNEYS AT LAW

Centennial Tower
101 Marietta Street, Suite 3500
Atlanta, Georgia 30303
404.688.8810
www.kesslerschwarz.com

In an effort to facilitate communication between parents and resolve disputes during or following a divorce or custody/visitation action, it is now common to include in both temporary and final orders provisions requiring the parties to attend co-parenting sessions. In essence, co-parenting can be defined as teaching divorced or divorcing parents the necessary skills to jointly raise their child(ren) in a manner that promotes cooperation, rather than disputes.

Although there are many provisions that have been drafted to address this issue, the following is a typical co-parenting provision included in Agreements:

> The parents will agree on _____ to act as the co-parenting therapist to facilitate the communications between the parents. The parents will meet with said therapist for as long as determined by the therapist and they will equally divide the costs associated with such sessions. Each parent will pay for ½ the costs of the co-parenting sessions they both attend and for sessions the child may attend without either parent. Each parent will pay the entire cost of any sessions that he or she attends without the other parent.

Although a majority of the typical co-parenting provisions simply require the parents to attend co-parenting sessions, the scope of co-parenting is now often extended so that provisions are now included in Temporary and/or Final Orders which essentially delegate the final decision making authority over custody and/or visitation matters to the co-parenting therapist. For

example, an Agreement may contain the following provision as to educational decisions:

> The parents will be required to meet with the co-parenting counselor, _____ in order to facilitate communications between the parents. The parents will meet with the co-parenting counselor as recommended by the counselor. The parents will each pay for one-half of the costs of the co-parenting counselor for sessions that they both attend and for sessions that the child may attend without either parent present. Each parent will pay the entire cost of any sessions that he or she attends without the other parent.
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> Decisions concerning the child's education, such as, but not limited to change of school, choice of school, choice of curriculum and subjects, tutoring and special lessons, and having the child undergo educational testing and evaluation by a specialist, shall be discussed by both parents in a good faith effort to reach a mutual decision. In the event that the parents cannot reach a mutual decision regarding such educational matters concerning the child, the parents will meet with the co-parenting counselor to attempt to reach a mutual decision. In the event that the parents do not reach a mutual decision, each parent will articulate his/her position regarding the matter to the co-parenting counselor and the co-parenting counselor will determine which parent's position is in the best interests of the child. The parents will both fully comply with the determination made by the co-parenting counselor.
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> In working with the parents to resolve the matter and in making his determination as to which parent's position is in the best interests of the child, the co-parenting counselor shall consult with the appropriate personnel at the child's school, with the child's physicians and therapist(s), and with any other professional or person that the counselor believes will inform his determination. The co-parenting counselor shall also meet with the child. All medical, psychiatric and educational records of the child will be made available to the co-parenting counselor. If the issue is change of school or choice of school, the co-parenting counselor shall also consult with an appropriate educational specialist selected by the co-parenting counselor. The parties shall each pay for one-half of the costs of the services for the co-parenting counselor and of the educational specialist in connection with making the educational determination.

Additionally, parties may want the co-parenting therapist to serve as a Guardian Ad Litem following the divorce case to ensure the parties' cooperation relating to the best interests of the minor child. To achieve said purpose, the following may be included:

> The parties agree that _____ shall be appointed as a *Guardian*

ad Litem for the Children. The *Guardian ad Litem* shall perform an evaluation of the Children commencing one year following the parties' execution of this Agreement to determine whether the physical custody arrangement outlined in this Agreement in the best interests of the Children (acknowledging that the *Guardian ad Litem* may conclude that other physical custody arrangements may have certain advantages and/or may be more beneficial to the Children's welfare and well being, the purpose of the *Guardian ad Litem* evaluation is to ensure that the physical custody arrangement outlined herein above is not harmful to the welfare and well being of the Children and/or to ensure that all, or any one, of the Children are not suffering physical and/or emotional harm as a consequence of the arrangement).

The *Guardian ad Litem* shall conduct scheduled and unscheduled ("surprise") visits with each party and the Children, have dialogue with each party and the Children, have dialogue with certain limited select individuals with knowledge of the Children's welfare (including school personnel and other adults), and engage in other limited processes in their discretion to ensure that the Children are not suffering physical and/or emotional harm as a consequence of the physical custody arrangement outlined herein above. Counsel for each party shall provide direction to the *Guardian ad Litem* as to the role of the *Guardian ad Litem.* The *Guardian ad Litem* shall report verbally to the parties and their counsel.

If the *Guardian ad Litem* finds that the Children are not suffering physical and/or emotional harm as a consequence of the physical custody arrangement outlined herein above, then no further action shall be taken; and if the *Guardian ad Litem* finds that the Children are suffering physical and/or emotional harm as a consequence of the physical custody arrangement outlined herein above, then the physical custody arrangement shall be modified as recommended by the *Guardian ad Litem.*

The parties shall split equally the cost of the *Guardian ad Litem*; the cost of the evaluation shall be limited to $_____(and the parties shall endeavor to minimize such cost through cooperation with the *Guardian ad Litem).*

Although there should be no dispute that parties can ***agree*** to include such a provision in an Agreement, the question arises whether it is permissible for a Court to ***order*** such a provision, ***absent an Agreement of the parties***. In other words, is it proper for a Court to delegate the final decision making authority over a custody or visitation issue to a third party, such as a co-parenting therapist?

A review of the applicable case law and statutes suggest that a Court, absent an

agreement of the parties, cannot delegate the final decision making authority of a custody/visitation issue to a third party. While the Court can certainly consider the opinion of a third party, the Court cannot delegate such final decision making authority.

Joint Legal Custody is defined in O.C.G.A. 19-9-6 (2) and supports the contention that a custody/visitation issue cannot be delegated to a third party. Specifically, the statute reads as follows:

> Joint legal custody means both parents have equal rights and responsibilities for major decisions concerning the child, including the child's education, health care, and religious training; provided, however, that the court may designate ***one parent*** to have sole power to make certain decisions while both parents retain equal rights and responsibilities for other decisions (emphasis supplied).

This statute is specific that a Court can designate one parent to have sole power to make certain decisions. Rather than including the word "party" or "individual", the statute is specific that only a parent can make such decisions. Therefore, a strict construction of this statute would prohibit a court, absent a finding that both parents are unfit to make such decision, from appointing a third party to make the final decision on a custody/visitation matter.

The inability of the Court to delegate such a decision making authority to a third party is further supported in Wrightson v. Wrightson, 266 Ga. 493 (1996) and its progeny. In Wrightson, the court held that:

> It is the trial court's responsibility to determine whether the evidence is such that a modification or suspension of custody/visitation privileges is warranted, and the responsibility for making that decision cannot be delegated to another, no matter the degree of the delatee's expertise or familiarity with the case. While the expert's opinion may serve as evidence supporting the trial court's decision to modify or suspend visitation, the decision must be made by the trial court, not the expert.

Id at 497.

Arguably, it is not permissible for a court to delegate this authority to a non-parent when there has been no showing of unfitness. For example, in Watkins v. Watkins 266 Ga. 269 (1996), the court stated that the freedom of personal choice in family life is protected by the U.S. Constitution and the right to the custody and control of one's child is a fiercely guarded right which should be infringed upon *only* in the most compelling circumstances.

Partly as a result of the popularity of co-parenting, it is now common for parties to agree to allow a third party to make the final decision making authority over an educational matter by including a provision similar to that previously enumerated herein. Again, while this is permissible pursuant to an Agreement of the parties, it is not permissible for a court to allow a third party to make such a decision since the right to decide educational issues is a parental decision (and thus, a custody issue). See Daniel v. Daniel, 250 Ga. 482, 485 (2001).

Therefore, under Wrightson, it would obviously be permissible for a court to *consider* the suggestions of a co-parenting therapist when determining visitation or custody. However, it would be impermissible for a Court to rule as follows:

> Defendant's visitation for the first year shall be supervised. Notwithstanding, said supervised visitation shall terminate or be extended as determined by the parties' co-parenting therapist.

Co-Parenting provisions are obviously helpful when parties do not trust the other parent's ability to make a decision that is in their child's best interest. Rather than simply drafting an Agreement that provides Joint Legal Custody to the parties without designating the party who has final decision making authority, the parties should explore the possibility of allowing a co-parenting therapist to make said decisions; since Agreements which simply state that parties will share joint legal custody without appointing someone as the final decision making authority are not likely to be approved by a Court. As noted in Daniel, 250 Ga. at 485,(which involved an

agreement which did not designate a parent or mechanism concerning final decision making authority over custody matters), "agreements which do not provide a reasonable procedure for resolving disputes in joint custody cases should not be approved by the trial court."